ISSUED JULY 19, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ABRAHIM AMINPOUR, MASOUD AMINPOUR, and YOOSEF AMINPOUR dba White Oak Inn 17757 Saticoy Street Reseda, CA 91335, Appellants/Licensees,	)	AB-7156
	)	File: 48-313187
	)	Reg: 97041977
	)	Administrative Law Judge at the Dept. Hearing: Sonny Lo
v.	)	
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	Date and Place of the Appeals Board Hearing: May 6, 1999 Los Angeles, CA

Abrahim Aminpour, Masoud Aminpour, and Yoosef Aminpour, doing business as White Oak Inn (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which conditionally revoked their on-sale general public premises license, with imposition of revocation stayed for a probationary period of two years provided appellants serve a 20-day suspension, for permitting their employee to loiter within the premises for the purpose of soliciting alcoholic beverages from a patron for the employee's consumption; for permitting the touching of the genitals of a patron by an employee; and for allowing alcoholic beverages intended for sale and consumption by patrons to contain contaminants,

[1] *The decision of the Department, dated June 4, 1998, is set forth in the appendix.*

being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivisions (a) and (b), arising from violations of Business and Professions Code §25657, subdivision (b); Health and Safety Code §§110545, 110560, and 110620; and California Code of Regulations, title 4, §143.2, subdivision (3).

Appearances on appeal include appellants Abrahim Aminpour, Masoud Aminpour, and Yoosef Aminpour, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on November 8, 1995. Thereafter, the Department instituted an accusation against appellants charging the above violations. An administrative hearing was held on March 10, 1998, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which ordered the license conditionally revoked.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the issue that the decision of the Department and the findings are not supported by substantial evidence, and the penalty is therefore excessive.

DISCUSSION

Appellants contend that the decision of the Department and the findings are not supported by substantial evidence, arguing that the waitress was not

employed, or knowingly permitted, to loiter[2] in the premises to solicit alcoholic beverages from the police officer, or to touch the genitals of the police officer -- an isolated act, and therefore, the penalty is excessive.

A. Solicitation.

Damion Gutierrez, a police officer with the Los Angeles Police Department, and a fellow officer entered the premises and sat at a table. Gloria Aracely Donis was observed by Gutierrez, waiting on tables, cleaning, and passing out drinks -- the officer had also observed Donis performing the same duties on a prior occasion [RT 9, 49]. The officer also observed two other females cleaning tables within the premises on the occasion of the present violation [RT 24].

The officers were approached by Donis, and upon receiving an order for beers, she obtained the beers and delivered them to the officers, collecting $3 for each of the beers [RT 10-12, 26]. Thereafter, Donis sat with the officers and asked officer Gutierrez to buy her a drink. The charge was $5 for a shot of Tequila, which she consumed [RT 11, 13-15, 27, 32].

Donis later sat with the officers, and asked officer Gutirrez to dance. After the dance, she asked for another shot which cost $5, which she partially consumed. She again asked to dance [RT 15, 18, 29, 34]. The officer estimated that Donis was with him close to one hour, intermittently, with more time spent with the officer near the end of the investigation [RT 30, 35-36].

Appellants' manager testified that Donis was not employed at the premises, but

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[2] *The word "loiter" is defined as: "to interrupt or delay an activity or an errand or a journey with or as if with aimless idle stops and pauses and purposeless distractions ... fritter away time in the course of doing something or proceeding somewhere ... to remain in or near a place in an idle or apparently idle manner ...." (Webster's Third New International Dictionary, 1986, p. 1331.)*

apparently liked to come there, and sometimes “volunteered” her services by taking care of her “tables” and “friends” [RT 76-77].

The Administrative Law Judge (ALJ) made a credibility determination as to the manager’s testimony that Donis was not employed (Finding III-C). The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

In addition to the ALJ’s finding of employment, allowing Donis to appear as if she was employed, could also classify Donis as an ostensible agent. Civil Code §2298 states: "An agency is either actual or ostensible." Civil Code §2300 defines "ostensible agency" as: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (See also 2 Summary of California Law, Witkin, pages 52-53 for a full discussion of ostensible agency).

In the matter of Shin (1994) AB-6320, the Appeals Board found an ostensible agency where a licensee's daughter, while visiting the premises, was told by the father/licensee not to sell anything, but to watch out for thieves while the father was busy with another patron. While at the counter near her father, the daughter sold an alcoholic beverage to a minor and accepted payment for the beverage, having access to the cash register.

