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

AB-9617
File: 42-461630; Reg: 16084011

MARIA SOFIA GUARDADO,
dba Nena's Cantina
11746-48 166th Street,
Artesia, CA 90701-1723,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: October 5, 2017
Los Angeles, CA

ISSUED OCTOBER 19, 2017

Appearances: *Appellant:* Armando H. Chavira, as counsel for Maria Sofia Guardado, doing business as Nena's Cantina

Respondent: Kerry K. Winters, as counsel for Department of Alcoholic Beverage Control.

OPINION

Maria Sofia Guardado, doing business as Nena's Cantina, appeals from a decision of the Department of Alcoholic Beverage Control[1] revoking her license—with the revocation stayed for a period of three years, contingent upon discipline-free operation during that period—and, concurrently, suspending her license for 30 days because she permitted drink solicitation activity in the premises, in violation of Business and Professions Code sections 24200.5,

[1]The decision of the Department, dated September 21, 2016, is set forth in the appendix.

subdivision (b) and 25657, subdivision (a); suspending her license for 15 days because she sold or distributed alcoholic beverages other than beer or wine, but failed to maintain records at her licensed premises of such sale or distribution, in violation of Business and Professions Code section 25752; and suspending her license for 15 days because she purchased alcoholic beverages for resale from a source that did not hold a beer manufacturer or wholesaler's license, in violation of Business and Professions Code section 23402. All suspensions are to run concurrently.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on February 22, 2008. On March 28, 2016, the Department instituted an 8-count accusation against appellant charging that she permitted drink solicitation activity, failed to maintain proper records, and improperly purchased alcoholic beverages for resale.

At the outset of the hearing held on June 1, 2016, counsel for appellant requested a continuance to permit him to review materials received from the Department as a result of a Public Records Act (PRA) request regarding solicitation cases brought against Hispanic licensees over the past eleven years. As a result of this PRA request, he received a box containing information on 1800 cases. The request for continuance was denied, and the box of PRA materials was not entered into the record. (See RT at pp. 7-34.) The issue of discriminatory enforcement was not raised in this appeal.

In another preliminary matter, the parties stipulated to two concurrent 15-day suspensions for counts 7 and 8. Therefore no evidence was presented and no argument was heard on those counts. (See RT at pp. 34-35.) Counts 7 and 8 are not at issue in this appeal.

During the administrative hearing held on June 1, 2016, documentary evidence was received and testimony concerning the violations charged was presented by Carlos Valencia, an agent with the Department of Alcoholic Beverage Control. Appellant presented no witnesses.

Testimony presented at the administrative hearing established that on four separate occasions—August 21, 2015, September 4, 2015, October 8, 2015, and November 6, 2015—the licensed premises was visited by undercover Department agents. Counts 1 through 6 of the accusation are at issue in this appeal.

Counts 1 and 2:

On August 21, 2015, Agents Valencia and Rubio went to the licensed premises in an undercover capacity, arriving about 8:30 p.m. The visit was in response to a complaint about the premises by a member of the public. (RT at pp. 36-37.) They sat down and ordered a Modelo and a Bud Light beer from the waitress, Gloria Aguilar Silva (Gloria). She obtained the beers and they paid her $7—$4 for the Modelo and $3 for the Bud Light. (RT at p. 39.)

As the agents sat at their table, they observed their waitress performing typical waitress duties: serving drinks, collecting money for those drinks, making change, collecting empty beer bottles, and conversing with customers—including the agents. After about 20 minutes, Agent Valencia asked Gloria when she was going to sit down with them. She said she would sit down when they bought her a beer. (RT at p. 41) Valencia agreed.

Gloria ordered a beer from the bartender, Jane Doe #1, who served her a 12-ounce can of Budweiser 55 Select in a glass. She brought the beer back to the table and told Valencia that it cost $10. He paid with a $20 bill and received $10 in change. (RT at pp. 42-44.)

Later, Valencia ordered another Modelo beer from Gloria. She obtained the beer from the bartender and charged him $4. (RT at p. 45.) He exited the premises a short while later.

Counts 3 and 4:

On September 4, 2015, Agents Valencia and Rubio returned to the licensed premises in an undercover capacity, arriving about 8:45 p.m. (RT at p. 47.) They sat down and ordered a Modelo and Bud Light beer. They were charged $7—$4 for the Modelo and $3 for the Bud Light. (RT at p. 48.)

