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

AB-9024
File: 41-362097 Reg: 08069396

FIDEL PICAZO FRANCO, dba El Texano Night Club
7616-16½ South Vermont Avenue, Los Angeles, CA 90044,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: May 6, 2010
Los Angeles, CA

ISSUED JULY 26, 2010

Fidel Picazo Franco, doing business as El Texano Night Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for permitting drink solicitation activities in the licensed premises, violations of Business and Professions Code[2] sections 24200.5, subdivision (b), and 25657, subdivision (b).

Appearances on appeal include appellant Fidel Picazo Franco, appearing through his counsel, Armando H. 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 March 20, 2009, is set forth in the appendix.

[2]Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on March 22, 2000. On August 6, 2008, the Department filed a First Amended Accusation against appellant charging him with permitting drink solicitation activities in the licensed premises on March 18, 2008.

At the administrative hearing held on January 15, 2009, documentary evidence was received and testimony concerning the violation charged was presented by Los Angeles police officer Miguel Reynoso. Appellant Fidel Franco and one of his patrons, Alberto Gonzalez, also testified.

Officer Reynoso and his partner went to the premises on March 18, 2008, sat at a table away from where most of the other patrons were sitting, and were served beer by a male employee, Carlos Vasquez. Vasquez asked Reynoso if he would like some female company. When Reynoso said he wouldn't mind that, Vasquez brought Norma Sanchez, who was sitting at a table by herself, to the officers' table.

Sanchez ordered a beer and Vasquez told Reynoso it would be $10 for her beer. Reynoso gave Vasquez $10, and Vasquez gave $8 to Sanchez. At different times during the evening, both Vasquez and Sanchez told Reynoso that when he paid $10 for a beer for Sanchez, $2 was for the house and $8 was for Sanchez. Over the course of about an hour, Sanchez asked the officers to buy her three more beers, which they did, on the same terms as the first beer Reynoso purchased for Sanchez.

Subsequent to the hearing, the Department issued its decision which determined that the violations alleged in count 2 (§ 25657, subd. (b)) and count 3 (§ 24200.5, subd. (b)) of the First Amended Accusation were established.

Appellant filed a timely appeal raising the following issues: 1)There was not substantial evidence to support the finding that Norma Sanchez was permitted to loiter for the purpose of drink solicitation; 2) the Department abused its discretion when it found a violation of section 24200.5, subdivision (b) (hereafter section 24200.5b), based upon language different from the statutory language of that section; and 3) the Department abused its discretion when it alleged, and considered in determining the penalty to impose, the existence of a prior disciplinary action that was not yet final.

DISCUSSION

I

Appellant contends there was not substantial evidence to support the finding that Sanchez was loitering in the premises, much less that she was loitering for the purpose of soliciting patrons to buy alcoholic beverages for her. He argues that it is pure speculation that Sanchez was loitering before she approached the investigators' table.

"Substantial evidence" is relevant evidence which reasonable minds would accept as 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]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the

effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

Section 25657, subdivision (b), makes it unlawful to "knowingly permit anyone to loiter in . . . said premises for the purpose of . . . soliciting any patron or customer . . . to purchase any alcoholic beverages for the one . . . soliciting." "The term 'loiter' has a well recognized meaning, and that is 'to linger idly by the way, to idle,' 'to loaf' or to 'idle.' (*Phillips v. Municipal Court*, 24 Cal.App.2d 453, 455 [75 P.2d 548].)" (*Wright v. Munro* (1956) 144 Cal.App.2d 843, 847 [301 P.2d 997].)

In this case, we cannot say that the ALJ's finding that section 25657, subdivision (b), was violated is without support in the record. The evidence shows that Sanchez spent an hour that evening doing nothing other than sitting with the investigators and soliciting them to purchase drinks for her, certainly enough evidence to support the ALJ's finding of loitering. What she was doing before the investigators saw her is not important; during the time the investigators could observe her, she was clearly loitering for the purpose of soliciting alcoholic beverages from the investigators.

II

Appellant contends that the Department committed a mistake of law when it amended count 3 by using language different from the statutory language of section

24200.5b to charge violation of that section. The change in language, appellant asserts, transformed an isolated instance into a premises-wide scheme of paying commissions for drink solicitations.

Count 3 of the Department's First Amended Accusation originally said that appellant "employed or permitted Norma SANCHEZ to solicit or encourage others, directly or indirectly, to buy drinks in the licensed premises under a commission, percentage, salary or other profit-sharing plan, scheme or conspiracy . . ." The amended count 3 said that appellant "employed or permitted Norma Sanchez to solicit or encourage others, directly or indirectly, to buy ***her*** drinks in the licensed premises under a commission, percentage, salary, or other profit sharing plan, scheme or conspiracy . . ." (Emphasis added.)

The specific language used in section 24200.5b is: "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 argues that the plain meaning of the language used in section 24200.5b "shows it applies to a series of solicitations by more than one person. It speaks in the plural, not in the singular or 'isolated act' context." (App. Br. at p. 6.) The solicitation by Sanchez, according to appellant, was an isolated act that involved only the officers, while the focus of section 24200.5b is on commission schemes "which are pervasive and part of the business practice." (*Id*. at p. 7.)

Appellant's reading of the statute to limit its effect to situations where there are at least two solicitors is interesting and creative, but clearly not in furtherance of the purpose of the statute or the Alcoholic Beverage Control Act in general. If the statute

were read as appellant urges, avoidance of a "pervasive . . . business practice" could be accomplished, for example, by having only one B-girl in the premises at a time.

But one B-girl, with the obvious cooperation of a premises employee, is clearly sufficient to constitute a violation of section 24200.5b. In *Karides v. Department of Alcoholic Bev. Control* (1958) 164 Cal.App.2d 549, 552 [331 P.2d 145] a single violation of section 24200.5b committed by the licensee's employee was held sufficient to subject the license to revocation.

Appellant refers us to no sources of support for his interpretation of the statute. We believe that legislative intent, logic, and case law provide sufficient support for rejecting appellant's argument.

III

Appellant contends that, because the Department's decision regarding appellant's prior drink solicitation violations was not final on the date of the current violation, the prior violations should not have been considered to aggravate the penalty. The decision in the prior case was dated March 18, 2008, the same day the present violation occurred.

Whether the decision in the prior case was final on the date of the present violation is irrelevant. It is the date of the hearing, when evidence may be presented regarding aggravation or mitigation of the penalty to be imposed, that finality of the penalty makes a difference.

The decision in the prior case was not appealed and it was final by the date of the administrative hearing in the present case 10 months later. There was nothing improper about using the prior violations to aggravate the penalty in the present case.

ORDER

The decision of the Department is affirmed.[3]

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

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[3]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.