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

AB-9338
File: 42-461056 Reg: 12077057

ELVA SOTELO and JOSE DE JESUS SOTELO
dba Cantina de Oro
16275 San Fernando Mission Boulevard, Granada Hills, CA 91344-3725,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 5, 2013
Los Angeles, CA

ISSUED JANUARY 31, 2014

Elva Sotelo and Jose de Jesus Sotelo, doing business as Cantina de Oro (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for drink solicitation activity in violation of Business and Professions Code sections 24200.5, subdivision (b), and 25657, subdivision (b).

Appearances on appeal include appellants Elva Sotelo and Jose de Jesus Sotelo, appearing through their counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J. Belvedere.

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[1]The decision of the Department, dated January 25, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public premises license was issued on December 12, 2007. On June 13, 2012, the Department instituted a 17-count accusation against appellants charging that, on three separate dates, appellants permitted individuals to engage in drink solicitation activity within the premises, in violation of sections 24200.5(b)[2] and 25657(b).[3]

At the administrative hearing held on November 14, 2012, documentary evidence was received and testimony concerning the violation charged was presented by Sergeant Lifernando Garcia and Officers Edgar Cruz, Eric Herrera, and Luis Farfan of the Los Angeles Police Department (LAPD). Appellants presented no witnesses.

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[2]Counts 1, 3, 5, 8, 10, 12, 14, and 16 alleged violations of section 24200.5, subdivision (b). That section states:

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

[3]Counts 2, 4, 6, 7, 9, 11, 13, 15, and 17 alleged violations of section 25657, subdivision (b). That section states:

> It is unlawful:
>
> ¶ . . . ¶
>
> (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.

Testimony established that on three separate dates in April, 2011, LAPD officers observed solicitation activity at the premises.

The events underlying counts 1 and 2 took place on April 14, 2011. On that date, Sergeant Garcia entered the premises, took a seat at the bar, and ordered a beer from the bartender, Alicia. He paid $5 for the beer.

A woman who introduced herself as "Miriam" took a seat next to Garcia. After a brief conversation, she asked Garcia to offer her a beer. Garcia agreed. Miriam ordered a Tecate Light from Alicia. Alicia served the beer to Miriam. Garcia placed a $20 bill on the bar. Alicia picked up the money, took it to the register, and returned with some change. She placed $10 in front of Garcia and $7 in front of Miriam. Miriam picked up the money and put it in her bra. Alicia was in a position to observe Miriam's actions.

Miriam finished her beer and asked Garcia to buy her another. He agreed. Miriam ordered another beer, which she was served. Garcia placed a $10 bill on the counter. Alicia picked up the money, took it to the register, and returned with some change. She placed the change in front of Miriam. Miriam picked it up and put it in her bra.

Miriam later solicited a third beer from Sergeant Garcia in the same manner.

The events underlying counts 3 through 6 took place on April 15, 2011. Sergeant Garcia returned to the premises, took a seat at the bar, and ordered a Modelo beer from the bartender, Elizabeth Carrillo. He paid $5 for the beer.

Garcia was again approached by Miriam, who took a seat next to him and asked him to buy her a beer. He agreed, and Miriam ordered a beer from Carrillo. Garcia placed a $20 bill on the counter. Carrillo picked up the money, took it to the register,

and returned with some change. She placed $10 of the change on the bar in front of Garcia and $7 in front of Miriam. Miriam picked up the money and put it in her bra.

Miriam solicited four additional beers from Sergeant Garcia, in the same manner. In each instance, Garcia paid, but did not receive the change — instead, Miriam did. (Counts 3 and 4.)

Later, a woman who introduced herself as "Patty" approached Sergeant Garcia and began talking to him. She subsequently asked him to buy her a beer. He agreed. Patty ordered a Bud Light beer from Carrillo, who served it to her. Garcia paid with a $10 bill. Carrillo took the money to the register and retrieved $7 in change. She gave all the change to Patty, who placed the money in her purse. Carrillo was in a position to observe Patty's actions.

When Patty finished her beer, she asked Garcia to buy her another. He agreed, and she ordered another Bud Light from Carrillo. Carrillo served her the beer. Garcia paid with a $20 bill. Carrillo took the money to the register and retrieved some change. She gave $10 to Garcia and $7 to Patty, who placed the money in her purse.

Patty solicited two more beers from Sergeant Garcia in a similar manner. Each time, she put the money in her purse. (Counts 5 and 6.)

