

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

AB-9297

File: 42-505198 Reg: 11076169

JORGE RODRIGUEZ ALCANTAR and CRUZ ZAMORA LARA, dba College Inn
8640 Lindley Avenue, Northridge, CA 91325,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 1, 2013
Los Angeles, CA
Telephonic Deliberation: August 12, 2013

ISSUED AUGUST 30, 2013

Jorge Rodriguez Alcantar and Cruz Zamora Lara, doing business as College Inn (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their on-sale beer and wine public premises license for violations of Business and Professions Code sections 24200.5, subdivision (b),² and

¹The decision of the Department, dated August 8, 2012, is set forth in the appendix.

²Business and Professions Code section 24200.5, subdivision (b), provides that the Department shall revoke a license "if the licensee has employed or permitted any person 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."

25657, subdivisions (a) and (b).³ The order of revocation was conditionally stayed for three years, on condition appellants serve a 35-day suspension.

Appearances on appeal include appellants Jorge Rodriguez Alcantar and Cruz Zamora Lara, appearing through their counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Sean D. Klein.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public premises license was issued on December 23, 2010. On December 16, 2011, the Department instituted an accusation against appellants charging that drink solicitation activities occurred on April 28 and 29, 2011.

At the administrative hearing held on May 1, 2012, documentary evidence was received and testimony concerning the violation charged was presented by Richard Carnet and Esmeralda Reynoso, Department investigators. Investigator Carnet testified that on April 28 and 29, 2011, during visits to the licensed premises, he was asked by Claudia Sainz to buy her drinks. He agreed to do so. In connection with each

³Business and Professions Code sections 25657, subdivisions (a) and (b), provide as follows:

It is unlawful:

(a) For any person to employ, on 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 the licensed premises.

(b) In any place of business where alcoholic beverages are sold to be consumed on 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 any visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting.

solicitation, Sainz either retained the change from a \$20 bill tendered by Carnet for the Bud Light beer she requested, or was given \$6 by bartender Lorena Rodriguez Cuevas from the change Carnet received.

The Department found that counts 1, 3, 4, 5, and 6 were supported by substantial evidence. The remaining counts of the 9-count accusation were dismissed.

Appellants have filed an appeal from the Department's order, contending that there was no evidence any solicitation was heard by bartender Cuevas, and that the evidence failed to establish Sainz was an employee or loitered in the premises.

DISCUSSION

Appellants contend there is no evidence the bartender heard any of Sainz's drink solicitations, and argue that, without such evidence, there can be no finding that any solicitation actually occurred. Appellants also argue that the evidence is insufficient to establish that Sainz was an employee.

Investigator Carnet's testimony is undisputed. He testified that Sainz asked him to buy a beer three separate times on April 28, 2011. Each time Carnet paid for the drink, a Bud Light beer, with a \$20 bill. The first time, he and Sainz were seated at a table. Sainz took the \$20 to the bar and returned to the table with money in her hand, which she kept. Carnet and Sainz then moved to the bar, where the next two solicitations occurred. Again, Carnet paid with a \$20 bill, this time to bartender Cuevas directly. Each time, Cuevas gave \$6 to Sainz and \$10 to Carnet.

Three acts of solicitation occurred the next day, all involving Sainz. Each time Carnet paid with a \$20 bill, received \$10 in change, and bartender Cuevas gave \$6 of the change to Sainz and \$10 to Carnet.

It is unimportant whether bartender Cuevas heard Sainz ask Carnet to buy her a drink. Her actions in paying a percentage of the change from Carnet's \$20 bills to Sainz are enough support the findings that the payments were pursuant to a percentage or profit-sharing scheme. There is nothing in the record to suggest any other reason why the bartender would divide a patron's change between the patron and the woman drinking with him. The interactions between Sainz and the bartender are also consistent with Sainz's presence in the premises as being permissive.

We agree with appellants that the evidence Sainz was an employee is too insubstantial to support a finding she was employed to solicit. Investigator Carnet's testimony that he saw her performing waitress duties, without describing in any detail anything she did, is simply too vague to prove Sainz was employed as a waitress. Her statements to him that she was employed, admitted as administrative hearsay, are not enough, we think, to sustain a finding of employment. On the other hand, that she was loitering in the premises for the purpose of soliciting drinks is well substantiated, and management, in the person of Cuevas, the bartender, was well aware of what Sainz was doing.

We are satisfied that the evidence supports the findings that sections 24200.5, subdivision (b), and 25657, subdivision (b) were violated (counts 1, 3, 4, 5, and 6 of the accusation), and these are enough to sustain the Department's order.

ORDER

The decision of the Department is affirmed.⁴

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

⁴ 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.