ISSUED JANUARY 3, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

GUADALUPE BOJORQUEZ AMARILLAS dba Rookie Bar 8011 Norwalk Blvd. Santa Fe Springs, CA 90606, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7537 File: 40-308902 Reg: 99046674 Administrative Law Judge at the Dept. Hearing: Ronald E. Gruen Date and Place of the Appeals Board Hearing: October 5, 2000 Los Angeles, CA

Guadalupe Bojorquez Amarillas, doing business as Rookie Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his on-sale beer license for drink solicitation by an employee, 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 §§23804; 24200.5, subdivision (b); and 25657, subdivisions (a)

[1] The decision of the Department, dated November 10, 1999, is set forth in the appendix.

and (b); 4 California Code of Regulations §143; and Penal Code §303.

Appearances on appeal include appellant Guadalupe Bojorquez Amarillas, 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 license was issued on August 4, 1995. Thereafter, the Department instituted an accusation against appellant charging the above referenced violations. An administrative hearing was held on September 28, 1999, at which time oral and documentary evidence was received.

Subsequent to the hearing, the Department issued its decision which determined that the charged violations had been proven, and ordered the license revoked.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the decision and findings are not supported by substantial evidence, (2) the decision improperly relies on expert testimony, and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends the decision and findings are not supported by substantial evidence.

"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 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].)

The accusation alleges seven counts, all concerning one date, where it is alleged a bartender solicited a Department investigator five times, to purchase for her a beer, an alcoholic beverage.

The investigator entered the premises and sat at the bar counter, and ordered beers for himself throughout the evening, paying $2.50 for each. During the time the investigator was at the bar counter, one of the bartenders, Alma Diaz, was behind the bar counter acting in the capacity of a bartender by serving drinks to patrons. Diaz solicited beers from the investigator on five occasions, with the charge being $7.50 per beer. Each time the funds were placed in the cash register, Diaz placed a mark on "something" beside the cash register. During the

conversations with the investigator, which consumed a large amount of time that evening, estimated at about 40% of the time the investigator was at the bar counter, Diaz said her name was “Jenny.” After Diaz had a conversation with appellant who was sitting at the bar counter, she gave the investigator a napkin, which had the name “Jenny” and a phone number Diaz said was a phone number of another bar where she also worked. Diaz also told the investigator that she was working from 7 p.m. to 1 a.m. that evening, a six-hour shift [RT 13-24, 26-29, 31, 33, 48, 52].

Two “books” were located near the cash register, at the time of seizure, being in the hands of a bartender who was taking them from the location [RT 77]. One of the books, Exhibit 3, shows under a date of “4-23-99," the names of three persons with marks beside their names. One name was “Jenny,” with five marks. The Department argues that the five marks represent the actual number of drinks solicited and accepted by bartender Diaz. The other book, Exhibit 4, shows names also. Under “Jenny”, beside a notation of “4/23," and “viernes” (meaning Friday - RT 31) is the number 6. The Department argues that this number six represents the six hours Diaz was to work that evening, as testified to by Diaz, shown at RT 17.

We will consider each of the alleged violations of law by considering the evidence in relationship to the specific wording of each statute.

A. Business and Professions Code §24200.5, subdivision (b), states in pertinent part:

> “... the Department shall revoke a license ...: (¶) (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."

Appellant was at the bar counter during some of the time the solicitations were made, and Diaz was acting as a bartender.

We conclude that employment was shown along with the solicitation, and while there is no direct evidence as to any salary, employment reasonably implies the employee is paid something of value for time worked. The hours of work were adequately proven by testimony and Exhibit 4 [RT 17]. There is substantial evidence that the bartender was employed to solicit.

B. Business and Professions Code §25657, subdivision (a), states in pertinent part:

> "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, 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."

The record shows employment and solicitation five times by the bartender. It is concluded that the first portion of the statute was proven sufficiently to support the decision. While not necessary to our conclusion stated above, the remainder following the comma was not proven.

