

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

AB-9298

File: 61-229096 Reg: 11075796

RICARDO A. RESENDEZ, dba El Rancho Grande
720 Fremont Street, Delano, CA 93215,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: June 6, 2013
Los Angeles, CA

ISSUED JULY 13, 2013

Ricardo A. Resendez, doing business as El Rancho Grande (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his license for permitting drink solicitation pursuant to a commission scheme and for permitting the sale of a controlled substance (methamphetamines) on the premises, in violation of Business and Professions Code sections 24200.5(a) and (b),² 25657(a) and

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

²Business and Professions Code section 24200.5 provides the following grounds for revocation:

- (a) If a retail license has knowingly permitted the illegal sale, or negotiations the sales, of controlled substances or dangerous drugs upon his or her licensed premises. . . .
- (b) If the licensee has employed or permitted any persons to solicit or

(b),³ and Health and Safety Code section 11379(a). Additionally, the decision suspended appellant's license for 5 days for permitting the consumption of alcoholic beverages outside the edifice of the licensed establishment, a violation of section 25612.5(c)(3).

Appearances on appeal include appellant Ricardo A. Resendez, appearing through his counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer public premises license was issued on February 15, 1989. On October 17, 2011, the Department instituted a 30-count accusation against appellant alleging that appellant's employee permitted drink solicitation activities in violation of sections 25657(a) and (b); that appellant's employee allowed consumption of alcoholic outside the edifice of the on-sale retail establishment in violation of section 25612.5(c)(3); and finally, that appellant's employee permitted patrons to sell a controlled substance, to wit, methamphetamines, on the premises, in violation of Health

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.

³Business and Professions Code section 25657 provides that 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 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.

and Safety Code section 11379. The accusation asserted revocation was proper under section 24200.5(a) and (b).

At the administrative hearing held on May 30, 2012, documentary evidence was received and testimony concerning the violation charged was presented by the appellant, Ricardo Resendez; by Joseph Perez, Jr., an ABC supervising agent; by Oscar Zapata, Ricardo Carnet, Isaac Borunda, and Paul Lopez, ABC agents; by Damacio Diaz, a Bakersfield Police Department detective; and by Apryl Brown, a criminalist with the Controlled Substances Unit of the Kern Regional Crime Laboratory.

Testimony established the events, which took place over four separate dates. Counts 1 through 7 of the accusation pertained to the events of February 11, 2011. On that date, Agents Carnet and Zapata, accompanied by Supervising Agent Perez, entered the premises and were approached by two women, Alma Paredes and "Antonia." The two women solicited a total of four beers from the agents, but the bartender, Mora, did not give the women any money during these transactions. Mora did permit Agent Perez to drink his beer on the sidewalk outside the premises, however.

Counts 8 through 15 of the accusation pertained to the events of March 4, 2011. On that date, Agents Carnet, Zapata, and Borunda entered the premises, accompanied by Supervising Agent Perez. They were again approached by Paredes and Antonia. Paredes asked Carnet to buy her a beer. He agreed. Paredes ordered a beer from Luz Resendez, appellant's wife,⁴ who was tending the bar. Resendez served Paredes a Bud Light. Agent Carnet gave Resendez a \$20 bill. Resendez returned with change and gave \$16 to Agent Carnet and \$2 to Paredes.

⁴For purposes of this opinion, "Resendez" refers to Luz Resendez. Ricardo Resendez, the licensee, will be referred to as the "appellant."

Antonia asked Agent Zapata to buy her a beer, and Agent Zapata agreed. Antonia ordered a beer from Mora, who was also tending the bar. Agent Zapata gave Mora a \$20 bill. Mora obtained change, gave \$16 to Agent Zapata and passed some money to Antonia.

Paredes asked Agent Carnet to buy her a second beer. He agreed. Paredes ordered from Resendez. Again, Agent Carnet gave Resendez a \$20 bill. Resendez returned \$16 to Agent Carnet and passed \$2 to Paredes.

Antonia asked Agent Zapata to buy her a second beer. He agreed. Antonia ordered from Mora. Again, Agent Zapata gave Mora a \$20 bill. Mora returned \$16 to Agent Zapata and handed some folded-up money to Antonia.

