

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

AB-9370

File: 48-425738 Reg: 13078140

CLAUDIA ACOSTA, dba El Cielo Bar
20913 Vanowen Street, Canoga Park, CA 91303,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 1, 2014
Los Angeles, CA

ISSUED JUNE 20, 2014

Claudia Acosta, doing business as El Cielo Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked her license for permitting drink solicitation activities, and loitering for the purpose of drink solicitation within the licensed premises, in violation of Business and Professions Code sections 24200.5, subdivision (b), and 25657, subdivisions (a) and (b).

Appearances on appeal include appellant Claudia Acosta, appearing through her counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated September 6, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general license was issued on July 5, 2005. On March 13, 2013, the Department instituted a 29-count accusation against appellant charging that on four separate dates, appellant employed or permitted individuals to engage in drink solicitation activity within the premises, in violation of sections 24200.5, subdivision (b);² that appellant employed an individual for the purpose of drink solicitation, and paid her a commission for this activity in violation of section 25657, subdivision (a); and appellant employed or permitted individuals to loiter in the licensed premises for the purposes of drink solicitation activities, in violation of section 25757, subdivision (b).³

²Section 24200.5 states, in relevant part:

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.

³Section 25657 states:

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.

At the administrative hearing held on July 24, 2013, documentary evidence was received and testimony concerning the violation charged was presented by Los Angeles Police Department (LAPD) officers Luis Farfan and Felipe Benavides. Appellant presented no witnesses.

Subsequent to the hearing, the Department issued its decision which determined that counts 1, 5, 6, 14, 15, 18, 19, 24, 25, 26, 27, 28, and 29 had been proven.⁴ Counts 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 16, 17, 20, 21, 22, and 23 were dismissed.

Appellant then filed a timely appeal raising the following issues: (1) the counts which were sustained are not supported by substantial evidence; and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends the counts which were sustained are not supported by substantial evidence.

When an appellant contends that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the

⁴Of the 13 counts which were sustained, counts 1, 5, 14, 18, 24, 26, and 28 charged violations of section 24200.5(b); and counts 6, 15, 19, 25, 27, and 29 charged violations of section 25657(b).

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 Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].) "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

The Department's investigation included four visits to the premises on October 20, 2011, October 27, 2011, November 3, 2011, and November 11, 2011. The scheme was essentially unchanged throughout the undercover investigation. Each beer purchased by and for an investigator cost \$5, while each beer solicited cost \$10 — with the woman who solicited the beer receiving \$8 in commission for each beer purchased on her behalf. In many instances, the bartender or waitress facilitated the division of money between the agent and the solicitor, either by being directly involved or by looking the other way when it occurred.

Count 1:

On October 20, 2011, LAPD officers Farfan and Cabrera entered the licensed premises and ordered beers from the bartender, for which they paid \$5 each. They sat at a table and were joined by a woman named Blanca, and then another named Rosario. Officer Farfan bought one round of drinks for both women, then another drink for Blanca. There was no evidence that the bartender was aware of these solicitations.

Blanca then asked Farfan to buy her a third beer. He agreed, they went to the bar together, and drinks were ordered. Farfan placed \$20 on the bar, the bartender served a Corona to Farfan and a yellowish liquid in a plastic cup to Blanca, then gave all the change to Blanca. In front of the bartender, Blanca handed \$5 to Farfan and placed the remainder of the change in her bra.

_____ Appellant maintains that the evidence is insufficient, on this and other counts which were sustained, to show that the beverages served in plastic cups were alcoholic beverages, despite the sworn testimony of two police officers that the women asked for and were served beer,⁵ that the beverages smelled like beer, and the findings of the ALJ that it was beer that was ordered and served. It is presumed that when an alcoholic beverage is ordered, an alcoholic beverage is served (*Mercurio v. Dept. of Alcoholic Bev. Control* (1956) 144 Cal.App.2d 626, 634-635 [301 P.2d 474]; *Griswold v. Dept. of Alcoholic Bev. Control* (1956) 141 Cal.App.2d 807, 811 [297 P.2d 762]), and appellant failed to refute that presumption. In addition, the Board is entitled to rely on the expertise of a police officer testifying in a liquor license case, who is testifying as an expert in the field, and who is competent to give an opinion on whether a beverage contains alcohol. (See *Griswold, supra.*)

Counts 5 - 6:

On October 27, 2011, LAPD officers Farfan and Cabrera returned to the premises, sat at the bar, and ordered two Corona beers from the bartender for which they paid a total of \$10. They were joined by Blanca and another woman. Farfan bought Blanca one drink which was not found to be a solicitation by the ALJ. Two more

⁵Officer Farfan specifically testified that when Blanca asked for all her beers she asked for "cerveza de barril" or draft beer. [RT at pp. 76-77.]

beers were solicited by Blanca over the course of the evening, and each time Farfan placed money on the bar which the bartender took, and then returned with change which he placed in front of Blanca. Each time she placed \$8 in her bra, and each time Farfan paid \$10 per beer.

