

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-8595

File: 42-395496 Reg: 05060772

OSCAR RAMON ESCALANTE dba Mi Cielito Lindo Bar
18146 Sherman Way #7, Reseda, CA 91335,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: June 7, 2007
Los Angeles, CA

ISSUED AUGUST 8, 2007

Oscar Ramon Escalante, doing business as Mi Cielito Lindo Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his license for having served an alcoholic beverage to an obviously intoxicated patron and for having permitted acts of drink solicitation, violations of Business and Professions Code sections 25602, 25657, subdivisions (a) and (b), and Department Rule 143.²

Appearances on appeal include appellant Oscar Ramon Escalante, appearing through his counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

¹The decision of the Department, dated August 10, 2006, is set forth in the appendix.

² All statutory references are to the Business and Professions Code.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on March 19, 2003. On September 26, 2005, the Department instituted a 17-count accusation against appellant. Count 1 charged the service of an alcoholic beverage to an obviously intoxicated patron in December 2004. The remaining counts charged individual acts of drink solicitation pursuant to a commission, percentage, salary or profit sharing plan, scheme, or conspiracy (sections 25657, subdivisions (a) and (b),³ 24200.5, subdivision (b)), and Department Rule 143 (Title 4, Cal. Code Regs., section 143.)

An administrative hearing was held on June 13, 2006, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued a decision which sustained the count which alleged the service to an obviously intoxicated patron (count 1), and six of the counts alleging acts of drink solicitation (counts 3, 4, 6, 9, 10, and 12). Counts 2, 5, 7, 8, 11, and 13 through 17 were dismissed.⁴

³ Section 25657, subdivisions (a) and (b) provide as follows:

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.

(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.

⁴ All of the counts alleging violations of section 24200.5, subdivision (b), were among those dismissed.

Appellant thereafter filed a timely notice of appeal. Appellant concedes that count 1 was properly sustained, and contends that the remaining counts which were sustained are not supported by substantial evidence.

DISCUSSION

The only issue to be considered in this appeal is whether the administrative law judge's (ALJ's) findings that various females were employed or permitted to loiter to engage in acts of drink solicitation are supported by substantial evidence.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456] and *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

"Trial court findings must be supported by substantial evidence *on the record taken as a whole*. Substantial evidence is not [*literally*] any evidence - it must be reasonable in nature, credible, and of solid value." (*Hill v. National Collegiate Athletic Assn.*, (1994) 7 Cal.4th 1, 51 [26 Cal.Rptr.2d 834] italics added.)

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 uncontradicted evidence showed this to be a typical “B-girl” drink solicitation case. Women (one of whom was the bartender) asked male patrons to buy them drinks, the male patrons were charged substantially more for the drinks purchased for the women than for the patrons’ own drinks, the women sat with the male patrons and consumed the drinks purchased for them, and between solicitations remained in the bar and performed duties such as clearing tables and serving drinks, activities normally associated with employment.

The evidence supporting the findings consisted of the testimony of the Department investigators of the statements made by the women when asking the investigators to buy them drinks, and of the activities of the women before, during, and after drinks were solicited.

Appellant contends that the statements made by the women when soliciting drinks were hearsay evidence incapable of supporting a finding. The contention is without merit. The statements made to Department investigators asking them to buy drinks, are clearly not hearsay evidence. As stated in *Greenblatt v. Munro* (1958) 161 Cal.App.2d 596, 602 [326 P.2d 929], the statements “were not introduced for the truth of the contents but only to show what was said, for what was said was part of the violation itself. ... As the violation is the solicitation, such can only be accomplished by words.”

There were four acts of solicitation on the two days involved in the counts of the accusation which were sustained. On May 21, 2005, appellant’s bartender, Luz Alvarado, solicited Department investigator Ricardo Carnet to purchase a beer for her, and charged him \$9. On the same day, Lizbeth Tapia asked Carnet to buy her a juice. He agreed, and Tapia returned with a 12-ounce can of Kern’s apple juice, for which

Carnet was charged \$9.

On May 27, 2005, Investigator Carnet and Investigator Jeremy Suetos sat at a table where Tapia and Maria Rodriguez were sitting. Rodriguez asked the investigators to buy them beers. The investigators agreed, and Carnet was charged \$10 each for beers for Tapia and Rodriguez and \$4 each for his and Suetos' beers. A short while later, Tapia asked Investigator Suetos to buy more beer for her and Rodriguez. He agreed to do so, and was charged \$10 each for the beer for the women, and \$4 each for his and Carnet's beer. In the interim between the two solicitations, both Tapia and Rodriguez would leave the table and clear tables of empty bottles and rearrange chairs.

The Department's brief (Dept. Br., P. 7) tells us that the phrase "to employ or knowingly permit anyone to loiter" found in section 25657, subdivision (b), "describes the sine qua non of b-girl activity - a woman who is employed or permitted to hang out with men for the purpose of soliciting drinks. The fact that such a woman may perform other duties as well does not change this."

The degree of attention in the Alcoholic Beverage Control Act and the Penal Code⁵ devoted to the proscription of drink solicitation reflects what we perceive as the Legislature's firm conviction that drink solicitation is a social evil not to be tolerated.

There is no basis for the Board to interfere with the penalty imposed by the Department. Appellant was on notice from earlier disciplinary proceedings that drink solicitation was a problem at the premises, so under a duty to prevent it.

A licensee has a general, affirmative duty to maintain a lawful establishment.

⁵ See Business and Professions Code sections 24200.5, subdivision (b) and 25657, subdivisions (a) and (b); Penal Code sections 303 and 303a. See also Department Rule 143 (4 Cal. Code Regs., §143), which reflects additional Department attention to this subject.

Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly. Once a licensee knows of a particular violation of the law, that duty becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from recurring, once the licensee knows of it, is to 'permit' by a failure to take preventive action.

(Laube v. Stroh (1992) 2 Cal.App.4th 364, 379 [3 Cal.Rptr.2d 799].)

Drink solicitation appears to have become institutionalized at the premises. We cannot say revocation is an inappropriate penalty.

ORDER

The decision of the Department is affirmed.⁶

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁶ 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.