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

AB-9203
File: 41-476040 Reg: 11074232

XAVIER GALLARDO PORTALLANZA, dba El Sol de la Noche
1302 Francisquito Avenue, Suite B, West Covina, CA 91790,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 16, 2012
Los Angeles, CA

ISSUED OCTOBER 3, 2012

Xavier Gallardo Portallanza, doing business as El Sol de la Noche (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license, with revocation stayed for three years, and suspended his license for 20 days for allowing drink solicitation activities in the licensed premises in violation of Business and Professions Code sections 24200.5, subdivision (b), and 25657, subdivision (b).

Appearances on appeal include appellant Xavier Gallardo Portallanza, appearing through his 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 October 10, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine eating place license was issued on January 5, 2010. On January 25, 2011, the Department filed a 22-count accusation against appellant charging that various drink solicitation activities occurred over the course of three visits to the licensed premises during a Department investigation.

At the administrative hearing held on March 29, 2011, documentary evidence was received and testimony concerning the violations charged was presented by Department investigator Anthony Posada; by the appellant, licensee Xavier Gallardo Portallanza; and by Maribel Magana, one of appellant's employees.

Subsequent to the hearing, the Department, through a designee of the Director, adopted the proposed decision submitted by the ALJ which dismissed all counts of the accusation. The prosecuting arm of the Department then petitioned for reconsideration. Reconsideration was granted, the previously adopted decision was rescinded, and the matter was decided pursuant to Government Code section 11517, subdivision (c). The Department's decision adopted all the ALJ's Findings of Fact; sustained counts 11, 13, 15, 16, 18, and 22, which charged violations of Business and Professions Code[2] sections 24200.5, subdivision (b), and 25657, subdivision (b), on July 23 and August 20, 2010; the remaining counts were found not established and were dismissed.

Appellant filed a timely appeal raising the following issues: (1) There was not substantial evidence to support a finding that section 24200.5, subdivision (b), was violated, as charged in count 11, and (2) there was not substantial evidence that any of

[2]Unless otherwise designated, all subsequent statutory references are to the California Business and Professions Code.

the persons named in counts 13, 15, 18, and 22[3] "loitered" within the meaning of section 25657, subdivision (b).

DISCUSSION

I

Appellant contends there is not substantial evidence to support finding a violation of section 24200.5, subdivision (b) (24200.5(b)), with regard to count 11 of the accusation. Count 11 charges that appellant permitted a woman named Patti to solicit patrons to buy drinks for her in violation of section 24200.5(b). Section 24200.5(b) provides that:

> [T]he department shall revoke a license upon any of the following grounds:
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> ¶ . . . ¶
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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.

In finding that the violation charged in count 11 was established, the Department said it relied on paragraphs 10, 11, 12, and 19 of the Findings of Fact (FF):

> FF 10. On July 23, 2010, Investigators Posada and Zavala returned to the premises posing as customers. Patti greeted them and they sat in a booth. A female identified as Maura Esther Alvarez De Dios (Maura) approached and took their order of a Bud Light beer for each investigator. Posada described Maura as a bartender. [Appellant] testified that Maura was a waitress. Patti asked Posada to buy her a beer. Posada agreed. Posada handed Maura a $20.00 bill. Maura served

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[3]Appellant has not included count 16 in this appeal. Count 16 charged that appellant permitted a woman known as "Ibarra" to solicit drinks under a commission or profit-sharing plan on August 20, 2010, in violation of section 24200.5, subdivision (b). This is the same charge made in count 11 with regard to a woman known as "Patti." Since count 16 is not appealed, we consider that appellant has conceded the violation charged in that count.

three 12 ounce bottles of Bud Light beer. Maura did not give any change. Patti began to consume the beer.

FF 11. Patti asked Posada to buy her a drink. Posada agreed. Patti obtained a red plastic cup that contained a red colored liquid. The evidence is unclear as to how this was served, whether it was served at the table by Maura or whether Patti went to the fixed bar to get it. Patti told Posada that the red liquid was Clamato. Clamato is not an alcoholic beverage. After consuming this, Patti ordered another Clamato from Maura. Patti did not ask anyone to buy her this drink prior to ordering it. Patti asked Posada and Zavala if they wanted anything. Zavala said that he wanted a Bud Light beer. Patti was served another red cup containing a red liquid (Clamato) and Zavala was served a 12 ounce bottle of Bud Light beer. Posada handed Maura a $20.00 bill. Maura gave Posada $5.00 in change. Posada then observed Maura give Patti a folded napkin that had a $5.00 bill within it. At no time was the price of the Clamato established. Apparently Investigator Posada never inquired as to the cost of the Clamato. The Department did not inquire from waitress Magana or [appellant], both of whom testified, what the cost of a Clamato drink was or better yet whether it was in fact served at the premises.

FF 12. Patti asked Posada to buy her a beer. Posada agreed. Patti ordered a Bud Light beer from Maura. At this time Posada and Patti got up and left the table to dance. As he was getting up Posada placed two $5.00 bills on the table. Upon seeing this Patti took one of the $5.00 bills. Maura approached Patti and Posada while they were dancing. Maura told Patti that she was short $5.00. Patti informed Maura that she (Patti) already took her $5.00.