The events underlying counts 7 through 17 took place on April 22, 2011. On that date, Sergeant Cabrera and Officer Farfan entered the premises and took seats at the bar.

About fifteen minutes later, Sergeant Garcia returned to the premises, along with Officers Eric Herrera and Edgar Cruz. They took seats at one of the tables. Sergeant Garcia ordered three beers from one of the waitresses. The beers cost $5 each.

Miriam approached Sergeant Garcia and asked him to buy her a beer. Miriam

asked him for some money and he handed her $20. She took the money to the bar, where Carrillo was again working as the bartender. Carrillo served her a Tecate Light. Miriam gave $10 of the change to Garcia and kept $7 for herself. (Counts 7 and 8.)

After some conversation, Miriam left the table and made her way around the premises. She returned with Herica Martinez and Maria Mejia.

Miriam asked Garcia to buy her another beer, and Herica Martinez asked Officer Herrera to buy her a beer. Garcia and Herrera agreed. Miriam indicated that she would get the beers, at which point Herrera asked her to get one for him, too. Garcia gave Miriam a $50 bill, which she took to the bar. Miriam spoke with Carrillo, then returned to the table with a Tecate Light for herself, a Bud Light for Martinez, and a beer for Officer Herrera. Miriam kept $7 for herself and placed another $7 in a napkin, which she handed to Martinez. Miriam gave the remaining $30 to Garcia.

Herica Martinez solicited an additional four beers from Officer Herrera. Each time, she received $7 wrapped in a napkin. (Count 9.)

Mejia asked Officer Cruz if he would offer her a drink. He agreed, and gave $10 to Miriam. Miriam went to the bar and returned with a Bud Light and $7 in change. She placed the $6 in a napkin and handed both the napkin and the beer to Mejia. Officer Cruz did not receive any change.

Mejia solicited three more beers from Officer Cruz in the same manner. In each case, Mejia received $7. (Counts 10 and 11.)

Mejia went to the restroom, at which point Maria Martinez approached Officer Cruz and asked him to buy her a beer. He agreed. Miriam ordered a Bud Light from Carrillo and served it to Martinez. She paid with a $20 bill she had obtained from Officer Cruz. Miriam gave $10 of the change she received to Cruz. She wrapped the

remaining $7 in a napkin and gave it to Martinez.

Maria Martinez solicited a second beer from Officer Cruz in the same manner. Again, Cruz received $10 in change, and Martinez received $7 wrapped in a napkin. (Counts 12 and 13.)

At one point, Sergeant Garcia went to the restroom. On his way back, Sandy Coto began to talk to him, and asked him to buy her a beer. He agreed, and she ordered a beer from Carrillo. Garcia handed a $10 bill to Coto, who passed it to Carrillo. Carrillo retrieved some change, which she handed to Coto. Coto asked if she could sit with him. He declined because he was already sitting with Miriam. Instead, he introduced Coto to Officer Farfan, who was seated at the bar.

Officer Farfan and Coto engaged in conversation while she consumed her beer. When she finished, she asked Farfan to offer her a beer. He agreed. Coto ordered a Bud Light from Carrillo, who served it to her. Farfan placed a $20 bill on the bar. Carrillo picked it up, took it to the register, rang up $3, and returned with some change. She handed $10 of the change to Officer Farfan and placed the remaining $7 in front of Coto. Coto picked up the money and placed it in her pocket. Carrillo was directly across the bar at the time.

Coto finished her beer and asked Officer Farfan to buy her another. Officer Farfan paid for the beer by placing a $20 bill on the bar. Carillo again picked up the money, took it to the register, rang up $3, and returned with some change. She gave $10 to Officer Farfan and placed the remaining $7 in front of Coto. Coto picked up the money and pocketed it. (Counts 16 and 17.)

During the hearing, the Department moved to dismiss counts 14 and 15, which alleged solicitation activity by another individual, Patricia Carrillo.

Subsequent to the hearing, the Department issued its decision which determined that counts 1 through 6, 16, and 17 had been proven and no defense had been established. The decision dismissed the remaining seven counts, all of which were based on events that took place at a table away from the bar counter, without evidence that any employee was aware that solicitation activity was taking place.

In determining the penalty, the ALJ took note of several aggravating factors, including prior disciplinary action for solicitation activity. The accusation in that case, which alleged separate solicitation activity in June 2009, was filed five months before the present violations occurred.[4] (Hereinafter, "the 2009 case.") On July 6, 2011, appellants entered into a stipulation and waiver in the 2009 case, and the Department imposed a stayed revocation with 20 days' suspension. The certificate of decision, however, did not issue until July 20, 2011 — three months *after* the events underlying this case.