C. Business and Professions Code §25657, subdivision (b), in pertinent part states:

> "It is unlawful: (b) In any place of business where alcoholic beverages are sold to be 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."

The record shows no loitering, as has been defined over many cases, as hanging around and idleness. The bartender was on duty and working. Whether she talked to patrons, for long or short periods, such is in the line of duty to make the customers have a pleasant time while ordering and consuming beer. The count should be dismissed. Incidently, the count in the accusation is erroneously worded and does not follow the language of the statute.

D. Business and Professions Code §23804, states:

> "A violation of a condition placed upon a license pursuant to this article shall constitute the exercising of a privilege or the performing of an act for which a license is required without the authority there of and shall be grounds for the suspension or revocation of such license."

On June 9, 1995, appellant signed a Petition For Conditional License which imposed conditions on his license. The preamble states that appellant had a past history of permitting employees to solicit and accept alcoholic beverages from patrons. The conditions imposed stated:

> "1. No employee or agent shall be permitted to accept money or any other thing of value from a customer for the purpose of sitting or otherwise spending time with customers while in the premises, nor shall the licensee provide or permit, or make available either gratuitous (sic) or for compensation, male or female persons who act as escorts, companions, or guests of and for the customers.
>
> "2. No employee or agent shall solicit or accept any alcoholic or non-alcoholic beverage from any customer while in the premises.
>
> "3. No employee or agent shall accept any money or thing of value from any customer in order to sit with or in any way engage said customer."

The record shows that the second condition was violated. Conditions 1 and 3 were obviously not violated.

E. Penal Code §303, states:

> "It shall be unlawful for any person engaged in the sale of alcoholic beverages ... 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 ... ."

The record shows the bartender was employed and apparently, from the evidence of marking marks for beers solicited (Exhibit 3), there is substantial evidence that she was employed to solicit. Also, a licensee is responsible for the unlawful acts of his employees.

F. 4 California Code of Regulations §143 (Rule 143), states:

> "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 of any employee. (¶) It is not the intent or purpose of this rule to prohibit the long-established practice of a licensee or a bartender accepting an incidental drink from a patron."

The record shows a violation of this Rule. The last sentence's escape clause is not applicable. Possibly the first drink could be classed as a incidental drink from a patron, but not five in a row, and a charge three times that paid for the same type beer, by the patron (investigator).

A licensee is vicariously responsible for the unlawful on-premises acts of his employees. Such vicarious responsibility is well settled by case law. (Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; and Mack v. Department of Alcoholic

Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].)

II

Appellant contends the decision improperly relies on expert testimony. Finding 6, erroneously placed within the context of count 7, states Exhibits 3 and 4 were established by "expert testimony." In this the Administrative Law Judge (ALJ) erred.

Testimony was presented as to the Exhibits [RT 27-29, 65-67, 72-73], but we cannot say such testimony would come under the heading of expert testimony. The investigator testified from past experience as to other marking systems he had seen which seem to fall into the same type systems. Also, he translated the Spanish wording. All that can be said, is that the words "expert testimony" in this context overreaches the evidence, and is not proper.

III

Appellant contends the penalty is excessive.

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].)

It is rare that a revocation is sought for only one day and one person soliciting, even if done five times. However, such action by the Department is within its discretion, if properly exercised. The actions of the Department do not

appear to be arbitrary.

Appellant had a prior violation for solicitations, where the license was conditionally revoked for three years, with a 10-day suspension. The presently reviewed conduct by bartender Diaz occurred on the day following the end of the 10-day suspension, with appellant sitting on at the bar counter during the five solicitations.

The foundational premise of the Department is that Business and Professions Code §24200.5, subdivision (b) was violated, which mandates some form of revocation.

ORDER

The decision of the Department is affirmed, except as to count 3 of the accusation (the wording of the count is erroneously worded and does not follow the statute), which is reversed. The penalty is affirmed.[2]

RAY T. BLAIR, JR., ACTING CHAIRMAN
E. LYNN BROWN, 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.