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

AB-8762
File: 42-312368 Reg: 07064956

CONSUELO PRIETO, dba La Paloma Bar
1262 Long Beach Boulevard, Long Beach, CA 90813,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: December 4, 2008
Los Angeles, CA

ISSUED MARCH 20, 2009

Consuelo Prieto, doing business as La Paloma Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license for having engaged in a profit-sharing conspiracy and having permitted drink solicitation in violation of Business and Professions Code sections 24200.5, subdivision (b), and 25757, subdivision (a), and Department Rule 143.

Appearances on appeal include appellant Consuelo Prieto, appearing through her counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated October 22, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on October 12, 1995. Thereafter, the Department instituted an accusation against appellant charging that, on September 22 and November 3, 2006, appellant, through her employees, violated or permitted the violation of Alcoholic Beverage Control Act provisions prohibiting drink solicitation activities.

An administrative hearing was held on August 7, 2007, at which time documentary evidence was received and testimony concerning the violations charged was presented by Department investigators Jonathon Rubio and Enrique Alcala. Appellant presented no witness on her behalf.

Subsequent to the hearing, the Department issued its decision which determined that charges under Business and Professions Code sections 24200.5, subdivision (b), and 25757, subdivision (a), and Department Rule 143 had been established, but that a violation of Business and Professions Code section 25757, subdivision (b), had not been established. The Department ordered appellant's license revoked.

Appellant filed a timely notice of appeal in which she contends that the Department's finding is not supported by substantial evidence.

DISCUSSION

Appellant argues that the evidence upon which the Department based its finding that appellant employed or permitted certain females to engage in a drink solicitation conspiracy - the testimony of two Department investigators that they were solicited for drinks by certain females in appellant's premises on two separate occasions, following which appellant's bartender gave part of the charge for the higher-priced drink to the females - was inadmissible hearsay.

The Department's evidence - the testimony of the investigators - consisted of three kinds. The first, consisting of the spoken acts of solicitation, was not hearsay. It consisted of the operative facts constituting the solicitation violation. As to that testimony, appellant's contention is totally without merit.

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) "Except as provided by law, hearsay evidence is inadmissible." (*Id*., subd. (b).)

Not all out-of-court statements, however, are hearsay. A statement is not hearsay if it is not offered to prove the truth of the matter stated. A solicitation for prostitution or drinks is a classic example of such non-hearsay:

> Los Robles argues in this regard that the testimony of the agents of the department regarding their conversations with the girls, Pattie and Jean, was inadmissible "administrative" hearsay. It was not inadmissible upon any theory. Although admitted in an administrative hearing, it would have been equally admissible under common law rules. Solicitation for prostitution was the very fact in issue. The truth of the girls' statements was not important. The fact they were made was. The declarations were admissible as original evidence. They were "operative facts." (See Witkin, Cal. Evidence (2d ed. 1958) p. 425 et seq.; *People v. Contreras*, 201 Cal.App.2d 854, 857 [20 Cal.Rptr. 551]; *Greenblatt v. Munro*, 161 Cal.App.2d 596, 601-602 [326 P.2d 929]; *People v. Gaspard*, 177 Cal.App.2d 487, 489 [2 Cal.Rptr. 193].)

(Los Robles Motor Lodge, Inc. v. Department of Alcoholic Beverage Control (1966) 246 Cal.App.2d 198, 205 [54 Cal.Rptr. 547].)

The California Supreme Court stated an even more general rule in this regard:

> [A]n out-of-court statement is hearsay only when it is "offered to prove the truth of the matter stated." (Evid. Code, § 1200.) Because a request, by itself, does not assert the truth of any fact, it cannot be offered to prove the truth of the matter stated.

(People v. Jurado (2006) 38 Cal.4th 72, 117 [41 Cal.Rptr. 3d 319, 131 P.3d 400].)

Since the women's requests themselves constitute the violations, they are considered "operative facts," and not hearsay. (See 1 Witkin, Cal. Evidence (4th ed. 1997) Hearsay, §§ 31-34, and cases cited therein.)

The other statements of the women regarding how much they were paid, who paid them, and how the solicitations were tracked, were properly admitted as administrative hearsay that supplemented or explained the direct evidence presented by the investigators.

The statements made to the investigators by the women soliciting them about their employment arguably constituted admissions of agents binding on their principal, exceptions to the hearsay rule. With no evidence offered to refute them, they would be sufficient to support a finding of employment.

Finally, the bartender charged an inflated price for the beers solicited, and paid $7 of the inflated markup to the women. This conduct was observed by the investigators, so their testimony about it is not hearsay, and is strong evidence of unlawful drink solicitation.

"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 [95 L.Ed. 456, 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].) When, as in this case, 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 Department's findings are clearly supported by substantial evidence. Given appellant's history of solicitation violations, the penalty of revocation cannot be considered unreasonable.

ORDER

The decision of the Department is affirmed.[2]

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

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[2] 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.