FF 19. Respondent testified that Magana and Maura were both waitresses. [Appellant] testified that he does not know Ibarra (Exhibit C) or Patricia Ramirez (Exhibit D) and they are not employees.

In Conclusion of Law (CL) paragraphs 4(b) and 4(c) the Department explained the factors that established the count 11 violation:

CL 4(b) . . . . The evidence established that on July 23, 2010 (Count 11), an employee of the premises, waitress Maura, was present when Patti solicited the investigators. Moreover, Maura received payment from one of the investigators and returned some change to the investigator while surreptitiously handing part of the change to Patti. . . .

CL 4(c) While no evidence established that any of the excess money charged for drinks made its way to the licensee, this is not a requirement. The statute simply prohibits a licensee from permitting any person to solicit the purchase of alcoholic beverages under "any commission,

> percentage, salary, or other profit-sharing plan, scheme or conspiracy." Since the women soliciting the drinks received some portion of the price charged for those drinks, there is sufficient evidence that this is some sort of commission, percentage or profit-sharing plan or scheme. Moreover, because the evidence established that employees of the licensee were aware of the activities involved, such knowledge is imputed to the licensee. (*Wright v. Munro* (1956) 144 Cal.App.2d 843.)

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 Beverage Control v. Alcoholic Beverage 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].)

Appellant argues there was not sufficient evidence to establish the violation charged because there was no evidence that Maura overheard Patti soliciting Posada for her beer nor was there testimony that Patti received any money from Maura in

conjunction with her solicitation of the beer. While appellant may be correct in these assertions, that does not preclude finding a violation of section 24200.5(b).

It could be argued that Maura heard or should have heard Patti's solicitation of Posada. As the Department points out in CL 4(b), the evidence showed that Maura was at the table where Posada and Patti were sitting, taking their order, when Patti solicited Posada. Posada ordered two Bud Lights, one for himself and one for Zavala, and Patti solicited him at that point. Posada testified:

> A. After I placed my drink order and Investigator Zavala's drink order, Patti looks at us and asks me if I would buy her a beer.

It would not be unreasonable to infer that Maura was aware of Patti's solicitation, particularly in light of what followed.

Although Patti received no money at the time the first beer was ordered, she did receive money from Maura a little later. When Patti got her second Clamato from Maura, Maura handed her a $5.00 bill in a folded napkin. Then when Patti and Posada left the table to dance after ordering a solicited beer for Patti, Patti took one of the two $5.00 bills that Posada left on the table to pay for the beer. Maura brought the beer but found only $5.00 on the table. When she told Patti that there was not enough money, Patti said that she had already taken her $5.00.

Even though Patti did not receive the $5.00 in the napkin at the time she solicited the first beer, it is very reasonable to assume that the money was in the nature of a commission for her solicitation, particularly in light of the way the money was delivered. No other possible explanation comes to mind and appellant has not offered one. When Patti took the money from the table, and Maura did not dispute Patti's "right" to it, that was clearly money that Patti acquired as a result of her solicitation.

The failure to present positive proof of Maura hearing the actual solicitations is not fatal to the Department's determination in this case. The later payment to Patti showed that Maura was not only aware of, but participating in, a "plan, scheme or conspiracy" to pay commissions or otherwise share the money that was received as a result of Patti soliciting patrons to buy drinks for her.

The activities of Patti and Maura in the licensed premises are exactly those that show a violation of section 24200.5(b). Maura was appellant's employee, so her knowledge and participation is imputed to appellant.

Viewing this matter, as we must, in the light most favorable to the Department's determination, we must conclude that substantial evidence supports the finding that there was a violation as charged in count 11 of the accusation.

II

Appellant contends that there is not substantial evidence showing that Patti (counts 13 and 15) or Gloria Ibarra Maura (Ibarra) (counts 18 and 22) "loitered" within the meaning of section 25657, subdivision (b) (25657(b)). Section 25657(b) provides:

> It is unlawful:
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> ¶ . . . . ¶
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> (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.

Appellant asserts that in prior decisions, the Appeals Board has held a solicitation violation must be found in order to find that a person "loitered" within the meaning of section 25657(b). Because the "required" finding of a solicitation violation is missing, appellant argues, there can be no section 25657(b) loitering violations. In

addition, appellant says, the ordinary meaning of "loiter" is to "linger idly by the way," "to idle," or "to loaf" and there was no evidence presented of Patti or Ibarra idling or loafing.

Appellant appears to equate "solicitation violation" with a violation of section 24200.5(b) or 25657, subdivision (a) (25657(a)).[4] Although the accusation originally included charges of section 25657(a) violations, these charges were among the counts dismissed. Appellant concludes, therefore, that there is no basis for finding that the women loitered in violation of section 25657(b).

