

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

AB-9137

File: 48-432674 Reg: 10073012

NICANDRO LUNA and ERNESTINA CORREA LUNA, dba El Mar Azul
1525 Santa Fe Avenue, Long Beach, CA 90813,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: June 2, 2011
Los Angeles, CA

ISSUED JULY 19, 2011

Nicandro Luna and Ernestina Correa Luna, doing business as El Mar Azul (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for their having permitted drink solicitation activity in violation of Business and Professions Code sections 24200.5, subdivision (b), and 25675, subdivision (b).

Appearances on appeal include appellants Nicandro Luna and Ernestina Correa Luna, appearing through their counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated October 21, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on December 2, 2005. The Department instituted an accusation against appellants on May 8, 2010, charging that on two occasions appellants permitted various female individuals to solicit drinks pursuant to a commission, percentage, salary, or profit-sharing scheme, in violation of Business and Professions Code section 24200.5, subdivision (b),² and on three occasions to loiter in the premises for purposes of drink solicitation, in violation of Business and Professions Code section 25657, subdivision (b).³ The accusation also alleged violations of license conditions, charges which were dismissed following the hearing.

At the administrative hearing held on August 18, 2010, documentary evidence was received and testimony concerning the violations charged was presented.

Subsequent to the hearing, the Department issued its decision which determined that the charges in 10 of the 18 counts of the accusation had been established.

Appellants have filed a timely appeal making the following contentions: the findings that females were permitted to loiter for the purpose of soliciting drinks and

²Section 24200.5 provides that the Department shall revoke a license where "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."

³Business and Professions Code section 25657, subdivision (b), provides that it is unlawful "[i]n 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."

were permitted to solicit drinks pursuant to a profit-sharing scheme are not supported by substantial evidence.

DISCUSSION

Appellants contend that the findings regarding loitering and drink solicitation are not supported by substantial evidence. "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].)

A. The drink solicitation charges:

The Department investigation consisted of three visits to the premises by Department Investigator Jorge Campana; the first on September 4, 2009, followed by visits on September 18, and October 30 of the same year. Campana was accompanied by investigator Garcia on the October 30 visit.

Campana testified that on the September 4 visit, he ordered a beer from bartender Sonia Bernal and was charged \$4, which he paid. He was then approached by a woman identified as Carina, who asked him to buy her a drink. Carina ordered a beer. Campana was told by the bartender that the beer cost \$10. Campana paid for the beer with a \$20 bill. The bartender placed \$16 change on the bar in front of Carina. Carina took \$6 from the change, and handed Campana \$10. This took place directly in front of the bartender.

Appellant contends the bartender did not see this, and that Campana testified that he did not know where the bartender was looking when Carina took the \$6. Appellant is mistaken; the transcript citation [RT 55] they rely upon relates to a transaction which took place on October 30, and which involved a different bartender.

In the October 30 transaction, involving a solicitation by a woman named Lila Fernandez, the bartender placed Campana's \$6 change from the beer he purchased for Fernandez directly in front of Fernandez. A whispered conversation between the bartender then ensued, following which Fernandez asked Campana if he was a police officer. Campana said "No," and asked why she asked. Fernandez did not respond,

became nervous, adopted a quiet demeanor, and did not pick up the money which had been placed before her.

The close similarity between the transaction on September 4, where a clear case of solicitation pursuant to a commission scheme was established, and the transaction on October 30, which was disrupted at a critical juncture, is strong enough to sustain the October 30 charge despite the fact the change was left on the bar. Whatever the bartender may have said, it was enough to deter Fernandez from completing the transaction, but not enough to obscure the fact that both solicitations reflected a pattern, in each case implicating the bartender in the scheme.

B. The loitering charges:

The Department's decision discusses in sufficient detail the conduct regarding drink solicitation. The same evidence is sufficient to support the counts charging loitering for the "purpose of begging or soliciting." There is no reference to what Carina and Fernandez did before or after the acts of drink solicitation beyond Campana's testimony that when he first saw Carina, she was mingling with other patrons. The absence of any evidence that either Carina nor Fernandez were performing any duties such as cleaning tables or serving drinks supports the finding of loitering.

Based on the evidence in this case, there appears to have been little difference between the conduct engaged in by a person who solicits drinks pursuant to a commission scheme and one who loiters for the purposing of soliciting drinks. In either case the vice is in the solicitation. There was testimony that Nicandro Luna was present on all three of the nights in question, monitoring activities in the bar, and in a position to observe the acts of solicitation and loitering.

ORDER

The decision of the Department is affirmed.⁴

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴ 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.