

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

AB-9328

File: 40-60370 Reg: 12077004

JOSEFINA CUEVAS and JUAN M. CUEVAS,
dba El Michoacano Bar
11011 San Fernando Road, Pacoima, CA 91331-2642,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED DECEMBER 20, 2013

Josefina Cuevas and Juan M. Cuevas, doing business as El Michoacano Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for drink solicitation activity in violation of Business and Professions Code sections 24200.5, subdivision (b), and 25657, subdivisions (a) and (b).

Appearances on appeal include appellants Josefina Cuevas and Juan M. Cuevas, appearing through their counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J. Belvedere.

¹The decision of the Department, dated October 22, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer license was issued on January 15, 1979. On May 25, 2012, the Department instituted a thirty-four-count accusation against appellants. The first thirty-three counts charged that, on four separate dates, appellants employed or permitted individuals to engage in drink solicitation activity within the premises, in violation of sections 24200.5(b)² and 25657(a) and (b).³ The final count alleged

²Counts 1, 4, 7, 10, 13, 16, 19, 22, 25, 28, and 31 alleged violations of section 24200.5. That section states:

Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds:

¶ . . . ¶

(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.

³Counts 2, 5, 8, 11, 14, 17, 20, 23, 26, 29, and 32 alleged violations of section 25657, subdivision (a). Counts 3, 6, 9, 12, 15, 18, 21, 24, 27, 30, and 33 alleged violations of subdivision (b). Section 25657 states, in relevant part:

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.

appellants permitted an employee to accept a drink, in violation of rule 143.⁴

At the administrative hearing held on September 12, 2012, documentary evidence was received and testimony concerning the violation charged was presented by Officer Felipe Benavidez and Sergeant Liferlando Garcia, both of the Los Angeles Police Department (LAPD). Appellants presented no witnesses.

Testimony established that on four separate dates between August 18 and September 9, 2011, LAPD officers observed numerous instances of solicitation activity at the premises.

The events underlying counts 1 through 9 took place on August 18, 2011. On that date, Sergeant Garcia entered the premises with Sergeant Louis Cabrera. They approached the bar and ordered two beers from the bartender, Maria Concepcion Rodriguez. Cabrera paid for the drinks, which cost \$4 each.

While they were at the bar, Flor de Maria Lopez approached and asked Cabrera if he would buy her a beer. Cabrera agreed. Lopez ordered a Bud Light. Cabrera gave the bartender, Rodriguez, a \$20 bill. Rodriguez returned with the beer and some

⁴Rule 143 states, in relevant part:

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.

It is not the intent or purpose of this rule to prohibit the long-established practice of a licensee or a bartender accepting an incidental drink from a patron.

(Cal. Code Regs., tit. 4, § 143.)

change. She gave \$6 to Lopez and \$10 to Cabrera.

Sergeant Garcia asked Rodriguez why she was not drinking. She responded that he hadn't invited her to do so. Later, Rodriguez asked Garcia to buy her a beer. He agreed, and gave her a \$10 bill. Rodriguez took the money to the register, obtained \$6 in change, and dropped the change in a container near the register. She then obtained a Bud Light beer and began drinking it.

Seated at the bar near the officers were two individuals: an unidentified man and a woman identified only as "Elizabeth." Elizabeth asked the man to buy her a beer. Elizabeth then called Rodriguez over and ordered two Bud Light beers. The man handed Rodriguez a \$20 bill. Rodriguez obtained some change and two beers. She served the beers and handed all the change to Elizabeth. Elizabeth separated out \$6, which she kept, and handed the remaining change to the man.

Lopez asked Cabrera to buy her a second beer. He agreed. Lopez called Rodriguez over and placed her order. Cabrera handed a \$10 bill to Rodriguez. Rodriguez returned with a Bud Light beer and some change, all of which she gave to Lopez. Lopez pocketed the money.

Rodriguez picked up her beer bottle, gestured to Sergeant Garcia, and asked if he was going to buy her another one. He agreed, and handed her a \$10 bill. Rodriguez took the money to the register and obtained \$6 in change. She dropped the \$6 in the same container near the register and obtained another Bud Light beer, which she drank.

When the man seated with her left the premises, Elizabeth came over and sat next to Lopez, who introduced her to Garcia and Cabrera. Lopez asked Cabrera if he would buy Elizabeth a beer. He agreed. Lopez called Rodriguez over. Cabrera gave

Rodriguez a \$10 bill. Rodriguez obtained a Bud Light beer and \$6 in change, set them on the counter, and pushed them toward Elizabeth. Elizabeth placed the \$6 in her bra, in Rodriguez's view.