The ALJ observed that the present solicitation activity could not violate the stayed revocation imposed in the 2009 case, because the stayed revocation had not yet gone into effect when the present violations occurred. However, he did find that the existence of the prior violations could be used to enhance the penalty in the present case. This, coupled with appellants' apparent failure to take measures to prevent solicitation activity in the five months following issuance of the accusation in the 2009 case, led the ALJ to impose an aggravated penalty and revoke the license.

Appellants have filed an appeal making the following contentions: (1) appellants were deprived of due process because Department failed to inform them of the present

[4]See Reg No. 10073814, filed November 16, 2010.

investigation before they entered into the stipulation in the 2009 case; (2) the penalty is excessive; and (3) there is not substantial evidence to show a violation of either section 24200.5(b) or 25657(b).

DISCUSSION

I

Appellants contend that the Department deprived them of due process by failing to inform them of the present investigation before they entered into a stipulation and waiver in the 2009 case. Appellants assert that the Department was aware of the present LAPD investigation results when it negotiated resolution of the 2009 case, but failed to inform them, presumably in order to ensure revocation of the license in the present case. Appellants seek to supplement the record with testimony from subsequently decided Department decisions in order to establish Sergeant Garcia's customary filing habits, and thus, by inference, the Department's knowledge. Appellants argue that, had they been aware that the Department intended to file a new accusation, they would not have agreed to the stipulation and waiver.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing. (Cal. Const. art. XX, § 22; Business &

Professions Code §§ 23084 and 23085; *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].)

However, "[i]n appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced . . . at the hearing before the department it may enter an order remanding the matter to the department for reconsideration in light of such evidence." (Cal. Const. art. XX, § 22.)

Appellants present this Board with two recent Department decisions which, they assert, show that the Department had a record of the present investigation in its files when it negotiated the stipulation and waiver in the 2009 case, but failed to inform appellants of it in order to effectively set them up for revocation in the present case. Both decisions rely on testimony elicited from LAPD Sergeant Lifernando Garcia, who also participated in the present investigation and testified at the administrative hearing in this case.

We note that these decisions are offered in order to establish a fact not present in the record. This Board is not a finder of fact; it cannot supplement the record, and cannot make findings regarding the Department's knowledge. At best, it may remand for further fact-finding, but only if the evidence is relevant and legitimately could not have been produced, through reasonable diligence, at the original hearing.

Appellants, however, have failed to show that there is any evidence contained in the documents they offer that could not reasonably have been produced at the administrative hearing. Appellants point repeatedly to testimony in these outside cases, offered by Sergeant Garcia, regarding the timeframe in which he submits reports to the Department. Sergeant Garcia, however, took the stand in this case, and no questions were asked of him regarding his submission of investigative reports to the Department.

Presumably, appellants knew that the present violations took place between the date the accusation issued and the date they signed a stipulation and waiver in the 2009 case — and yet they chose not to pursue any line of questioning related to the Department's knowledge of the present investigation.

Perhaps more importantly, appellants cite no authority indicating that the Department's knowledge of the present violations is in any way relevant. The stipulation and waiver purported only to resolve the accusation in the 2009 case. (See Exhibit 2.) The accusation in the 2009 case, issued five months before the present investigation, put appellants on notice of solicitation activity on the premises — and yet, as the ALJ observes in assigning a penalty, "there is no evidence that they undertook any actions to prevent women from soliciting drinks inside the Licensed Premises."

Perhaps most revealing is that absence of testimony indicating whether *appellants themselves* knew of the present violation. The record suggests that the women involved in the present solicitation activity, including appellants' bartender, were photographed by police on the final date of the operation, which ought to have put appellants on notice that additional violations had occurred well before they signed the stipulation and waiver. [See RT at pp. 56, 89, 106, 157-158, 169.] If anything, the evidence in the record tends to show that appellants knew or should have known about the investigation before the Department did.

Appellants instead plead ignorance. (App.Br. at p. 4.) This defies credibility, especially since the 2009 case was pending at the time, and is unsupported by any testimony in the record. The Department's knowledge of the present violations is almost certainly irrelevant in light of the fact that appellants were on notice of repeated solicitation activity and failed to take measures to prevent it.