Antonia later asked Agent Zapata to buy another beer for her as well as for Paredes. He agreed. Antonia ordered two beers from Mora. Agent Zapata gave Mora a \$20 bill. Mora returned \$12 to Agent Zapata and handed some folded-up money to both Antonia and Paredes.

Paredes then asked Agent Zapata to buy a fourth round for both her and Antonia. He agreed. Paredes ordered two beers from Mora. Agent Zapata gave Mora a \$20 bill. Mora returned \$12 to Agent Zapata and again handed some folded-up money to both Paredes and Antonia.

Bartender Mora again gave Agent Perez permission to drink his beer on the sidewalk outside.

Counts 16 through 25 pertained to events that took place on March 18, 2011. On that date, Agents Carnet, Zapata, and Borunda again entered the premises, accompanied by Supervising Agent Perez. Yet again, they were approached by Paredes and Antonia. Paredes asked Agent Carnet to buy her a beer. He agreed.

Paredes ordered a beer from Mora, who told Agent Carnet that it would cost \$6. Agent Carnet gave Mora a \$20 bill. Mora gave him \$14 in change. During this first transaction, Mora did not give any money to either Paredes or Antonia.

Antonia then asked Agent Zapata to buy her a beer. He agreed. Antonia ordered a beer from Mora. Agent Zapata gave Mora a \$20 bill. Mora gave him \$14 in change and handed some folded-up money to Antonia.

Paredes asked Agent Carnet to buy her a second beer. He agreed. Paredes ordered a beer from Mora. Agent Carnet gave Mora a \$20 bill. Mora gave him \$14 in change and handed \$3 to Paredes.

Antonia asked Agent Zapata to buy her a second beer. He agreed. Antonia ordered a beer from Mora. Agent Zapata gave Mora a \$20 bill. Mora gave him \$14 in change and handed some folded-up money to Antonia.

Antonia later asked Agent Zapata to buy her a third beer. He agreed. The transaction took place in the same manner, with Mora giving Antonia some money.

Later, a woman identified only as "Jihada" approached Agent Perez. She spoke with one of the bartenders in Spanish, but did not speak directly to Agent Perez. The bartender served her a beer, and asked Agent Perez for \$6. Agent Perez paid with a \$20 bill. The bartender gave him \$14 in change, and handed some money to Jihada.

One of the bartenders again permitted Agent Perez to consume his beer on the sidewalk outside.

Counts 26 through 30 pertained to events that took place on April 28, 2011. On that date, Agent Borunda entered the premises, accompanied by Detective Diaz of the Bakersfield Police Department. Agent Borunda struck up a conversation with a woman named Jennifer, who asked him if he would buy her a beer. He agreed. Bartender

Mora was standing across the bar from them at the time. Mora told Agent Borunda the beer would cost \$5. Agent Borunda gave Mora \$15. Mora gave him some change and gave \$2 to Jennifer.

Detective Diaz commented that he was tired. Mora commented that maybe he needed something. Detective Diaz said he did, and asked if she knew anyone. Mora pointed out a woman sitting at the bar, later identified as Rosie Martinez.

Detective Diaz approached Martinez and asked if she had anything to wake him up. Martinez asked him who had sent him. Detective Diaz pointed at Mora. Martinez led him to the men's restroom, and asked him what he wanted. Detective Diaz asked for \$40 worth of crystal meth. Martinez dropped four bindles of crystal methamphetamine in Detective Diaz's pocket. Detective Diaz handed her a \$100 bill, but Martinez indicated she did not have change. They left the restroom. Detective Diaz obtained change from Agent Borunda and gave Martinez \$40.

Appellant testified that he had never seen any solicitation activity on the premises, and that he had ejected individuals involved in narcotics incidents.

Subsequent to the hearing, the Department issued its decision which sustained counts 7, 9, 10, 12 through 15, 17, 18, 20, 21, 25, and 27 through 30. The decision dismissed counts 1 through 6 (alleging solicitation activity on February 11, 2011); counts 8, 11, 16, 19, and 26 (alleging that the women were employed by appellant for purposes of solicitation); and counts 22 through 24 (alleging solicitation by Jihada). The decision imposed a penalty of revocation pursuant to Business & Professions Code section 24200.5, subdivisions (a) and (b), as well as a concurrent 5-day suspension.