A "solicitation violation" however, is not limited to those situations that fall under section 25657(a). Both section 24200.5(b) and section 25657(b) also prohibit solicitation activities. "Loitering" is not what is prohibited by section 25657(b); it is loitering "for the purpose of begging or soliciting."

In any case, finding a violation of section 25657(b) is not dependent on finding a violation of one of the other solicitation provisions. Even if it were, appellant has conceded that Ibarra solicited by not contesting the Department's determination that the charges of count 16 were sustained (see fn. 2, *ante*), and in this opinion we have already concluded that count 11, regarding solicitation by Patti, should be sustained.

Appellant also asserts that loitering was not established because there was no evidence that the women "were lingering idly by or loafing." (App. Br. at p. 8.) Loitering

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[4]Section 25657, subdivision (a), provides:

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.

may be shown by a number of things a woman might be doing before soliciting, appellant argues, such as the solicitor sitting at the bar not drinking, but there was no such evidence introduced. Since no evidence was presented of what the women were doing before Posada walked in, appellant argues, there is no way to prove that the women were loitering.

Evidence of what the women were doing before the investigators came in would be difficult, if not impossible, to provide. However, on July 23, Patti greeted them as they came in, sat in a booth with them, and began soliciting. During the whole course of the investigator's time there, Patti did nothing other than sit with the investigators and solicit drinks. She had no other duties there, and someone soliciting drinks is not just an ordinary patron with lawful business there. It would be difficult to conceive a term for what Patti did other than loitering for the purpose of soliciting alcoholic beverages.

Ibarra's actions were similar to those of Patti. She approached the investigators shortly after they arrived, and when they declined to buy a raffle ticket, she joined them and started soliciting alcoholic beverages. She received money in a folded napkin from the server for each beer she solicited. She also had no other duties in the premises. It seems inescapable that she was allowed to loiter for the purpose of soliciting.

There is, however, another problem with the four counts that charged violations of section 25657(b). Two of them, 15 and 22, duplicate the charges in two other counts, 13 and 18. Counts 13 and 18 charge that "respondent-licensee employed or knowingly permitted . . . [Patti and Ibarra] to loiter . . . for the purpose of begging or soliciting . . . in violation of Business and Professions Code Section 25657(b)." Counts 15 and 22 charge that "respondent-licensee's agent or employee, Maura Esther Alvarez De Dios, employed or knowingly permitted" Patti and Ibarra to loiter in violation of

section 25657(b). But charging that the licensee's employee permitted the illegal acts is the same as charging the licensee with permitting them.

> It is well settled that a pleading alleging that defendant committed a certain act is simply an allegation that in legal effect the defendant is responsible for the act -- i.e., that defendant through his agent committed the act or that defendant personally committed it. Either can be proved under an allegation that "defendant" committed the act.

(*Cooper v. State Board of Equalization* (1955) 137 Cal.App.2d 672, 679 [290 P.2d 914].)

There was no substantial evidence establishing that the licensee personally permitted the violations; the evidence was that the licensee's employee, Maura Esther Alvarez de Dios, personally permitted the violations. Although Alvarez de Dios was the person found to have permitted the violations, the only liability with which the Alcoholic Beverage Control Act is concerned is that of the licensee. Alvarez de Dios could possibly be liable for some criminal charge or perhaps even a tort claim, but under section 25657(b), no matter who committed the violation, it is only the licensee who bears responsibility for it and who is penalized for the violation by suspension or revocation of his license.

Although counts 13 and 18 are stated differently from counts 15 and 22, they all charge the same person, the licensee, with the same two violations. In other words, counts 13 and 18 duplicate counts 15 and 22. The Department's decision found four violations when there were only two.

When duplicative charges occur in the criminal law context, the situation is resolve by allowing a punishment or penalty to be imposed on the basis of only one of the two counts. That is, instead of treating the duplicate counts as two violations, for purposes of imposing the penalty, they are treated as just one violation.

In an analogous situation involving the ABC Act, the Department imposed discipline on a licensee who was found to have violated both a license condition and a Department rule by showing sexually explicit films on the licensed premises. The appellate court held that "where a condition imposed on a license duplicates a department rule, relevant statute or ordinance, the department may impose discipline for one or the other violation, but not for both." (*Cohan v. Department of Alcoholic Bev. Control* (1978) 76 Cal.App.3d 905, 911 [143 Cal.Rptr. 199].)

Applying that principle to this case, it would mean that only four counts were established instead of six. When a penalty has been imposed on the basis of several violations, and some of those violations are found not to have been established, it is appropriate to have the penalty reconsidered. (*Vollstedt v. City of Stockton* (1990) 220 Cal.App.3d 265, 277-278 [269 Cal.Rptr. 404]; *Kirkpatrick v. Civil Service Com*. (1981) 116 Cal.App.3d 930, 932 [172 Cal.Rptr. 405].) Therefore, we will remand this matter to the Department for reconsideration of the penalty.

ORDER

The decision of the Department is reversed as to penalty and the matter is remanded to the Department for reconsideration of the penalty.[5]

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[5]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.