Elizabeth later asked Cabrera to buy her another beer. He agreed and gave Rodriguez a \$20 bill. She obtained change and a Bud Light beer. She gave the beer and \$6 of the change to Elizabeth, who counted the money and again placed it in her bra.

Over the course of the evening, Lopez solicited Cabrera four more times. Each time, Cabrera paid, but Rodriguez gave some or all of the change to Lopez. Additionally, Rodriguez herself solicited Garcia four more times. Each time, she placed some or all of the change in the container near the register.

The events underlying count 10 through 18 took place on August 26, 2011. On that date, Garcia and Cabrera returned to the premises. Rodriguez was again working the bar. They entered, took seats at the bar, and ordered two beers. Each beer cost \$4.

There were no women in the premises at the time. Garcia asked Rodriguez if any girls were going to show up. Rodriguez told him that some would show up later. Garcia told Rodriguez they were bored. Rodriguez placed a phone call.

Garcia asked if he could call someone. Rodriguez said he could. He called Officer Maricela Vargas, who subsequently entered the premises in an undercover capacity, took a seat next to Garcia, and began to drink with him.

Lopez arrived at the premises. She took a seat next to Cabrera and asked him to buy her a beer. He agreed and gave Rodriguez a \$10 bill. Rodriguez retrieved a Bud Light beer and \$6 in change, both of which she gave to Lopez. Lopez placed the

\$6 in her purse, within Rodriguez's view.

Lopez finished her first beer and asked Cabrera to buy her another. Rodriguez stated that she would need one, too. Cabrera gave Rodriguez a \$20 bill. Rodriguez obtained two beers and some change, \$6 of which she placed in the container near the register. She handed the remaining \$6 to Lopez, who pocketed it in Rodriguez's view.

Lopez solicited a third beer from Cabrera. Cabrera paid for the beer, but Rodriguez returned the change to Lopez, who again pocketed it in Rodriguez's view.

The events underlying counts 19 through 24 took place on September 3, 2011. On that date, Garcia and Cabrera entered the premises, took seats at the bar, and ordered two beers. The beers cost \$4 each.

Two men began to stare at Garcia and Cabrera. After a while, one of the men asked if they were "narcos." Cabrera said they were not. The man replied that his friend had recognized them.

Rodriguez asked Garcia if he was going to buy her a beer. He agreed and gave her a \$20 bill. Rodriguez obtained change. She placed \$6 in the container near the register and gave the remaining \$10 to Garcia. She then obtained a Bud Light beer and began drinking it.

The two men continued to talk about Garcia and Cabrera. Rodriguez ultimately turned to the men and told them that Garcia and Cabrera were not "narcos," because if they were, they would have arrested her already.

Cabrera asked if Lopez would be there later. Rodriguez told him she would.

The men called Rodriguez over and told her she should not be soliciting beers from Garcia and Cabrera. Rodriguez told the men she knew Garcia and Cabrera.

Lopez entered and told Cabrera to buy her a beer. He agreed and gave

Rodriguez a \$20 bill. Rodriguez retrieved a Bud Light beer and some change. She gave the beer and all of the change to Lopez. Lopez separated out \$6, which she placed in her pocket, and returned the remaining \$10 to Cabrera.

Lopez solicited a second beer from Cabrera. He agreed and paid for the beer. Lopez received another \$6.

Rodriguez solicited a second beer from Garcia. He agreed and handed her some money. She retrieved some change, \$6 of which she placed in the container near the register. She obtained a Bud Light beer and began to drink it.

The events underlying counts 25 through 34 took place on September 9, 2011. On that date, Garcia and Cabrera returned to the premises and sat at the bar. They ordered two beers, and were charged \$4 for each.

Lopez approached Cabrera and asked him to buy her a beer. He agreed and gave \$10 to Rodriguez. Rodriguez obtained a Bud Light beer and some change, both of which she gave to Lopez. Lopez placed the \$6 in her bra, within Rodriguez's view. Lopez poured the beer into an empty margarita glass and began drinking it.

Rodriguez asked Garcia to buy her a beer. He agreed and gave her a \$20 bill. She obtained change, \$6 of which she placed in the container near the register. She then grabbed a Bud Light beer, began drinking it, and returned \$10 to Garcia.

A woman identified only as "Raquel" was playing pool. She approached, introduced herself to Cabrera, and asked him to buy her a beer. He agreed and gave \$10 to Rodriguez. Rodriguez retrieved a Bud Light beer and some change. She gave the beer to Raquel and placed \$6 on the bar in front of her. Raquel picked up the money, counted it, and told Cabrera it was her share for sitting with him. Raquel and Cabrera subsequently danced.

