

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

AB-9389

File: 42-461507 Reg: 13078558

EL GALLERO CORPORATION,
dba El Gallero Sports Bar
9755 Mason Avenue, Chatsworth, CA 91311,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 7, 2014
Los Angeles, CA

ISSUED AUGUST 20, 2014

El Gallero Corporation, doing business as El Gallero Sports Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked its license, with the revocation stayed for a period of three years, and suspended its license for 30 days for drink solicitation activities, in violation of Business and Professions Code sections 25657, subdivisions (a) and (b), 24200.5, subdivision (b), and rule 143, in addition to permitting the sale of controlled substances, in violation of section 24200.5, subdivision (a).

¹The decision of the Department, dated November 19, 2013, is set forth in the appendix.

Appearances on appeal include appellant El Gallero Corporation, appearing through its counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J. Belvedere.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on December 18, 2007. On May 20, 2013, the Department instituted a 14-count accusation against appellant charging that appellant 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 permitted employees to accept a drink while

²Section 24200.5(b) states, in relevant part:

. . . the department shall revoke a license:

¶ . . . ¶

(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.

working in the licensed premises, in violation of rule 143,⁴ and knowingly permitted the illegal sale of controlled substances in the licensed premises in violation of section 24200.5, subdivision (a).⁵

At the administrative hearing held on September 24, 2013, documentary evidence was received and testimony concerning the violations charged was presented by Department of Alcoholic Beverage Control (ABC) Agents Oscar Zapata and Ricardo Carnet.

After the hearing the Department issued its decision which determined that counts 2-14 had been proven and that no defense had been established. Count 1 was dismissed.

Appellant then filed a timely appeal raising a single issue: the decision is not supported by substantial evidence.

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.

(Cal. Code Regs., tit. 4, § 143.)

⁵Section 24200(a) states in relevant part:

. . . the department shall revoke a license:

(a) If a retail licensee has knowingly permitted the illegal sale, or negotiations for such sales, of narcotics or dangerous drugs upon his licensed premises. Successive sales, or negotiations for such sales, over any continuous period of time shall be deemed evidence of such permission.

DISCUSSION

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 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 [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].)

Testimony at the administrative hearing established that on six occasions — February 16, March 1, March 8, March 14, March 28, and April 26, 2012 — appellant's licensed premises was visited by undercover ABC agents.

Count 1:

On February 16, 2012, Agents Zapata and Carnet entered the premises

separately and sat at the bar. Carnet ordered a beer and the bartender charged him \$4, which he paid. Carnet noticed an individual named Valente Becerra being approached by various patrons who would then follow him into the restroom. Carnet followed Becerra into the restroom and asked if he had any cocaine; he said he did, but it was not on him, and Agent Carnet gave him \$40. Becerra left the premises and when he returned he handed Carnet two small plastic baggies of cocaine while Carnet was seated at the bar. The administrative law judge (ALJ) found this count was not supported by substantial evidence because it was not established that the bartender had knowledge of Becerra's drug sale activities. Count 1 was dismissed.

Count 2:

On March 1, 2012, Agents Carnet and Zapata returned to the licensed premises and sat at the bar. Zapata ordered a beer from bartender Centeno for which he paid \$4. Zapata noticed Valente Becerra by the pool tables, approached him, and asked if he had any cocaine. Becerra said he only had one baggie left. Zapata followed Becerra into the restroom where he gave him \$20 and Becerra gave him a baggie of cocaine. Zapata returned to the bar, told Centeno that he had purchased cocaine from Becerra, and asked if it was good quality. Centeno said it was.

Appellant argues that this count should not be sustained because the bartender did not have knowledge of the sale *prior* to the event and thus did not "knowingly permit" the sale of drugs. It cites no cases in support of this contention, however, and we know of none. It is well settled in Alcoholic Beverage Control Act case law that an employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377 [3

Cal.Rptr.2d 779]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].) There is nothing in the relevant case law that requires *prior* knowledge of the sale by the employee for this to apply.

Counts 3-5:

On March 8, 2012, agents Carnet and Zapata returned to the licensed premises and ordered a Pacifico and a Bud Light from bartender Centeno for which they were charged \$5 each. When Centeno's shift was over, Araceli (aka "Chelly") took over as bartender. Maria Garsia⁶ sat down next to Zapata and she asked him to buy her a beer. He agreed, she ordered a beer from Araceli, and was served a Bud Light. Agent Zapata handed Araceli a \$20 bill and she returned with \$10, which she handed to Zapata. Zapata did not see what happened to the rest of the change. After she finished her first beer, Garsia asked Zapata to buy her another. He agreed, and Garsia ordered a Bud Light from Araceli. The bartender served Garsia the beer and Zapata paid with a \$20 bill. The bartender gave Zapata \$10 in change and attempted to hand some money to Garsia, but Garsia said not to give her the money.

