

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

AB-9240

File: 42-403342 Reg: 11074221

CRUZ ZAMORA LARA and RAMON PENA OLIVAS, dba Club Reseda
18436 Saticoy Street, Reseda, CA 91335,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 1, 2012
Los Angeles, CA

ISSUED DECEMBER 5, 2012

Cruz Zamora Lara and Ramon Pena Olivas, doing business as Club Reseda (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their on-sale beer and wine public premises license, ordered revocation stayed, subject to three years of operation without discipline, and imposed a 30-day suspension, for having permitted drink solicitation under a commission, percentage, salary, or other profit-sharing plan or scheme, in violation of Business and Professions

¹ The decision of the Department, dated January 13, 2012, is set forth in the appendix.

Code section 24200.5, subdivision (b),² and section 25657, subdivisions (a) and (b).³

Appearances on appeal include appellants Cruz Zamora Lara and Ramon Pena Olivas, appearing through their counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public premises license was issued on December 24, 2003. On November 11, 2010, the Department instituted a 33-count accusation against appellants charging that acts of drink solicitation occurred on five

² Section 24200.5, subdivision (b) provides:

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.

³ Business and Professions Code §25657 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.

"(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.

"Every person who violates the provisions of this section is guilty of a misdemeanor."

separate dates in August and September, 2009.⁴

An administrative hearing was held on October 19, 2011, at which time documentary evidence was received and testimony concerning the violations charged was presented by San Francisco police officers Jose Rodriguez and Liferlando Garcia. Appellants presented no witnesses.

Subsequent to the hearing, the Department issued its decision, sustaining the charges alleged in 24 counts of the accusation as amended and dismissing 12 counts.⁵

Appellants filed a timely notice of appeal in which they contend the Department's findings are not supported by substantial evidence.

DISCUSSION

We find guidance for this appeal in the principles enunciated in the court's decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr. 826] (*Masani*), where the court stated:

Our review "is limited to a determination of whether the Department has proceeded without or in excess of its jurisdiction; whether the Department has proceeded in the manner required by law; whether the Department's decision is supported by its findings; whether those findings are supported by substantial evidence; or whether there is relevant evidence which, in the exercise of reasonable diligence could not have been produced or was improperly excluded at the hearing before the Department. [Citations].

⁴ Amendments to the accusation resulted in three additional counts.

⁵ Ten counts (1A, 4A, 7, 10B, 13, 16, 22, 25, 28, 30, and 31) charging violations of section 24200.5, subdivision (b), were sustained, and three (1B, 4B, and 10A) were dismissed. Two counts (8 and 23) charging violations of section 25657, subdivision (a), were sustained, and eight (2, 5, 11, 14, 17, 20, 26, 29, and 32) were dismissed. All eleven counts (3, 6, 9, 12, 15, 18, 21, 24, 27, 30, and 33) charging violations of section 25657, subdivision (b), were sustained.

Certain principles guide our review. ... [Citations]. We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations]. We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor a 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. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for the 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.

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

The facts of this case strongly suggest that appellants have knowingly fostered an institutionalized pattern of solicitation by providing "drinking companions" for their patrons, either by employing bartenders blind to what is occurring in their presence, or simply capitalizing on the presence of women loitering in the premises, or some combination of both. In any case, the evidence solidly established a course of conduct built around drink solicitation. The evidence established a total of 26 drinks solicited, spread among a total of six women over five days between August 8 and September 11, 2009.⁶ One of those six, Albertina Tapia, who is referred to in the proposed decision as "Tapia," and throughout the transcript and this summary as "Martha," was present and solicited drinks on each of the five days. She directly accounted for 16 of the 26 instances of solicitation, and indirectly for another 10 by the women described as friends or acquaintances. Almost all of the solicitation activity took place at a bar estimated to be 15 to 20 feet in length and staffed by two bartenders.

⁶ The difference between the number of counts and the number of drinks solicited is explained by the duplication of charges in the accusation.

Thirteen counts of the accusation charged that appellants' agents or employees permitted Albertina Tapia, aka "Martha," to solicit or encourage others to buy her drinks under a commission, percentage, salary, or other profit-sharing plan, scheme or conspiracy in violation of section 24200.5, subdivision (b). The remaining counts alleged that the women who had solicited drinks were either employed or permitted to loiter for the purposes of soliciting drinks.