We see no reason why the Department's knowledge of the present violations during execution of the stipulation and waiver in a previous case is relevant. Even if we assume that it is, appellants could easily have elicited testimony regarding Sergeant Garcia's customary filing timeline during questioning at the administrative hearing. Appellants failed to do so. We therefore see no cause to remand.

II

Appellants contend, as part of their due process challenge, that the penalty of revocation is excessive.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of California v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, it will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion the Department acted within the area of its discretion. (*Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

In their opening brief, appellants largely focus on the possibility of automatic revocation. "The 'triggering' of the stayed revocation in [the 2009 case] guaranteed that the respondents' license would be outright revoked in the present case, which turned out to be the Department's decision." (App.Br. at p. 9.)

This is incorrect. In a footnote to his penalty assignment, the ALJ correctly observed:

> [T]he violations in the present case took place after the accusation in the prior matter was filed, but before the decision was rendered. Accordingly, the prior may be used to enhance the penalty in this case, but the present violations do not violate the stay imposed by the decision in the prior disciplinary matter.

Appellants' concerns are misplaced; there was no abuse of discretion on this point.

Appellants, however, further contend that "[e]ven if the stayed revocation was not 'triggered' it is the department's case to outright revoke on a second similar accusation." (App.Br. at p. 9.)

At no point in the case before us do appellants challenge the fact of the 2009 violations, nor do they seek to overturn their stipulation in that case. Assuming the present violations are proven, appellants have indeed accrued two sets of multiple solicitation violations in less than two years.

Revocation is mandated for even a single violation of section 24200.5(b) by the terms of the statute itself, and is within the penalty guidelines for a single violation of either section 24200.5(b) or 25657(b) according to rule 144. The ALJ properly considered the 2009 case, as well as other aggravating factors. The penalty of revocation is reasonable.

III

Appellants contend that there is not substantial evidence to support a finding of a violation as to counts 1 through 6, 16, and 17. Specifically, appellants assert that there is no evidence that the bartender overheard the solicitations, or that there was any conversation between the bartender and soliciting individuals.

As noted above, this Board may determine "whether the Department's decision is supported by its findings" and "whether those findings are supported by substantial evidence." (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control*

Appeals Board, *supra*, at p. 1437.)

Appellants contend that there is no evidence that any employee overheard Miriam, Patty, or Coto solicit a beer from Sergeant Garcia. Moreover, they assert that there is no evidence of any conversation between bartender Carrillo and the women alleged to have solicited drinks. This, appellants claim, is fatal to the Department's case:

> Section 24200.5b requires evidence of a conspiracy between premises employees and the alleged solicitor females to solicit drinks. The knowingly permit or employed language of this section can only be satisfied by active communication between the bartender and soliciting females, and such communication was never established to have occurred in any of the alleged solicitations.

(App.Br. at pp. 12-13.)

Appellants cite no authority for the proposition that active dialogue is a necessary element of proof, or that an employee must overhear the actual solicitation request. This is because no such authority exists.

It is true the Department must indeed show that appellants or their employees were complicit in the scheme. However, even in criminal prosecution, proof of conspiracy need not take the form of explicit dialogue:

> To prove a conspiracy to commit a crime the prosecution need not show that the parties met and expressly agreed to commit a crime. [Citations.] The evidence is sufficient if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. [Citations.]

(*People v. Lowery* (1988) 200 Cal.App.3d 1207, 1219 [246 Cal.Rptr. 443].) The fact that an employee pays a commission directly to the soliciting individual is sufficient to show that the employee and the soliciting individual had tacitly agreed to the

arrangement.

The ALJ properly weighed the evidence in his conclusions of law:

> CL 6. With respect to counts 1, 2, 3, and 4, Miriam solicited a number of beers from Sgt. Lifernando Garcia directly at the bar counter. In connection with each solicitation, the bartender paid a commission directly to Miriam, indicating that the bartender was aware of the solicitations and was, in fact, participating in them. The same is true for Patty's solicitations of Sgt. Garcia (counts 5 and 6).
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> CL 7. With respect to counts 16 and 17, Sandy Coto solicited two beers from Ofcr. Luis Farfan. In each case, the bartender paid a commission directly to Coto. Once again, by paying a commission, the bartender was aware of the solicitation and was participating in it.

We are satisfied with the ALJ's analysis, and agree that the evidence is sufficient to prove the violations alleged.

ORDER

The decision of the Department is affirmed.[5]

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

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[5]This 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.