

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

AB-9291

File: 42-315267 Reg: 11075507

MARIA TERESA PACHECO and ROBERT PACHECO, dba Coral Reef
909 West Anaheim Street, Wilmington, CA 90744,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: June 6, 2013
Los Angeles, CA

ISSUED JULY 29, 2013

Maria Teresa Pacheco and Robert Pacheco, doing business as Coral Reef (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license, with the revocation stayed for a period of three years, and, in addition, suspended it for a period of 25 days, for permitting drink solicitation activities in violation of Business and Professions Code sections 24200.5, subdivision (b); 25657, subdivision(a); and 25657 subdivision (b).

Appearances on appeal include appellants Maria Teresa Pacheco and Robert Pacheco, appearing through their counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated July 17, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' license was issued on January 17, 1996. On July 26, 2011, the Department instituted a 17-count accusation charging that, on three separate occasions in 2010, appellants permitted drink solicitation activities in the licensed premises in violation of Business and Professions Code sections 24200.5, subdivision (b);² 25657, subdivision (a);³ and 25657 subdivision (b).⁴

At the administrative hearing held on May 8, 2012, documentary evidence was received and testimony concerning the violations charged was presented by four LAPD officers: Stephen Moore, Stefani Carson, Pedro Rodriguez, and Liferlando Garcia. Appellants presented no witnesses.

Testimony established that undercover officers visited the licensed premises on February 19, 2010 [counts 1 - 6], February 26, 2010 [counts 7 - 9], and March 5, 2010 [counts 10 - 17], posing as customers, and that they observed drink solicitation activity.

Subsequent to the hearing, the Department issued its decision which determined that counts 7, 8, 10, 12, 13, 15, and 16 had been proven, and the remaining counts were dismissed.

²Section 24200.5 provides that "the department shall revoke a license . . . (b) [i]f 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."

³Section 25657, subdivision (a), makes it unlawful: "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."

⁴Section 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."

Appellants filed a timely appeal making the following contention: The counts sustained by the Department are not supported by the evidence.

DISCUSSION

Appellants contend the Department's findings are not supported by the evidence because they maintain that "all of the sustained counts were based on the testimony of undercover officer Sergeant Garcia which testimony came from the investigative reports of Officer Cabrera who did not testify. . . . the inability of Officer Garcia to recall the contents of the reports he read just before the administrative hearing, and his reliance on faulty memories of the investigations cannot support a finding of any violations."

(App.Op.Br. at p. 4.)

When findings are attacked as being unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department. (See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 245, pp. 4236-4238.)

(*Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815].)

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].)

The ALJ made numerous findings of fact in his Proposed Decision regarding the drink solicitation activities observed by the undercover vice officers. Each time an undercover officer ordered a drink from an individual soliciting a drink, the officer paid \$10 for the beer, then observed \$6.50 being kept by the soliciting individual, with \$3.50 being paid to the bar. (See Findings of Fact 7-13.)

Appellant maintains that the Board should disregard Sergeant Garcia's testimony because it is based on a report made by Officer Cabrera, who did not testify. It argues that Department's case rests exclusively on hearsay, and therefore must be reversed.

The Government Code, however, notes that an administrative hearing

. . . need not be conducted according to technical rules relating to evidence or witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(Gov. Code §11513, subd. (c).) Evidentiary standards in an administrative hearing are therefore more relaxed than in more formal proceedings.

The language in the Government Code is paralleled in the Code of Regulations, section 7429, subdivision (f)(4). Both explicitly permit the use of hearsay in administrative hearings “for the purpose of supplementing or explaining other evidence.” (§11513, subd. (d); Cal. Code Regs., tit. 2, §7429, subd. (f)(4).) This is

what it appears the ALJ did in this case.

The admission or rejection of evidence by an administrative agency is not grounds for reversal unless the error has resulted in a miscarriage of justice. ([*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1054 [228 Cal.Rptr. 567].) In other words, it must be reasonably probable a more favorable result would have been reached absent the error. (*Breakup v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 853–854 [139 Cal. Rptr. 888].) Such error “is not prejudicial if the evidence ‘was merely cumulative or corroborative of other evidence properly in the record,’ or if the evidence ‘was not necessary, the judgment being supported by other evidence.’ [Citation.]” (*McCoy, supra*, 183 Cal.App.3d at p. 1054, quoting *Rue-El Enterprises, Inc. v. City of Berkeley* (1983) 147 Cal.App.3d 81, 91 [194 Cal.Rptr. 919].)

(*Lone Star Security & Video, Inc. v. Bureau of Security & Investigative Services* (2009) 176 Cal.App.4th 1249, 1254-1255 [98 Cal.Rptr. 3d 559].)

A reasonable person would accept the evidence presented, as summarized in the findings of fact, as substantial evidence for the conclusion that appellant permitted drink solicitation activity in the licensed premises. We disagree with appellant that insufficient evidence exists to support the ALJ’s findings, or that error occurred.

ORDER

The decision of the Department is affirmed.⁵

BAXTER RICE, CHAIRMAN
 FRED HIESTAND, MEMBER
 PETER J. RODDY, MEMBER
 ALCOHOLIC BEVERAGE CONTROL
 APPEALS BOARD

⁵This 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.