

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

AB-9354

File: 42-371457 Reg: 12077091

RIGOBERTO RAMIREZ, dba Tarasco Bar
543 North Avalon Boulevard, Wilmington, CA 90744,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 6, 2014
Los Angeles, CA

Redeliberated April 3, 2014
Sacramento, CA

ISSUED APRIL 15, 2014

Rigoberto Ramirez, doing business as Tarasco Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his license for 30 days, with the revocation stayed for a period of three years, provided no further cause for discipline arises during that period, after which the stay will become permanent. In addition, the license was suspended for 30 days for permitting drink solicitation activities on the licensed premises in violation of Business and Professions Code sections 24200.5, subdivision (b); 25657, subdivisions (a) and (b); and rule 143.

Appearances on appeal include appellant Rigoberto Ramirez, appearing through his counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control,

¹The decision of the Department, dated April 3, 2013, is set forth in the appendix.

appearing through its counsel, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on May 29, 2001. On June 18, 2012,² the Department instituted a 28-count accusation against appellant charging that on five separate dates, appellant employed or permitted individuals to engage in drink solicitation activity within the premises, in violation of sections 24200.5(b)³ and 25657(a) and (b),⁴ and permitted employees to accept a drink

²The Department's decision incorrectly states the accusation was filed on January 18, 2012.

³Section 24200.5 states, in relevant part:

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.

⁴Section 25657 states, in relevant part:

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.

while working in the licensed premises, in violation of rule 143.⁵ On December 10, 2012, the Department filed an amendment to the accusation adding counts 29-33 for additional violations of these same sections. Counts 2, 4, 9, 19, and 27 were not established and were dismissed. The remaining 28 counts were sustained.

At the administrative hearing held on December 11, 2012, and February 12, 2013, documentary evidence was received and testimony concerning the violation charged was presented by Los Angeles Police Department (LAPD) officers Liferlando Garcia, Pedro S. Rodriguez, and Francisco Lopez. Appellant Rigoberto Ramirez also testified.

Testimony established that on five separate occasions, appellant's licensed premises was visited by undercover officers from the LAPD:

Counts 1-3: On February 24, 2011, Officer Garcia entered the premises and ordered a beer from the bartender, Helena, for which he was charged \$4. Garcia was subsequently approached by a female named Rocio, who asked him to buy her a beer. He agreed and gave her a \$20 bill. She pulled money from her bra and paid the bartender \$2 for the beer, gave Garcia \$10, and kept the \$20 bill. Rocio requested three additional beers during the evening, and each time she paid the bartender \$2 and

⁵Rule 143 states, in relevant part:

No on-sale retail licensee shall permit any employee of such licensee to solicit, in or upon the licensed premises, the purchase or sale of any drink, any part of which is for, or intended for, the consumption or use of such employee, or to permit any employee of such licensee to accept, in or upon the licensed premises, any drink which has been purchased or sold there, any part of which drink is for, or intended for, the consumption or use of any employee.

(Cal. Code Regs., tit. 4, § 143.)

kept \$8 for herself. It was not established that Rocio was an employee of the premises.

Counts 4-8 and 29: On March 3, 2011, Officer Garcia returned to the premises, ordered a beer from the same bartender, Helena, who had been working on February 24th, and was charged \$4. Subsequently, he was approached by Leticia who asked him to buy her a beer. Garcia placed \$20 on the bar, Helena took it and then placed change on the counter between Garcia and Leticia. Leticia separated the change, gave \$10 to Garcia, and put \$8 in her pocket. Leticia consumed her beer, getting up several times to perform waitress-type duties. Leticia solicited four more beers from Garcia in between her waitress duties, and each time she kept \$8 for herself.

Also on March 3, 2011, Officer Lopez entered the premises and ordered a beer from the bartender Helena. He paid with a \$20 bill and received \$16 in change. Subsequently, he was approached by Leticia who asked him if he wanted another. He said yes and gave her \$10. She returned with the beer and \$6 in change. Later he was approached by Rocio who offered to keep him company if he bought her a beer. He agreed and gave her \$20. She obtained the beer and some change from Helena, put some of the change in her bra, and gave Lopez \$10. Later, he bought her a second beer, with the money being handled in the same way.

Counts 9-14: On March 18, 2011, Officer Garcia returned to the premises. He ordered a beer from the bartender Helena for which he paid \$4. He was approached by Leticia who asked him to buy her a beer. He agreed and placed \$20 on the counter. The bartender brought back change which she placed between Garcia and Leticia. Leticia took \$8 and gave Garcia \$10 change. Helena observed this. Leticia consumed some of her beer but got up several times to check on other patrons, take orders, deliver beers, collect money, and take customers their change. Leticia solicited three

more beers from Garcia in between her waitress duties, and each time she kept \$8 for herself.

Also on March 18, 2011, Officer Lopez returned to the premises and ordered a beer from the bartender Helena. He gave her \$20 and received \$16 in change. He was approached by Leticia who asked if he wanted her to bring over a friend. He said yes, and a female identified as Lily came over and asked Lopez to buy her a beer. He said yes and put \$20 on the counter. Helena took the \$20, made change, and put \$10 in front of Lopez and \$8 in front of Lily. Lily took the \$8 while being observed by Helena. Lily solicited three more beers from Lopez, and each time she took an \$8 commission. It was not established that Lily was an employee of the premises.

