

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

AB-9252

File: 41-289634 Reg: 10073723

MANUELA GARCIA FLORES and MARIO FLORES, dba La Fonda Restaurant and Bar
1044 West Gladstone Street, Azusa, CA 91702-4207,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 7, 2013
Los Angeles, CA

ISSUED MARCH 11, 2013

Manuela Garcia Flores and Mario Flores, doing business as La Fonda Restaurant and Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for drink solicitation activities in violation of Business and Professions Code section 24200.5, subdivision (b);² 25657,

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

²Business and Professions Code section 24200.5, subdivision (b) provides, as grounds for suspension or revocation:

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.

subdivisions (a) and (b);³ and rule 143.⁴

Appearances on appeal include appellants Manuela Garcia Flores and Mario Flores, appearing through their counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine eating place license was issued on December 6, 1993. On November 10, 2010, the Department instituted a 15-count accusation against appellants charging various drink solicitation activities in violation of provisions

³Business and Professions Code §25657 provides that 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."

⁴ Department rule 143 (4 Cal. Code Regs., §143) provides:

No on-sale retail licensee shall permit any employee of such licensee to solicit, in or upon the licensed premises, the purchase or sale of any drink, any part of which is for, or intended for, the consumption or use of such employee, or to permit any employee of such licensee to accept, in or upon the licensed premises, any drink which has been purchased or sold there, any part of which drink is for, or intended for, the consumption or use of any employee.

of the Business and Profession Code and Department rule 143.⁵

The administrative hearing was held on December 20, 2011. Documentary evidence was received and testimony concerning the violation charged was presented by Department investigators Frank Robles, Benjamin Delarosa, Enrique Alcala, Joseph Perez, and Anthony Posada. Subsequent to the hearing, the Department issued its decision which sustained counts 1 through 6, 9, 10, and 11, and dismissed counts 7, 8, and 12 through 15.

Appellants have filed an appeal making the following contentions: The findings that the licensees (a) knowingly permitted females to solicit under any commission, salary, or other profit-sharing plan, scheme or conspiracy, or (b) knowingly permitted females to loiter in the premises for the purpose of soliciting any patron or consumer to purchase beer for them, or (c) that Julia Rivera accepted a drink in violation of rule 143, are not supported by substantial evidence.

DISCUSSION

I

Appellants contend that there is no evidence that appellants knowingly employed persons for the purpose of drink solicitation, or knowingly permitted the persons who engaged in acts of solicitation to loiter in the premises for such purpose.

The premises was visited by Department investigators three times: February 19, 2010 (counts 1-4); February 26, 2010 (counts 5-8); and March 19, 2010 (counts 9-15). Various acts of drink solicitation took place on each of those three dates.

⁵Counts 1, 3, 5, 7, 12, and 14 charged violations of Business and Professions Code section 24200.5, subdivision (b); counts 2, 4, 6, 8, 10, 13, and 15 charged violations of Business and Professions Code section 25657, subdivision (b); count 11 charged a violation of Business and Professions Code section 25657, subdivision (a); and count 9 charged a violation of Department rule 143. As noted below, only counts 1 through 6 and 9 through 11 were sustained by the Department.

Department investigator Frank Robles testified that Benjamin Delarosa, a fellow investigator, joined him at a table. Investigator Delarosa summoned a waitress, identified as Julia Rivera, and ordered a beer. Rivera took the order, brought him a Bud Light beer, and charged him \$3.50.

Brenda and Laura entered the bar a half hour later. Brenda made eye contact with Investigator Robles, then joined the investigators. Brenda asked Robles to buy her a beer, and he agreed. She went to the bar, obtained a Miller Lite beer, collected \$20 from Robles, and gave him \$10 change.

Brenda asked if her friend, Laura, could join them. Robles agreed. Each then asked Robles to buy them a beer. He placed an order with Rivera, the waitress. She took the order, returned with a bottle of Miller Lite beer and one of Bud Light beer.

Finding of Fact 8 chronicles what happened next:

Supr. Inv. Robles handed a \$20 bill to Rivera. Rivera and Brenda looked at each other, then had a whispered conversation. Rivera took the money to the bar counter and returned with some change. Rivera handed \$3 in change to Supr. Inv. Robles. She handed a crumpled up napkin to Brenda and another to Laura. Brenda and Laura opened their respective napkins and removed \$5 each.

It is obvious from the surreptitious behavior of Rivera, an employee of the premises, that she is part of a scheme or conspiracy of the kind made illegal under Business and Professions Code section 24200.5, subdivision (b), an offense charged in counts 1 and 3 of the accusation, and her knowledge is reasonably imputed to her employer.

Appellants argue, incorrectly, that Robles was unable to confirm that Rivera was an employee of the premises. Robles said only that he was unable to confirm, by means other than the fact Rivera had twice acted as a waitress at his table, that she was an employee. And Robles' silence when he saw he was being overcharged, or

when he observed Rivera's concealed transfer of money to the two women, proves nothing more than Robles' skill as an investigator.

The violations found with respect to the events of February 26 (Counts 5 and 6) appear to be premised on the conclusion that an unidentified woman who was sitting at a table with Investigators Robles and Delarosa was an employee. We think that conclusion is not supported by substantial evidence. The woman's explanation of the profit-sharing, if that is what it could be called, is perfectly consistent with how such a scheme could work without the bartender's knowledge or participation. It is surmise on the part of the Department that this was a plan known to the licensees. There is no evidence the woman made any statements to the investigators that she was an employee, and her offer to get drinks for them is not inconsistent with what a person involved in solicitation might offer to do. Nor is there any evidence that the bartender knew who the unidentified woman was or that she might be soliciting drinks. Finally, that at one point the woman stood next to Rivera, the waitress, proves little; there is no evidence they even spoke to each other. Finally, there is nothing that might have indicated to the bartender or Rivera that the woman was loitering, since the only evidence of what she did was that she sat with the investigators and fetched their drinks. That strikes us as proving nothing.

Contrary to appellants' claim, the evidence clearly established that Julia Rivera accepted a drink, in violation of rule 143. Investigator Robles paid for beers solicited by Rivera for herself and Patricia Gonzalez, identified by Robles as the bartender's mother, and he testified that he saw them consume the beers. [RT 51.]

Seven counts of the accusation were based on the events of March 19. Only three of those counts (9-11) were sustained, all premised on Rivera's solicitation of

beers for herself and Patricia Gonzalez. While drinks were solicited by other women in the premises, the Department found no evidence they were known to the licensees or their employees.

By our count, the Department proved only seven of the 15 counts of the accusation (counts 1-4, and 9-11). The code provisions violated in counts 1 and 3 (section 24200.5, subdivision (b)) call for mandatory revocation. The other counts which survive do not specify a level of discipline, other than that the violations would be grounds for suspension or revocation under the provisions of Business and Professions Code section 24200, subdivisions (a) and (b).

Given the prior history of multiple solicitation violations and stayed revocations extending even into 2010, the year when the present violations occurred, it seems extremely doubtful that the Department would see fit to grant still another stay of revocation. Under such circumstances, the Board is not obligated to remand for reconsideration of the penalty. (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 635 [166 Cal.Rptr. 826].)

ORDER

The decision of the Department is affirmed.⁶

BAXTER RICE, CHAIRMAN
FRED HIESTAND, 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.