The conduct in question began in the early evening of August 7, 2009, when Tapia sat down at the bar next to plain-clothed Los Angeles Police Sgt. Liferando Garcia.

Martha solicited a total of four beers from Sgt. Garcia on the first day of the investigation, and three beers from him on each of the remaining four days of the investigation. On day three of the investigation, Martha invited a friend to join her; other friends and acquaintances joined Martha on day four; and, on day five, Martha was joined by no fewer than four women, each of whom solicited beers from Sgt. Garcia.

That such intensive solicitation activity could have occurred without the knowledge and acquiescence, if not assistance, of appellants' bartenders, would be difficult to imagine. Indeed, the record contains substantial evidence of bartender conduct manifesting knowledge of and cooperation with the solicitation scheme.

We are satisfied that there is ample evidentiary support for all of the counts sustained by the ALJ. Each and every beer solicited carried an inflated cost of \$10, \$3 of which went into the register, the other \$7 to the purse or pocket of the woman who solicited the drink.⁷ Appellants' arguments attacking Sgt. Garcia's memory concerning

⁷ The undercover officers paid \$4 for beers they purchased.

where on the bar counter, or in front of whom, he may have placed the money for the drinks are unpersuasive attempts to have the Board reweigh the testimony.

Perhaps the most blatant evidence of knowledge of, and cooperation with, drink solicitation activities imputable to appellants is the conduct of their bartender on the night of September 8, described in Findings of Fact 19 through 23, relating to counts 13 through 21:

FF 19. Sgt. Garcia returned to the Licensed Premises on September 8, 2009. He went to the bar counter and ordered a Modelo from the bartender. She served it to him and charged him \$4. Tapia [Martha] sat down next to him at the bar counter and they began to converse.

FF 20. Tapia asked Sgt. Garcia if he would buy her a beer. He said that he would. Tapia ordered a beer from one of the bartenders, who served her a Bud Light. Tapia told Sgt. Garcia that the beer would cost \$10, so he placed that amount on the bar counter. The bartender took the money to the register and returned with \$7 change, which she placed on the bar counter in front of Tapia. Tapia put the money in her purse and began to consume her beer.

FF 21. When she finished her first beer, Tapia asked Sgt. Garcia to buy her a second one. He agreed. Tapia ordered the beer from the same bartender; Sgt. Garcia ordered one for himself as well. The bartender grabbed a Bud Light and a Modelo and placed them in front of Tapia and Sgt. Garcia, respectively. Tapia told him that the two beers cost \$14. Sgt. Garcia placed a \$20 bill on the counter. The bartender took the money, placed it in the register, and made some change. She gave \$6 to Sgt. Garcia and placed \$7 in front of Tapia. Tapia began consuming her beer.

FF 22. Claudia Vasquez and Daniela Lopez joined them a short time later and began talking to him. Claudia asked Sgt. Garcia if he would buy them a beer. He said no. After further conversation, both Vasquez and Lopez asked him if he would buy them a beer. He agreed. Tapia asked him if he would buy her a beer as well. He agreed. They ordered three beers from the bartender. The bartender retrieved three beers and placed one in front of each of the three women. Sgt. Garcia placed \$30 on the bar counter. The bartender picked up the money, took it to the register, and obtained some change. She returned and gave \$7 to Tapia, \$7 to Vasquez, and \$7 to Lopez. All three women picked up the money and began consuming their beer.

FF 23. Tapia, Vasquez, and Lopez solicited Sgt. Garcia one more time. He declined to buy them any more beers, telling them he had to leave.

A reasonable inference to be drawn from the bartender's distribution of the \$7 surcharge on solicited beers directly to each of the three women is that the bartender is a participant in the drink solicitation scheme and conspiracy. How otherwise would the bartender have known to distribute the money in that manner? Under settled law, the acts and knowledge of the bartender are imputed to the employer. (See *Yu v. Alcoholic Bev. etc. 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. Etc. Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291]; *Wright v. Munro* (1956) 144 Cal.App.2d 843 [301P.2d 997].)

ORDER

The decision of the Department is affirmed.⁸

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

⁸ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.