Later, Garsia asked for a third beer and the same sequence of events took place — Garsia ordered the beer from Araceli, Zapata paid with a \$20 bill, received \$10 in change, and Garsia again waved off Araceli's attempt to hand her money. During the evening a woman named Evelyn asked Agent Carnet to buy Araceli a beer. He agreed, handed Araceli \$20, and received \$10 in change. He observed her obtain a glass which appeared to contain beer.

⁶We have used the spelling which was used in the accusation and decision. She is referred to as Maria Garcia in the reporter's transcript.

Counts 6-9:

Agents Carnet and Zapata returned to the premises on March 14, 2012. Carnet entered first, took a seat at the bar, and ordered a Tecate from the bartender, Andrea, for which he paid \$5. Zapata entered second, took a seat at the bar, and ordered a Bud Light from Andrea for which he paid \$5.

Carnet began talking to Evelyn, who asked him to buy her two buckets of beer. He said that was too much. He agreed to buy her one beer, and she ordered a Tecate from Andrea. Carnet paid with a \$20 bill. Andrea served the beer to Evelyn and gave Carnet \$10 in change. He did not see what happened to the rest of the change, but Evelyn told him later that the bartenders kept her commissions and gave them to her later. Evelyn solicited three more beers from Carnet, and each one cost \$10, but there was no contemporaneous payment of any commission by the bartender.

Garsia came over to Zapata and asked him to buy her a beer. He agreed, and Garsia ordered a Bud Light from Andrea. Andrea served her the beer and took \$20 from Zapata. She handed \$10 of the change to Zapata and attempted to hand the rest to Garsia, who told her not to give her the money. Instead, she asked Andrea to place the money in her purse which was on a shelf behind the bar counter, which she did.

Garsia asked for a second beer and Zapata agreed. She ordered a Bud Light from Andrea, and Zapata again paid with a \$20 bill. Andrea gave \$10 of the change and again tried to give the rest to Garsia. Garsia again told her to put the money in her purse, and she did. Garsia requested two more beers that evening, and each time this same sequence of events took place, with Zapata paying for the beer and Andrea placing a portion of the change in Garsia's purse.

Counts 10-11:

On March 28, 2012, Agents Carnet and Zapata visited the premises again. They sat at the bar and Zapata ordered a Bud Light from bartender Araceli for which he was charged \$4.

Garsia struck up a conversation with Zapata and she asked him to buy her a beer. He agreed, and Garsia ordered a beer from Araceli. Zapata handed \$20 to Araceli and she obtained change. She handed \$10 to Zapata and \$5 to Garsia which she put in her pocket. This exact sequence of events was repeated three more times in the course of the evening.

Counts 12-14:

Carnet and Zapata visited the premises for the final time on April 26, 2012. They sat at the bar and Carnet ordered a beer from bartender Centeno for which he paid \$5. Centeno asked Carnet to buy her a drink and he agreed. She obtained an O'Doul's — a non-alcoholic beer. Carnet handed her \$20 and she gave him \$10 in change. Later, she asked him to buy her a real beer and he agreed. She obtained a Modelo, he handed her \$20, and she gave him \$10 in change.

Appellant argues that there was no evidence that the licensee knew about the drink solicitation activity occurring on the premises or that the bartenders overheard the solicitations . However, a licensee's vicarious responsibility for the unlawful on-premises acts of his or her employees is well established. Actual knowledge is not required. (*Morell v. Dept. of Alcoholic Bev. Control* (1962) 204 Cal.App.2d 504, 514 [22 Cal.Rptr. 405]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 172, 180 [17 Cal.Rptr. 315]; *Mack v. Dept. of Alcoholic Bev. Control* (1960) 178 Cal.App.2d 149, 153 [2 Cal.Rptr. 629].) The bartenders in this case participated in the scheme

directly by handing commissions to soliciting individuals or putting the money in their purse. This participation, and therefore knowledge, is properly imputed to the appellant.

Appellant also alleges that no evidence supports the contention that the non-employee soliciting individuals were loitering prior to the actual solicitations. This assertion must be rejected. In *In re Flores* (2008) AB-8713, the Board addressed the issue of loitering and concluded that when a commission scheme is found, it follows that the bartenders and waitresses have "knowingly permitted" the solicitors to loiter for purposes of soliciting drinks:

These facts provide substantial evidence to support finding violations of both statutes cited above. Not only do they show the plan or scheme of paying a commission for each drink solicited, they also show that the bartenders were not merely innocent or ignorant bystanders. The complicity of the bartenders is obvious; without their complicity, the women would not have received commissions on the beers they solicited. There can be no question that the bartenders "knowingly permitted" these women "to loiter in . . . [the] premises for the purpose of . . . soliciting" drinks. It is hard to imagine a more obvious illegal "bar girl" operation.

Appellant's brief does not address the overall picture displayed by the findings and evidence. Instead, the brief selectively addresses individual transactions, attempting to explain away the circumstances relating to the sale of drugs and drink solicitation activity, as well as diverting attention from the fact that appellant's own employees were aware of and facilitating the illegal conduct. Our review of the record leads us to conclude that all of the counts which were sustained are supported by substantial evidence.

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.