

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

AB-9251

File: 40-343033 Reg: 11074835

MARIA VICTOR HERNANDEZ and MARTIN HERNANDEZ MURILLO, dba Dino's Bar
646 N. Avalon Blvd., Wilmington, CA 90744,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 6, 2012
Los Angeles, CA

ISSUED JANUARY 17, 2013

Maria Victoria Hernandez and Martin Hernandez Murillo, doing business as Dino's Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license, conditionally stayed the order of revocation, subject to three years of discipline-free operation, and ordered a 40-day suspension, for drink solicitation activities violative of Business and Professions Code

¹The decision of the Department, dated March 8, 2012, is set forth in the appendix.

sections 24200.5, subdivision (b)²; 25675, subdivisions (a) and (b)³; and 23804.⁴

Appearances on appeal include appellants Maria Victoria Hernandez and Martin Hernandez Murillo, appearing through their counsel, Ralph Barat Saltsman and Autumn M. Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer license was issued on July 9, 1998. On April 6, 2011 the Department instituted a 19-count accusation against appellants charging that licensees and their agents and employees engaged in drink solicitation activities.

²Section 24200.5, subdivision (b) provides, as a ground for revocation:

(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.

³Business and Professions Code §25657 provides:

"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.

"Every person who violates the provisions of this section is guilty of a misdemeanor."

⁴Section 23800 permits the Department to impose conditions upon licenses; section 23804 provides that a violation of a condition is grounds for suspension or revocation.

At an administrative hearing held on November 22, 2011, documentary evidence was received and testimony concerning the violations charged was presented by Los Angeles Police Department Sergeant Liferlando Garcia. Appellants presented no witnesses.

Subsequent to the hearing, the Department issued its decision which determined that drink solicitation activities in violation of the pertinent statutes had occurred on numerous occasions during three days in August and September, 2009.

Appellants have filed an appeal making the following contentions: (1) the counts alleged involving "Sandra" and/or "Rush" cannot be sustained because there was no evidence they were loitering; (2) no evidence supports the finding that "Jane Doe" was an employee (counts 1 and 2); and (3) the Department failed to establish and make necessary findings for a violation of section 25657, subdivision (b).⁵

DISCUSSION

It is a well-settled legal principle that the failure to raise issues or assert defenses at the administrative hearing bars their consideration when raised for the first time on appeal. (*Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 576

⁵The introduction section of appellants' opening brief asserts that "[t]hrough incorrect evidentiary rulings, misapplications of law, assumptions without factual basis, lack of evidence or testimony, and misinterpretation of statutes and rules and issues, there are innumerable reasons why this decision of the Department must now be reversed."

We are not obligated to search the record for whatever specific legal or factual issue this assertion is meant to embrace in terms of error. Where a point is merely asserted without any argument or authority for the proposition, it is deemed to be without foundation and requires no discussion by a reviewing court. (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [199 Cal.Rptr. 72].)

[146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Wilke & Holtzheizer, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].

We have carefully scrutinized arguments made by appellants' then-counsel at the close of the administrative hearing [RT 164-169] in an effort to determine what issues were brought to the attention of the ALJ, and, with an equal degree of care, the arguments raised in this appeal by appellants' new counsel. We are compelled to say that, at the close of the administrative hearing, none of the issues addressed in appellants' brief to this Board were even hinted at. Indeed, appellants' then-counsel virtually admitted the acts of solicitation. [See, RT 166.] The substitution of new counsel on appeal does not permit them to raise issues their predecessor counsel did not.

Counsel's argument at the administrative hearing covered only three subjects; the impropriety of penalizing twice a solicitation and condition violation (which the ALJ resolved in appellants' favor); the conduct of one of the officers in his interaction with the women who solicited drinks from the officers, which he analogized to entrapment; and mitigation of penalty based on appellants' history of discipline-free operation. None of these issues are mentioned in appellants' brief to this Board.

Thus, this Board is fully justified in rejecting outright the arguments and issues raised in appellants' briefs. However, we think it useful to address them to demonstrate why this appeal lacks merit.

Appellants seem to suggest (App. Br. at p.4) that the dismissal of counts 5, 13, and 16, relating to Sandra and Rush, should apply to all counts that referred to them.

Sandra was a waitress, and Rush was a bartender, and the ALJ found that they continued to perform their duties as employees while drinking with the officers, and were not loitering; this is why counts 5 and 16 were dismissed. However, appellants offer no reasons why the counts relating to their acts of solicitation (counts 6, 8, 17, 18, and 19) should not have been sustained.

Appellants argue that there is no evidence to support the findings relating to counts 1 and 2 that "Jane Doe" was an employee. The evidence established that a woman named "Mari" (no last name) solicited drinks from Sgt. Garcia and placed her orders with a waitress, referred to in the accusation as "Jane Doe." The waitress took the orders, placed them with the bartender, handled the money side of the transaction with Sgt. Garcia and the bartender, and served the beer. Mari solicited a total of four beers. As to the first two beers, the waitress returned each time with \$8 change from Sgt. Garcia's \$10 bills, and handed the change directly to Mari.

We think the Department could reasonably have inferred that the bartender's willingness to transact with Jane Doe was a ratification of an employment status. Jane Doe was not a party to the drink solicitations, and was providing services to appellants; thus, by reason of the bartender's actions, she became an agent whose conduct is imputed to appellants.

Appellants argue that the Department failed to establish and make necessary findings for a violation of section 25657, subdivision (b). They assert that there is no evidence of employment or payment of a percentage or a commission. However, appellants ignore specific instances where waitresses and bartenders disbursed the change that would ordinarily have gone to the police officers, instead to the women who were soliciting. In our mind, that is payment. Examples include Findings of Fact 6 and

7 (waitress gives \$8 change to Mari); Finding of Fact 11 (waitress Sandra gives \$8 change to Elizabeth); Findings of Fact 16 through 20 (bartenders Rush and Hidalgo give change from officers' purchases to Alma and Araceli); Findings of Fact 22 through 24 (bartender Rush pays herself the change from her own solicitation.)

Finally, appellants argue that the owners' absences from the premises on two of the four nights of the investigation prevent the Department from establishing that the payments were made knowingly for those nights. Given the large number of solicitations over the nights in question (18 by our count), some of which involved the bartenders themselves, persons who were left in charge of the premises and whose knowledge is imputed to appellants, this argument is unpersuasive.⁶ (We might add that the contention essentially admits that the owners were present the other two nights of the investigation.)

The evidence, viewed as a whole, depicts a broad pattern of solicitation, open and notorious, one which clearly was known to at least two of the bartenders. (See Findings of Fact 16 through 20 and 22 through 24.)

For all these reasons, we are satisfied that appellants' appeal lacks merit.

⁶In part because of the unusual circumstances in which it was obtained, and in part because that there is other evidence more directly attaching liability to appellants, we have omitted any discussion of a written statement taken from a person who claimed to work for appellant, purporting to establish ownership of the premises in someone other than the licensees.

ORDER

The decision of the Department is affirmed.⁷

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁷This 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.