Rodriguez then asked Garcia to buy a beer for herself and for Lopez. He agreed and gave Rodriguez a \$20 bill. She retrieved some change, \$6 of which she placed in the container near the register. She obtained two Bud Light beers, served one to Lopez, and began drinking the other. She also gave \$6 to Lopez. Lopez again poured the beer into a margarita glass and began drinking it.

Lopez said that, since Cabrera was now with Raquel, Garcia would have to buy her beers. She subsequently solicited three more beers from Garcia. Each time, she poured the beer into a margarita glass before drinking it.

Shortly before Garcia and Cabrera left the premises, Officer Benavidez and his partner entered. They took seats at the bar a short distance from Garcia and Cabrera. They ordered two beers, which they were served.

When Garcia and Cabrera left, Raquel sat next to Officer Benavidez. She asked him to buy her a beer. He agreed, and called over Rodriguez, who took the order. Benavidez gave Rodriguez \$20. Rodriguez returned with a Bud Light beer and some change. She placed the beer and the change in front of Raquel. Raquel picked up the change while Rodriguez was directly across the bar counter from her, and began to consume the beer.

During the course of the hearing, the Department moved to dismiss counts 13, 14, and 15, which alleged appellants permitted Officer Vargas to engage in drink solicitation activity.

Subsequent to the hearing, the Department issued its decision which determined that twenty-four of the counts had been proven, and no defense was established. The decision dismissed the remaining seven counts, including counts 2, 11, 23, and 26, which alleged Lopez was employed for purposes of solicitation in violation of 25657(a);

count 8, which alleged Elizabeth was employed for purposes of solicitation under the same section; and count 34, which alleged Lopez, as an employee, accepted a drink in violation of rule 143.

At the time of the present violations, appellants were serving a stayed revocation for previous solicitation activity.⁵ Additionally, appellants had served a stayed revocation for solicitation activity based on an accusation filed in 2006.⁶ Because of the egregiousness of the surviving counts and appellants' two recent prior disciplinary actions for similar violations, the ALJ imposed an aggravated penalty and revoked the license.

Appellants have filed an appeal contending that the testimony supplied by Officer Benavidez and Sergeant Garcia was not credible, and therefore cannot supply the substantial evidence necessary to carry the Department's burden of proof.

DISCUSSION

Appellants contend that the testimony provided by Officer Benavidez and Sergeant Garcia is unreliable and self-contradictory, and cannot supply substantial evidence of a violation. Appellants argue that Officer Benavidez contradicted himself, and could not recall material facts of the investigation. Appellants also contend that Sergeant Garcia's memory was hazy, and that for much of the testimony he was not personally knowledgeable of the facts, but merely read the contents of a report prepared by Sergeant Cabrera, who did not testify. Appellants argue that this lack of credibility undermines the charges.

⁵See Reg. No. 11074405, filed November 22, 2010.

⁶See Reg. No. 06062616, filed April 24, 2006.

The credibility of a witness' testimony is determined within the reasonable discretion accorded to the trier of fact. (*Brice v. Dept. of Alcoholic Beverage Control* (1957) 153 Cal.App.2d 315 [314 P.2d 807, 812]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Beverage Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Appellants assert that Officer Benavidez's recollection of events is insufficient to show solicitation violations during the course of his September 9, 2011 visit to the premises. Appellants first direct this board to several portions of Benavidez's testimony that supposedly undermine the charges. Benavidez testified that Rodriguez was on the far opposite side of the bar when Raquel approached to request a drink [RT at p. 29]; he could recall neither the price of the beer he ordered nor how much change was placed on the counter [RT at pp. 26-27]; and he testified that he could have picked up his change from the counter, but did not do so [RT at p. 26].

None of this is fatal to the Department's case on these counts. It is uncontradicted that Raquel asked Officer Benavidez to buy her a beer, that some amount of change was placed on the counter, and that Raquel took the change and put it in her bra.

However, appellants further assert that Officer Benavidez contradicted himself

regarding whether Rodriguez was still at the bar counter when Raquel placed the change in her bra — a fact which goes to the appellants' knowledge of Raquel's solicitation activity. On cross-examination, Benavidez made a single statement which suggests that Rodriguez was *not* present:

Q Okay. Then [Rodriguez] brought the change and the beer?

A Correct.

Q She put both on the counter?

A Correct.

Q Then she left?

A After a brief conversation she left.

Q Okay. And then Raquel took the money?

A Yes, sir.

[RT at pp. 29-30.] This single piece of testimony contradicts Benavidez's testimony both earlier and later in the hearing. On direct, for example, Benavidez testified:

Q And when Raquel kept the change, did she place it on her person?

A She placed it in her bra.

Q And where was [Rodriguez] when Raquel placed the money in her bra?

