

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

| | | |
|--------------------------------|---|--------------------------|
| RAUL LOPEZ |) | AB-7137 |
| dba De Carlos Lounge |) | |
| 3815 Hammel Street |) | File: 40-191112 |
| Los Angeles, California 90063, |) | Reg: 97041273 |
| Appellant/Licensee, |) | |
| |) | Administrative Law Judge |
| v. |) | at the Dept. Hearing: |
| |) | Sonny Lo |
| |) | |
| DEPARTMENT OF ALCOHOLIC |) | Date and Place of the |
| BEVERAGE CONTROL, |) | Appeals Board Hearing: |
| Respondent. |) | April 1, 1999 |
| |) | Los Angeles, CA |
| |) | |

Raul Lopez, doing business as De Carlos Lounge (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his license for having violated conditions on his license and for having employed a person under a commission, percentage, salary, or other profit-sharing plan, scheme or conspiracy, to solicit drinks or encourage the purchase of drinks, that employee having solicited and accepted drinks, all being found contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §24200.5, 23804, 25657, subdivision (a), and Rule 143.

¹The decision of the Department, dated April 30, 1998, is set forth in the appendix.

Appearances on appeal include appellant Raul Lopez, appearing through his counsel, Tom Stanley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on April 9, 1993. Thereafter, the Department instituted an accusation against appellant charging, in five counts, the following: (a) violation of conditions on appellant's license prohibiting the sale of alcoholic beverages after 12:00 midnight and prohibiting patron dancing at any time, in violation of Business and Professions Code §23804;² (b) the employment of Guadalupe Castellanos under a commission, percentage, salary or other profit-sharing plan, scheme or conspiracy, in violation of §24200.5; (c) the employment of Castellanos for the purpose of procuring or encouraging the purchase of alcoholic beverages, in violation of §25657, subdivision (a); (d) the solicitation by Castellanos of a drink for her own consumption, in violation of Rule 143; and (e) the acceptance of a drink by Castellanos, also in violation of Rule 143.

An initial administrative hearing was held on December 23, 1997, at which time the testimony of the Department investigators, Tony Pacheco and Mamie Gon, was presented, and exhibits marked. The Administrative Law Judge (ALJ) then continued the hearing to permit appellant to retain counsel. The hearing recommenced on March 9, 1998, at which time appellant's counsel, who had been retained one day previously, requested a continuance. His request was denied as untimely. Appellant's son, Raul Lopez, Jr., the manager of the premises, then testified to his version of the events of the night in question.

² *Unless otherwise noted, all code citations are to the Business and Professions Code.*

Subsequent to the hearing, the Department issued its decision sustaining the charges of the accusation, and ordering appellant's license revoked. Appellant filed a timely notice of appeal, and now raises the following issues: (1) there is insufficient evidence to sustain the decision; and (2) the denial of appellant's request for a continuance deprived him of a fair hearing with the effective assistance of counsel.

DISCUSSION

I

Appellant contends that the evidence is insufficient to support the decision.

The evidence can be summarized briefly. Pacheco testified that he entered the bar shortly after midnight, ordered and was served a drink at the bar [1 RT 9-10]. Upon entering, he observed approximately 20 male patrons and nine women [1 RT 11]. He also observed two couples dancing to music from the juke box. He was soon approached by Guadalupe Castellanos, who spoke briefly to him [1 RT 11-12]. Castellanos then interrupted the conversation to serve beers to two males who had just entered the bar [1 RT 12]. After collecting cash for the beers and paying the bartender, Castellanos returned [1 RT 13]. Pacheco asked Castellanos if she was required to drink with the male patrons; Castellanos replied only those who bought her beer [1 RT 13]. At this point Castellanos asked Pacheco to buy her a beer, and he agreed to do so [1 RT 14]. He was told her beer would cost \$4 [1 RT 14]. Castellanos ordered a Miller Light from the bartender, and when it was served, it was accompanied by a can of "Clamato" juice [1 RT 14]. Pacheco was told that the beer was \$2 (which was the same price he was charged for the beer he had earlier ordered) and the Clamato juice was also \$2 [1 RT 19]. Pacheco gave the bartender a \$5 bill, and received \$1 in change. Pacheco testified that, when ringing up the sale, the bartender placed money from the

till into a yellow container³ next to the cash register [1 RT 16].

Raul Lopez, Jr., appellant's son, and the manager of the premises, testified that he was in his office,⁴ and, according to his clock, it was not yet midnight when he discovered the investigators and police were in the premises [2 RT 13-14]. He admitted that Castellanos was an employee, as were some of the other women who were in the premises, but denied any scheme or plan involving drink solicitation [2 RT 16].

The ALJ chose to accept Pacheco's version of events, and there is considerable support for his findings, including, in addition to Pacheco's testimony, the container next to the cash register with \$128, the notes seized (Exhibit 6), and Castellanos's admissions.

This is a typical case for the application of the rule that where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Appellant's brief concedes the solicitation by Castellanos, but argues there is

³ Marked as Exhibit 8, but not forwarded to the Appeals Board, this item is variously referred to in the record as a yellow can or yellow cup. When seized by the police, it was found to contain \$128. Pacheco opined that this money represented commission payments for drinks solicited by females employed by the bar.

⁴ Although he referred to this location as a back room, at various times in his testimony he said he came "downstairs" when his curiosity was aroused because he heard no music from the juke box, and discovered the police.

insufficient evidence she was employed for that purpose. However, the separation of a portion of the sale proceeds, and the record keeping, are sufficiently indicative of a profit-sharing scheme, to warrant an inference that the person engaging in the solicitation was employed for that purpose.

There is nothing in Pacheco's testimony that is inherently incredible. In contrast, Raul Lopez, Jr.'s attempt to explain the monies in the yellow container as an inventory control for sales of Clamato juice is most unconvincing.

II

Appellant contends the ALJ erred in denying appellant's request for a continuance. The request was first made on the renewed hearing date of March 9, 1998. Appellant's counsel explained that he had been retained only the preceding day, a Sunday, and needed time to prepare appellant's defense.

The ALJ had continued the hearing from December 23, 1997, for the express purpose of permitting appellant time to retain counsel and prepare a defense to the charges.

Appellant offered no explanation why he had not earlier taken steps to hire an attorney.

A request for a continuance invokes the discretion of the court, and, in the absence of an abuse of discretion, its denial will be sustained.

There is nothing in the record to suggest that there was any abuse of discretion. Appellant was informed as early as the filing of the accusation of his right to retain counsel. Nonetheless, he appeared at the initial hearing without counsel, and it was only the leniency displayed by the ALJ that afforded him the chance to enlist the aid of an attorney in the presentation of any defense he may have had.

If appellant incurred any prejudice, it can only be blamed upon his own lack of diligence.

III

Appellant, in his notice of appeal, challenged the penalty as excessive. However, appellant did not brief the issue.

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 Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

There are two principal reasons why the penalty in this case may not be considered excessive.

First, it must be noted that the Department found a violation of §24200.5, which mandates revocation.

Second, appellant was on probation, and operating under an order staying revocation upon condition of no further violations, for a 1996 B-girl violation.

For these reasons, it cannot be said that the Department abused its discretion in revoking appellant's license. An overall view of the evidence conveys a strong impression that drink solicitation was an integral element of appellant's operation, and it is fair to surmise that the Department reasonably believed that only revocation could truly solve the problem.

ORDER

The decision of the Department is affirmed.⁵

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵ *This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.