Gloria stopped by to talk to them and asked them to buy her a beer. Valencia agreed. She ordered a beer from the bartender, Nancy Griselda Ibarra-Roman, and was served a Budweiser 55 Select beer and a small glass. (RT at p. 49.) She told him the beer cost $10. He paid her with a $20 bill and she obtained change for him in the amount of two $5 bills. (RT at p. 51.)

Agent Valencia later ordered a Budweiser 55 Select beer from Gloria. She obtained the beer and served it to him. She charged him $3 for the beer. (*Ibid*.) As they continued their conversation, Gloria joked to Ibarra-Roman that people would think Valencia was soliciting her because of the kind of beer he was drinking. The bartender jokingly said they would have to hire him for solicitations. (RT at p. 52.) Valencia exited the premises a short time later.

Counts 5 and 6:

On October 8, 2015, Agents Valencia and Rubio returned to the licensed premises again in an undercover capacity at about 8:55 p.m. and took a seat at the bar. They ordered a Modelo and Bud Light beer from the bartender, Jane Doe #2. She served them the beers and charged them $7—$4 for the Modelo and $3 for the Bud Light. (RT at pp. 53-54.)

Gloria came over and asked Valencia to buy her a beer. He agreed. She obtained a Budweiser 55 Select beer from the bartender and poured it in a small glass. She told Valencia it was $10. He paid her with a $20 bill and received $10 in change. (RT at pp. 54-56.) They talked for a while, then he exited the premises.

The agents returned to the premises on November 6, 2015, but were not solicited on that occasion. (RT at p. 75.) Counts 7 and 8 arose from that visit. Since the parties stipulated to those counts and the penalties resulting therefrom, no evidence was presented on these counts and they are not discussed here.

On July 1, 2016, the administrative law judge (ALJ) submitted a proposed decision, sustaining the accusation and revoking the license—with the revocation stayed for a period of

three years, contingent upon discipline-free operation during that period. Concurrent with the stayed revocation, the ALJ recommended suspending the license for 30 days, with two 15-day suspensions to run concurrently with that suspension.

On July 21, 2016, following the submission of the proposed decision, the Department's Administrative Hearing Office sent a letter from its Chief ALJ to both appellant and Department counsel, inviting the submission of comments on the proposed decision. The letter inviting simultaneous submission of comments from the parties states that the proposed decision and any comments submitted will be submitted to the Director of ABC in 14 days. Neither the appellant nor the Department submitted comments.

Thereafter, the Department issued its Certificate of Decision on September 21, 2016, adopting the proposed decision in its entirety.

Appellant then filed a timely appeal raising a single issue: the decision regarding counts 1 through 6, in relation to the charges that appellant employed or permitted individuals to engage in drink solicitation activity within the premises in violation of Business and Professions Code sections 24200.5(b)[2] and 25657(a)[3] is not supported by substantial evidence.

---

[2]Section 24200.5(b) states, in relevant part:

. . . the department shall revoke a license:

¶ . . . ¶

(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]Section 25657(a) states:

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.

DISCUSSION

Appellant contends the decision regarding counts 1 through 6 is not supported by substantial evidence and that these counts should be dismissed. (App.Op.Br. at pp. 8-12.)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

> 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 [an appellate] 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 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.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]. Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to

determine, 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. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].)

Substantial evidence, of course, is not synonymous with "any" evidence, but is evidence which is of ponderable legal significance. It must be "reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51.) Thus, the focus is on the quality, not the quantity of the evidence. Very little solid evidence may be "substantial," while a lot of extremely weak evidence might be "insubstantial." *(Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

The ALJ reached the following conclusions on these counts:

6. On August 21, 2015, Gloria Aguilar Silva (counts 1 and 2) was working as a waitress at the License Premises. In this capacity, she took orders from the agents, served them their drinks, received payment therefor, and assisted other customers. While so employed, she solicited a beer from Agent Carlos Valencia, charging him $10 (a $7 surplus over the cost of a domestic beer.) (Findings of Fact ¶¶ 5-8.)