Appellant filed a timely appeal contending: (1) that the Department's decision is not supported by substantial evidence, and (2) the penalty of revocation constitutes an

abuse of discretion.

DISCUSSION

I

Appellant contends that the Department's decision is not supported by substantial evidence.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a 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].) "Trial court findings must be supported by substantial evidence on the record taken as a whole. Substantial evidence . . . must be reasonable in nature, credible, and of solid value." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 51 [26 Cal.Rptr.2d 834].)

When, as in the instant matter, the 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. Bernard* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonable deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

Extensive case law has established that a licensee is responsible for the actions of his agents and employees. (See, e.g., *Morell v. Dept. of Alcoholic Bev. Control* (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; *Harris v. Alcoholic Bev. Control*

Appeals Bd. (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; *Mack v. Dept. of Alcoholic Bev. Control* (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].)

In this case, the testimony of the investigating officers is almost entirely uncontradicted. On four separate dates, women approached the investigating agents and asked the agents to buy them drinks. On three of these four occasions, the bartender serving the drinks, either Mora or Resendez, handed cash to the women, sometimes folded up, sometimes clearly visible, at the same time that the investigating officers received their change.

While the appellant did testify that he was personally unaware of any solicitation activity, he also testified that he had never asked either Mora or Resendez whether they were paying women to solicit drinks. [RT at pp. 195-197.] Appellant is responsible for the conduct of his bartenders; he cannot hide behind a barrier of willful ignorance.

Moreover, on each of the four dates, Supervising Agent Perez was permitted to finish his beer on the sidewalk outside the edifice of the establishment. Appellants presented no evidence or witnesses to counter this testimony.

Finally, on one of the four dates, appellant's bartender, Mora, directed Detective Diaz to a woman, Martinez, who sold him methamphetamines. Appellant did testify that he has personally ejected individuals involved in other narcotics transactions from the premises. [RT at pp. 188-190.] However, appellant is again responsible for the conduct of his bartenders, and there is substantial uncontradicted evidence that bartender Mora was complicit in the sale of methamphetamines inside the establishment.

The ALJ dismissed a number of counts, including the allegations of solicitation on February 11, 2011; any allegations that the women were employed by appellant for

the purpose of solicitation; and all solicitation charges involving the woman named "Jihada." The ALJ properly scrutinized the evidence and found these charges to be lacking. The remaining counts, however, are supported by an overwhelming quantity of uncontradicted testimony and evidence. We see no cause to reconsider the decision below.

II

Appellant contends that the penalty of revocation is excessive and constitutes an abuse of discretion.

Where an appellant raises the issue of an excessive penalty, the Appeals Board will examine the issue. (*Joseph's of California v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, the Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (*Martin v. Alcoholic Ben. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].)

Appellant claims that the penalty is an abuse of discretion in light of a "minimal disciplinary history" and the "limited time period" in which the violations took place. (App.Br. at p. 12.)

First, the events found to support a penalty of revocation did not occur over a "limited" time period – they took place, often repeatedly, on three separate occasions during the months of March and April, 2011.

Second, we have reviewed appellant's disciplinary history and cannot characterize it as "minimal." Appellant does have previous violations. We will not restate that disciplinary history here, however, because it is not relevant. Section 24200.5 expressly provides for revocation; it does not require that the ALJ consider a

licensee's disciplinary history.

Additionally, at oral argument, appellant asserts that mitigation was appropriate because Antonia and Paredes had solicited drinks from the officers at another establishment, and had "followed" the officers to appellant's premises. We note first that this issue was not briefed, and we need not address it here. Regardless, we cannot imagine how another establishment's violation of the law would make appellant's violation any less egregious.

The facts of this case establish grounds for revocation under *both* subdivisions of section 24200.5. If anything, this suggests that revocation is doubly appropriate. Revocation is therefore fully justified and well within the ALJ's discretion.

ORDER

The decision of the Department is affirmed.⁵

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

⁵This 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.