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

AB-9185
File: 42-375422 Reg: 10073744

ANA QUINTANA FLORES, dba Golden Pheasant
4164 North Perris Boulevard, Suite H, Perris, CA 92571,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 3, 2012
Los Angeles, CA

ISSUED JUNE 12, 2012

Ana Quintana Flores, doing business as Golden Pheasant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license for employing or permitting individuals to loiter in the premises for the purpose of drink solicitation, in violation of Business and Professions Code section 24000.5, subdivision (b) and section 25657, subdivisions (a) and (b).

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

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[1]The decision of the Department, dated August 17, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on November 5, 2001. On November 10, 2010, the Department instituted an accusation against appellant, which was amended on June 10, 2011, charging that she employed or permitted individuals to loiter in the premises for the purpose of drink solicitation.

At the administrative hearing held on June 14, 2010, documentary evidence was received and testimony concerning the violation charged was presented by Department investigators, Danny Vergara and Joseph Perez, Jr.; Department District Administrator, Gerardo Sanchez; and Marjorie Martinez, a certified Spanish language interpreter. Appellant presented no witnesses.

The testimony established that investigators Perez and Vergara visited the premises in an undercover capacity on five occasions: May 14, May 22, June 18, June 19, and July 2, 2009. Based on their testimony, the Department issued its decision which determined that cause for suspension or revocation was established as to counts 1, 4, 7, 10, 11, 14, 17, 20, 21 and 24, for violation of Business and Professions Code section 24200.5, subdivision (b)[2] and as to counts 3, 6, 9, 13, 16, 19, 23 and 26, for violation of Business and Professions Code section 25657, subdivision (b);[3] but that cause for suspension or revocation was not established as to counts 2, 5, 8, 12, 15, 18, 22 and 25, for violation of Business and Professions Code section 25657, subdivision (a).

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[2]The specific language used in section 24200.5, subdivision (b) is: "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]Section 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."

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

DISCUSSION

Appellant contends that the decision is not supported by substantial evidence, because it is based partly on the testimony of investigator Perez, who does not have a Spanish language certification. Because of the importance of words in a solicitation case, and because the investigator is not certified as being fluent in the Spanish language, appellant maintains that the findings are not supported by substantial evidence. Appellant also maintains that the testimony of investigator Vergara is unsupported because there is no evidence that bartenders or other employees heard bar-girls soliciting him for drinks.

When findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends,* [*Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002)] 100 Cal.App.4th [1250,]1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; ....) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor an appellate court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of

> an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

The administrative law judge (ALJ) made numerous findings of fact in his proposed decision regarding the drink solicitation activity observed by the undercover investigators. Consistently throughout these findings, each time an investigator purchased a beer for himself the charge was $3, but each time a beer was purchased for one of the women who had asked the investigators to buy her a drink (the bar-girls) the charge was $7. (See Findings of Fact 4 - 26.) In some instances it was unclear how much the bar-girl received, and in other instances it was established that she received $5 as a commission.

Appellant argues that because investigator Perez is not fluent in Spanish, his testimony should not be relied upon by the ALJ in forming his decision. However, the Spanish words and phrases were translated at the hearing by a court-certified interpreter. Those translations, taken in context with the actions of the bar-girls, the actions of the bartenders, the payment of a commission to the bar-girls, and the absence of any contrary evidence, support the ALJ's findings.

Appellant also argues that substantial evidence is lacking because no bartenders or employees actually heard any of the bar-girls solicit the investigators to buy them a drink. We believe this is irrelevant. There is no requirement that the employees corroborate the testimony of the investigators. Further, two of the bar-girls admitted to receiving a commission on their solicited drinks.

We believe that a reasonable person would accept the evidence presented as substantial evidence for the conclusion that appellant permitted drink solicitation activity in the licensed premises. We disagree with appellant that substantial evidence does not exist to support the ALJ's findings.

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]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.