7. On September 4, 2015, Aguilar Silva (counts 3 and 4) was once again working as a waitress at the Licensed Premises. While so employed, she solicited a beer from Agent Valencia, charging him $10 (a $7 surplus over the cost of a domestic beer). Both Aguilar Silva and the bartender, Nancy Ibarra Roman, made comments about the solicitation of beverages inside the Licensed Premises, indicating that they were aware of them. (Findings of Fact ¶¶ 9-11.)

8. On October 8, 2015, Aguilar Silva (counts 5 and 6) was once again working as a waitress at the Licensed Premises. While so employed, she solicited a beer from Agent Valencia, charging him $10 (a $7 surplus over the cost of a domestic beer). (Findings of Fact ¶¶ 12-14.)

(Conclusions of Law, ¶¶ 6-8.)

The ALJ found that appellant violated section 24200.5(b), which mandates revocation of

the license if a "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." (Bus. & Prof. Code, § 24200.5(b).) In addition, he found that appellant violated section 25657(a), which makes it unlawful "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." (Bus. & Prof. Code, § 25657(a).)

Appellant maintains that counts 1 through 6 should be dismissed because, she alleges, "the only evidence offered by the agent was hearsay statements offered to support the alleged violations." (App.Op.Br. at p. 9.) Government Code section 11513, subdivision (d), provides in relevant part that "hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding." (Gov. Code, § 11513(d).)

The problem with appellant's assertion is that the statements objected to as hearsay are the statements made by Gloria Aguilar Silva when she solicited Agent Valencia to buy her a beer. These statements are not being offered for the truth of the words that were spoken by her, but to establish the fact that a solicitation occurred. This is not hearsay, but admissible evidence. In a similar drink solicitation case, where the appellant argued that statements made by female employees to undercover agents were inadmissible hearsay, the court said:

> There is a well-established exception or departure from the hearsay rule applying to cases in which the very fact in controversy is whether certain things were said or done and not as to whether these things were true or false, and in these cases the words or acts are admissible not as hearsay, but as original evidence. [Citation.]
>
> [¶ . . . ¶]

> In the instant case the statements of the bartender and female employees were not introduced for truth of the contents but only to show what was said, for what was said is part of the violation itself. It made no difference whether the female employees wanted the beverages or not as long as they did ask the witness to purchase the beverages. As the violation is the solicitation, such can only be accomplished by words.

(*Greenblatt v. Munro* (1958) 161 Cal.App.2d 596, 602 [326 P.2d 929].) The same is true here—the statements are not hearsay but admissible evidence. Furthermore, appellant presented no contradictory evidence to refute the allegation of solicitation.

Appellant maintains "there was no evidence presented at the hearing save for Agent Valencia's testimony that [t]he beer can presented at hearing was the beer can involved in the transaction." (App.Op.Br. at pp. 9-10; Exh. 3.) Appellant did not object to exhibit 3 being entered into evidence at the hearing. (RT at p. 94.) Evidence Code section 353 provides that a party desiring to question an evidentiary ruling on appeal must make timely objection at trial, state the grounds of his objection, and direct the objection to the particular evidence he seeks to exclude. Failure to do so constitutes a waiver of the right. (Evid. Code, § 353.) Since appellant did not object at the administrative hearing to the admission of exhibit 3 this argument has been waived. (Also see: *Dugar v. Happy Tiger Records, Inc.* (1974) 41 Cal.App.3d 811, 817 [116 Cal.Rptr. 412 [in order to raise the point of erroneously admitted evidence on appeal there must be a showing that a timely objection was made at trial directing the attention of the trial court to the particular evidence sought to be excluded.])

Finally, appellant contends the charges should be dismissed because the Department failed to use marked bills for payment, so that they could later be retrieved and produced as evidence. Appellant offers no authority for why this should be required since production of the actual currency used in the solicitation activity is not a required element for proving such an accusation. This contention is entirely without merit.

Appellant does not address the fact that each time Agent Valencia ordered a beer for himself he was only charged $4 by appellant's employees, whereas he was charged $10 when

he bought beers for Gloria. Appellant states repeatedly that the counts should be dismissed, but presents no compelling reason for doing so. A review of the record in its entirety supports the conclusion that counts 1 through 6 are supported by substantial evidence. It was established that, on three separate occasions, appellant employed or permitted an individual to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under a commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy. We see no reason to disturb the Department's decision.

ORDER

The decision of the Department is affirmed.[4]

PETER J. RODDY, ACTING CHAIRMAN
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4]This 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.