A licensee is vicariously responsible for the unlawful on-premises acts of employees or agents. Such vicarious responsibility is well settled by case law. (Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504

[22 Cal.Rptr. 405, 411]; Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; and Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].)

Employment was found by the ALJ. We conclude that such finding was reasonable under the facts of this matter. The issue then turns to whether Donis could be classed as "loitering," while employed, to come within the section charged.

We conclude that review considers whether Donis was spending time away from her waitress duties with customers in protracted conversations and times, whether appellants' manager acquiesced to the idling on the part of Donis during these protracted times, and the solicitation or solicitations occurred during those protracted periods.

In Wright v. Munro (1956) 144 Cal.App.2d 843 [301 P.2d 997], the court found a loitering to solicit. There was a solicitation and after assent to the drink, the female solicitor asked the bartender to "Give me a drink." The bartender prepared a Vermouth over ice, without specific instructions as to content of the drink ordered. Later, the bartender asked the investigator if he would buy the previously soliciting female another drink. Obtaining consent, the bartender poured the same type of drink. This same solicitation scenario occurred at least five other times that day. It appears that the Wright court took the view that the continuous solicitations were outside the usual duties of the waitress, hence loitering.

Garcia v. Munro (1958) 161 Cal.App.2d 425 [326 P.2d 894], is a case appellants cite for the proposition that there could be no loitering in the present appeal. The Garcia case concerned two bartenders. One of the bartenders was heard to solicit a drink for herself, and solicited a Department investigator to buy her a drink on two

additional occasions. The court found no loitering as the bartender was performing the services at the time of the solicitations, for which she was hired, that of bartending -- she was not idle from her duties during the solicitations. The Garcia case is of little assistance to appellants.

We conclude that Donis was shown to be employed, and knowingly permitted to loiter for a protracted period of time during her employment period.

A. Touching.

During the first dance of Gutirrez and Donis, Donis moved her hand from the officer's shoulder to his lower back area. After the dance, Donis exposed her buttocks to the officer and asked the officer to look at her buttocks as her nylon had ripped. When Donis asked Gutirrez to look at her buttocks, the companion officer was seated with Gutirrez. Donis stood up, " ... picked up her short skirt, and proceeded to show us her buttocks" [RT 16].

When Donis asked the officer to dance with her the second time, she said that dancing made her "hot." When they returned from the second dance, and sat at the table, Donis rubbed the officer's left leg, inner side at the knee, and proceeded to rub the crotch area, squeezing his genitals [RT 15-20, 30-31, 34, 37-38, 40, 42-43].

Appellants contend that the "touching" incident was an isolated act[3], and not chargeable to appellants by way of imputed liability.

While it could be argued the "touching" was an isolated occurrence, it appears that the "touching" should have been foreseen by appellants: (1) the drink solicitations

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[3] *The word "isolated" is defined as caused to be alone or apart, an incident not likely to recur. (Webster's Third New International Dictionary, 1986, page 1199.*

appeared to be on-going, (2) the soliciting female was sitting at the table with the officers for interrupted but extended periods of time, (3) the dancing on the two occasions with one of the officers was apparently not within Donis' duties, (4) during the dancing, Donis touched the lower buttocks of the officer, and (5) while at the table of the officers, the waitress lifted her dress and requested the police officer to look at her buttocks. The conduct was open and blatant, and suggestive of a growing problem by this employee. Such misguided lack of diligent monitoring of Donis' conduct cannot be used to defend against such open and blatant behavior.

Appellants cite the case of McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8], a case which adds little to the present appeal. The case concerned several transactions which occurred on the premises involving patrons selling or proposing to sell controlled substances to undercover agents. While the licensee and its employees did not know of the specific occurrences, they knew generally of contraband problems and had taken numerous preventive steps to control such problems. The McFaddin court held that since (1) the licensee had done everything it reasonably could to control contraband problems, and (2) the licensee did not know of the specific transactions charged in the accusation, the licensee could not be held accountable for the incidents charged. The McFaddin case concerned unlawful acts of non-employees.

While reasonable minds may differ as to whether the touching was of such an unexpected nature appellants should not be held responsible, we determine that where the ALJ makes a finding which is reasonable, based upon and supported by the record, we cannot say such finding is unreasonable.

C. Penalty.

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].)

The stayed revocation appears reasonable, for no penalty of revocation will be hereafter imposed on solicitation grounds, if appellants cease all solicitation activity and exercise closer control over the day to day operation of the premises. The actual suspension of 20 days we view as reasonable also.

ORDER

The decision of the Department is affirmed.[4]

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

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[4] *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.