Counts 15-24 and 30-31: On April 7, 2011, Officer Garcia returned to the premises accompanied by Officer Lopez and they sat at the bar. Lopez ordered a beer from the bartender Helena for which he paid \$4. Garcia was approached by Leticia who asked if he would buy her a beer. He agreed, ordered a beer from Helena, and placed \$10 on the bar. Helena took the money and brought back \$7 in change which she handed to Leticia. No evidence was presented to establish that Leticia was working as an employee on this date.

Officer Lopez was approached by Lily who asked him to buy her a beer. He agreed, ordered a beer from Helena, and placed \$20 on the counter. Helena served the beer and placed \$17 in change on the counter. Lily took \$7 and gave \$10 to Lopez. The evidence did not establish that Helena heard or observed Lily solicit the beer.

A female identified as Vanessa was sitting at the bar near Officer Lopez and was approached by a seemingly intoxicated male. Subsequently, Lily asked Lopez if Vanessa didn't deserve a beer after such an encounter. Lopez agreed and gave

Vanessa money to pay for her beer. Vanessa ordered the beer from Helena, and when Helena returned with the beer and change, Vanessa put the \$7 change in her purse. The evidence did not establish that Helena heard Lily or Vanessa solicit a drink, that Helena observed Vanessa taking the \$7, or that Vanessa was working as an employee of the premises on that date.

Officers Garcia and Lopez were approached by a female named Rosa who stated that she had been burned by them at another location and that they owed her a beer. Leticia, Vanessa, and Lily also asked for beers. Lopez ordered beers for the four women, as well as beers for himself and Garcia, and paid for the six beers with a \$50 bill. The bartender brought back change, gave \$7 each to Leticia, Lily, and Vanessa, \$5 to Rosa, and \$2 to Lopez. Ten minutes later, Lily, Vanessa, and Rosa asked for another beer. Lopez paid the bartender \$40. She brought back the beers, gave Lopez \$10, as well as \$7 each to Lily and Vanessa, and \$5 to Rosa.

Rosa asked Lopez for another beer but he said he had no more money so she approached Garcia. She ordered a beer from Helena, as did Leticia. Garcia paid with a \$20 bill. Helena brought him some change, gave \$7 to Leticia and \$5 to Rosa.

Counts 25-28 and 32-33: On May 6, 2011, Officer Lopez returned to the premises with Detective Rodriguez and they sat at the bar where Helena was the bartender on duty. Rodriguez was joined by Lily. Vanessa was also sitting at the bar. Lopez ordered a beer and paid Helena \$3. Lily and Vanessa subsequently asked if Rodriguez and Lopez would buy them a beer and they agreed. The bartender brought back four beers for the four of them and Lopez paid her \$40. Helena gave Lopez \$12 in change and handed \$7 each to Lily and Vanessa.

Lily subsequently requested two more beers and on each occasion Lily was

handed \$7 by Helena out of the change owed to Lopez. Vanessa solicited three more beers from Rodriguez and on each occasion Vanessa was handed \$7 by Helena out of the change owed to Rodriguez. No evidence was presented to establish that Vanessa was working as an employee of the premises on this date.

Subsequent to the hearing, the Department issued its decision which determined that the charges in the accusation, with the exception of counts 2, 4, 9, 19, and 27, had been proven and that no defense had been established.

Appellant filed a timely appeal raising a single issue: The Department's decision is not supported by substantial evidence.

DISCUSSION

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 that the testimony of Officer Garcia does not constitute substantial evidence because even though he participated in the investigation he had difficulty remembering exact details. Appellant also maintains that the testimony of Officer Lopez does not constitute substantial evidence because he did not prepare his own report, and referred to the report of another officer to refresh his recollection.

Since the officers' testimony, if believed, is evidence of the solicitation activity, the issue is really one of credibility, and the ALJ is the person who makes that determination. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) In this case, the ALJ chose to accept the testimony of the officers, and our review of the record satisfies us that this was reasonable.

Appellant's brief relies on references to details in the hearing transcript to impeach the testimony of the officers. However, little would be served by addressing each and every factual contention made by appellant. The ALJ clearly understood the substance of the testimony and made a credibility determination. We cannot say that his resolution of the disputed facts was in any way erroneous.

Appellant also maintains there is not substantial evidence to support a finding that appellant had actual or constructive knowledge of any solicitation activities. However, the doctrine of *respondeat superior* provides that an employer or principal is vicariously liable for the wrongful conduct of his or her employees or agents committed within the scope of the employment or agency. (*Perez v. Van Groningen & Sons, Inc.*

(1986) 41 Cal.3d 962, 967 [227 Cal.Rptr. 106].) It is well settled in Alcoholic Beverage Control Act case law that an employee's on-premises knowledge and misconduct is imputed to the licensee/employer, as it has been here. (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].)

Looking at the record as a whole, we believe that substantial evidence supports the Department's decision.

ORDER

The decision of the Department is affirmed.⁶

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

⁶This 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.