ISSUED DECEMBER 21, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ADELMA PORTILLO dba Club El Sinaloense 6220 Eastern Avenue Bell Gardens, CA 90201, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7308 File: 40-306976 Reg: 98043687 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: November 5, 1999 Los Angeles, CA

Adelma Portillo, doing business as Club El Sinaloense (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license, staying the revocation for a probationary period of 36 months and suspending the license for 35 days, for appellant's employee soliciting an alcoholic beverage, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §§24200.5, subdivision (b); 25657, subdivisions (a) and (b); Penal Code §303; and Section 143 of chapter 1, title 4, California Code of Regulations (Rule 143).

[1]The decision of the Department, dated December 10, 1998, is set forth in the appendix.

Appearances on appeal include appellant Adelma Portillo, appearing through her counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on June 16, 1995. Thereafter, the Department instituted an accusation against appellant charging, in a five-count accusation, that, on February 27, 1998, she employed or permitted Sola Mendoza ("Mendoza") to solicit Tony Pacheco ("Pacheco") to buy her a drink, in violation of statutory provisions prohibiting various aspects of drink solicitation.

An administrative hearing was held on September 18, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigator Pacheco and by appellant's manager/bartender at the premises, Yolanda Amezcua ("Amezcua").

Subsequent to the hearing, the Department issued its decision which dismissed count 3 (charging a violation of §25657, subdivision (b) [permitting loitering to solicit]), and found the violations charged in all other counts to be established. However, the ALJ felt that the particular facts of this case did not warrant outright revocation, and ordered a stayed revocation with a 36-month probationary period and a 35-day suspension. The Department adopted the proposed decision of the ALJ.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant contends that there is no substantial evidence to support the findings of violations as to Counts 1, 2, 4, and 5.

DISCUSSION

Appellant contends there is no substantial evidence to support the findings of violations as alleged in Counts 1, 2, 4, and 5 of the Accusation.

Count 1

Count 1 charged a violation of Business and Professions Code §24200.5, subdivision (b), which provides for revocation of a license

> "[i]f 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."

In Determination of Issues I, the ALJ found a violation of this section, stating: "Mendoza, a compensated employee, solicited Pacheco to buy her drinks. She paid herself additionally by taking $4 extra from Pacheco."

There is no dispute that Mendoza was employed by appellant, through her bartender/manager, Amezcua, as a waitress. However, Mendoza was not found to have been employed to solicit drinks. Therefore, the ALJ's statement of his reason for finding a violation of §24200.5, subdivision (b), was not correct. Simple employment coupled with solicitation is not enough.

However, there was a violation of §24200.5, subdivision (b), because appellant must be held to have *permitted* Mendoza to solicit, which is also covered by this subdivision. Appellant was on notice that solicitation was a problem, being then on

probation for previous solicitation violations. A licensee has an affirmative duty, once aware of possible unlawful activity, to take such action as will prevent that violation from recurring. Thereafter, failure to prevent further violations "is to 'permit' by a failure to take preventive action." (Laube v. Stroh (1992) 2 Cal.App.4th 364, 379 [3 Cal.Rptr.2d 779].)

When Mendoza was hired, Amezcua told Mendoza that she was not allowed to solicit anyone to buy drinks for her. However, Amezcua did nothing else to prevent such activity. Appellant must bear imputed liability for Amezcua's permitting by her failure to prevent the solicitation.

Although it was based on the wrong reason, the determination regarding Count 1 was correct.

Count 2

Count 2 of the accusation charged a violation of Business and Professions Code §25657, subdivision (a), which makes it unlawful:

> "[f]or 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 or to pay any such person a percentage or commission on the sale of alcoholic beverages for procuring or encouraging the purchase or sale of alcoholic beverages on such premises."

Determination of Issues II explains why the ALJ found a violation of this statute: "Mendoza, an employee, solicited purchase of an alcoholic beverage."

This statute specifically says that a violation occurs when a licensee employs someone "*for the purpose of*" soliciting. As mentioned above, merely employing the person who then solicits is not enough. There was no showing that Mendoza was hired for the purpose of soliciting.

Neither was there a showing that appellant paid Mendoza a commission or percentage for her solicitation. The ALJ stated in Determination of Issues I that Mendoza "*paid herself* additionally by taking $4 extra from Pacheco." Neither appellant nor Amezcua were found to have had any knowledge or involvement in the solicitation.

Determination II, regarding Count 2 of the accusation, was in error.

Count 4

Determination III found a violation of Rule 143 (4 Cal. Code Regs. §143), as charged in Count 4. That rule states, in pertinent part:

> "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 had been purchased or sold there, any part of which drink is for, or intended for, the consumption or use of any employee."

The ALJ determined (Determination III) that "Mendoza, an employee, was permitted to solicit Pacheco to buy her a drink."

Rule 143 can only be violated by permitting an employee to solicit. Mendoza was unquestionably an employee and, as discussed above with regard to Determination I, appellant must be held to have permitted her to solicit. Therefore, this determination was correct.

Count 5

Determination IV found a violation of Penal Code §303 as charged in Count 5 of the Accusation. Penal Code §303 states:

> "It shall be unlawful for any person engaged in the sale of alcoholic beverages, other than in the original package, to employ upon the premises where the

> alcoholic beverages are sold any person for the purpose of procuring or encouraging the purchase or sale of such beverages, or to pay any person a percentage or commission on the sale of such beverages for procuring or encouraging such purchase or sale. Violation of this section shall be a misdemeanor."

The ALJ stated, with regard to this determination: "Mendoza was employed by respondent and solicited the purchase of an alcoholic beverage."

Penal Code §303 essentially restates Business and Professions Code §25657, subdivision (a). Like §25657, subdivision (a), Penal Code §303 has a requirement of employment "for the purpose" of solicitation. The discussion above regarding Determination II is equally applicable here, and Determination IV must be reversed for the same reasons.

CONCLUSION

As discussed above, the decision of the Department must be reversed as to Determinations II (Count 2) and IV (Count 5), but affirmed as to Determinations I (Count 1) and III (Count 4).

Although this means that only two of the original five counts remain, violation of §24200.5, subdivision (a), as found in Determination I, carries with it a penalty of revocation. The Department adopted the ALJ's recommendation of a softened penalty, limiting it to revocation stayed with a long probationary period and a substantial suspension.

Whether or not the Department would be likely to further reduce the penalty is questionable. This Board has said it will not remand for reconsideration of penalty unless "there is a 'real doubt' as to whether the same action would have been

taken upon a proper assessment of the evidence." (Miller v. Eisenhower Medical Center (1980) 27 Cal.3d 614, 635 [166 Cal.Rptr.826].)

We cannot say that we have any real doubt about the same action being taken by the Department even with only two of the five counts being sustained. Under the circumstances, we do not believe that a remand for reconsideration of the penalty is appropriate.

ORDER

The decision of the Department is reversed as to Determinations II (Count 2) and IV (Count 5), but affirmed in all other respects. [2]

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

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[2]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.