A Behind the bar standing in front of us.

Q Was [Rodriguez] in a position to see Raquel place the money in her bra?

.....

A Yes.

[RT at pp. 15-16.] On cross-examination, Officer Benavidez reinforced this statement:

Q Did you tell any of the officers that you had concluded that

[Rodriguez] was in a position to observe what Raquel did with the money?

A I had told Sergeant Cabrera, yes.

[RT at p. 23.] Finally, on redirect, Officer Benavidez clarified the sequence of events in detail:

Q Officer, you said that Raquel took the change off the fixed bar and put it in her bra; correct?

A Correct.

Q And you said that [Rodriguez] was in a position to see that; correct?

A Correct.

Q So did Raquel put the money in her bra before or after [Rodriguez] walked away to the other part of the bar?

A Before.

.....

Q And when — when [Rodriguez] placed the beer and the change on the counter, what did [Rodriguez] do immediately after that?

.....

A She stood there and talked to us.

Q And at what point did Raquel put the money in her bra?

A It was almost immediately as soon as it was placed on the counter, she grabbed it and placed it in her bra.

[RT at pp. 30-31.]

Based on Benavidez's testimony, the ALJ found that "Raquel picked up the change while Rodriguez was directly across the bar counter from her." (Findings of Fact at ¶ 34.) The ALJ added a footnote to the finding, however, which reveals that he was aware of the alleged contradiction and properly assessed its significance:

Ofcr. Benavidez testified that Rodriguez was directly across the bar counter from Raquel on direct, on cross, and on re-direct. This testimony is expressly relied upon. Toward the end of cross-examination, he testified that Rodriguez went to help other patrons before Raquel picked up the change. This lone piece of testimony appears to have been a mistake and is disregarded.

(Findings of Fact at ¶ 34, fn. 6.) The ALJ properly assessed Officer Benavidez's credibility and resolved an apparent contradiction in his testimony. This Board is not entitled to second-guess his conclusions on this point.

Appellants also attack Sergeant Garcia's credibility. They argue that his recollection of events was "hazy," that he "appeared confused because he did not appear to have a grip of the facts," and that he relied almost entirely on reports prepared by Sergeant Cabrera, who did not testify. Appellants conclude that Sergeant Garcia's testimony is insufficient to prove any violation at the premises.

Sergeant Garcia admitted that he reviewed the investigative reports before the hearing. [RT at p. 92.] Garcia only prepared one of the reports himself — the report of the investigation conducted on August 26, 2011. [RT at p. 91.] The other three reports were prepared by Sergeant Cabrera, who did not testify. [RT at pp. 91-92.]

During the course of direct examination, Sergeant Garcia did request to refresh his recollection by referring to an investigative report a total of nine times. On five of these occasions, he was simply unable to recall the amount of money given to the bartender — that is, whether it was a \$10 or \$20 bill. [RT at pp. 63, 69, 74, 80, 81-82.] On two occasions, he refreshed his memory as to what the soliciting individual did with the money she received — whether she counted it, or where she put it after taking it. [RT at pp. 58-59, 75.] On one occasion, he could not recall a snippet of conversation between Cabrera and Rodriguez. [RT at p. 70.] Finally, on a single occasion, he was

uncertain where Raquel put money she received and noted he would have to look at the report — but in this instance, the report was not offered, and he did not use it to refresh his memory. [RT at p. 84.]

Again, none of this is fatal to the Department's case. California law is extremely liberal in permitting a witness to refresh his recollection by referring to outside writings. (See Cal. Evid. Code § 771.) There are, in fact, "no express restrictions on the types of writings or the means used to refresh recollection." (3 Witkin Cal. Evidence § 192, citing Cal. Evid. Code § 771, Legislative Committee Comment.) Sergeant Garcia's use of the investigative report — even one drafted by another officer — to refresh his memory was entirely proper, both before and during the hearing. The fact that he himself authored the report for only one of the four dates is irrelevant, provided he testified regarding events he himself witnessed. It is uncontradicted that Sergeant Garcia was present during the investigations.

Sergeant Garcia provided extensive testimony regarding repeated incidents of solicitation activity over the course of four days based on his own observations. His testimony was hardly confused or hazy; in fact, he frequently recalled details which were not included in the investigative reports. His intermittent reliance on investigative reports to refresh his memory regarding minor details was not only permissible, it was entirely unsurprising given the sheer number of solicitations that took place on each of the four dates in question. Most importantly, Sergeant Garcia's testimony was utterly uncontradicted. It was entirely within the ALJ's discretion to rely on Garcia's testimony, and we are not entitled to second-guess his conclusions.

ORDER

The decision of the Department is affirmed.⁷

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

⁷This 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.