Counts 14 - 15:

On November 3, 2011, Farfan and Cabrera returned to the premises. Farfan took a seat at the bar and ordered a Corona beer for which he was charged \$5. He was joined by Blanca and she asked him to buy her a beer. He agreed, and she ordered a beer from the bartender. Farfan placed \$20 on the counter, which the bartender took, returning with \$18 in change which he placed in front of Blanca along with her beer. Blanca handed \$10 to Farfan and placed \$8 in her purse in front of the bartender. She asked for another beer, and the same sequence of events was repeated.

Counts 18 - 19 and 24 - 29:

On November 11, 2011, LAPD officers Benavidez and Herrera entered premises, ordered beers at the bar counter, paid \$5 each, then sat down at a nearby table. Benavidez was approached by an individual named Rosario Gonzalez who asked him to buy her a beer. He agreed and gave her \$20 which she took to the bar. She returned with a drink in a plastic cup and some change, then placed \$8 in her bra. Gonzalez solicited three more drinks from Benavidez and each time she separated \$8 from the change and placed it in her bra.

Benavidez was approached by another woman, Rosa Rodriguez, who asked him to buy her a beer. He agreed and gave her \$20. She ordered a beer from the waitress and gave her the money. The waitress returned with a beer in a plastic cup, gave \$10

to Benavidez, and gave the rest of the change to Rodriguez. This sequence of events was repeated twice more.

Later in the evening, Benavidez and Herrera were approached by Rosa Osario and Matilde Osario. They asked the officers to buy them beers and both agreed. They called a waitress over and both women ordered beer. Each officer handed the waitress \$20. The waitress returned with two beers in plastic cups which she served to Rosa and Matilde, gave \$10 to each of the officers, and gave \$8 to each of the women. Each of the women solicited a second beer and each received \$8 in commission in connection with these solicitations.

On the same day, Officer Farfan entered the premises by himself, ordered a Corona beer from the bartender, and was charged \$5. Farfan was joined by Blanca, who asked him to buy her a beer and told him to order one for himself. He agreed, and ordered two beers from the bartender. Farfan placed \$20 on the counter. The bartender picked up the money, took it to the register, then returned with a beer in a plastic cup and some change, both of which she gave to Blanca. She also served a beer to Farfan. In front of the bartender, Blanca handed \$5 to Farfan and placed the remainder of the change in her purse. Blanca asked for a second beer, and the same sequence of events was repeated.

Appellant maintains that these counts are not supported by substantial evidence because the solicitations were not overheard by employees. However, as the ALJ observes, in each of these instances the soliciting females received a commission either directly from the waitress or bartender, or they obtained their commission from change placed in front of them by the bartender — even though it was the officer who had paid for the drink. Each of the counts brought in this case under section

24200.5(b) is supported by at least one well-described, undisputed solicitation incident. None are supported solely by summary testimony, though summary testimony is often provided, briefly, at the end of each set of findings. Appellant's briefs, however, selectively address individual transactions, attempting to explain away the circumstances relating to the drink solicitations and divert attention from the fact that appellant's own employees were actively facilitating the illegal conduct. It is unimportant whether bartenders or waitresses heard the women ask the officers to buy them a drink. The actions of these employees in paying a percentage of the change to the women is enough to support the findings that the payments were pursuant to a percentage or profit-sharing scheme.

II

Appellant contends the penalty is excessive because the majority of the counts were dismissed. (App.Br. at p. 2.) Appellant offers no legal argument and cites no authority for this assertion.

The Board is not required to search the record to find support for an appellant's contentions or to develop an appellant's legal arguments. (See *Mansell v. Bd. of Admin.* (1994) 30 Cal.App.4th 539, 545-546 [35 Cal.Rptr.2d 574].) "When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary." (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 [46 Cal.Rptr.2d 119].) Appellant bears the burden of proving that the penalty was excessive, and a bare assertion does not meet this burden.

Even if we were to consider the assertion that the penalty is excessive, this Board has consistently held that it will not disturb the Department's penalty order in the

absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) Appellant's disagreement with the penalty imposed does not mean the Department abused its discretion. This Board's review of a penalty looks only to see whether it can be considered reasonable, not what considerations or reasons led to it. If it is reasonable, the Board's inquiry ends there.

Seven of the 13 counts sustained charged violations of section 24200.5, subdivision (b). That statute provides that the Department *shall revoke* a license where there are such violations. The evidence shows multiple violations of this section, coupled with the violations found involving loitering for the purpose of drink solicitation. In addition, the violations occurred while appellant was serving a three year stayed revocation, dependent upon no further violations during that three year period. There is ample reason to sustain the Department's decision and we believe revocation is the appropriate penalty.

ORDER

The decision of the Department is affirmed.⁶

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

⁶This 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.