

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

RAFAEL SANCHEZ	)	AB-7157
dba Pacheco's Latin Strip)	
650 South Atlantic Blvd.	)	File: 42-235621
Los Angeles, CA 90022,	)	Reg: 97042172
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.	)	May 6, 1999
	)	Los Angeles, CA
)	

Rafael Sanchez, doing business as Pacheco's Latin Strip (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his on-sale beer and wine public premises license for having permitted one of his employees to solicit the purchase of, and accept, alcoholic beverages, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Penal Code §303a and 4 California Code of Regulations §143 (Department Rule 143).

Appearances on appeal include appellant Rafael Sanchez, appearing through his counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Lewis.

FACTS AND PROCEDURAL HISTORY

¹The decision of the Department, dated May 28, 1998, is set forth in the appendix.

On December 30, 1997, the Department instituted an accusation against appellant charging, in three counts: (a) a violation of Business and Professions Code §25657, subdivision (a), in that appellant employed Concepcion Guadalupe Dominguez (“Dominguez”), or paid her a percentage or commission, for the purpose of encouraging the purchase or sale of alcoholic beverages (Count 1); (b) a violation of Penal Code §303, in that appellant employed Dominguez for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages (Count 2); and (c) a violation of Department Rule 143, in that appellant permitted Dominguez, an employee, to solicit and accept a drink intended for her consumption (Count 3).

An administrative hearing was held on April 16, 1998. At that hearing Department investigator Anthony Pachuko and Dominguez gave their respective, and conflicting, versions of the events which led to the charges of the accusation. The Administrative Law Judge (ALJ) elected to accept investigator Pachuko’s version of events, and concluded that Dominguez had, in fact, solicited and accepted beers purchased for her. But, having found that Dominguez was employed as a dancer, and was not compensated in any manner for encouraging the purchase of alcoholic beverages, he dismissed Count 1. Despite his finding that Dominguez was employed, however, the ALJ concluded, with respect to Count 2, that she was loitering for the purpose of soliciting the purchase for herself of an alcoholic beverage, and found a violation of Penal Code §303. As to Count 3, the ALJ concluded that appellant, aware that there was an existing problem with drink solicitation at the premises, could be held to have permitted the solicitation, and, therefore, violated Rule 143. The Department adopted the proposed decision

without change.

Appellant thereafter filed a timely notice of appeal, and now raises the following issues: (1) the ALJ erred in finding a violation of Penal Code §303; and (2) the ALJ erred in imputing to appellant knowledge of a 1995 violation and using that as a basis for finding a present violation.

DISCUSSION

I

Appellant contends that the ALJ erred in finding a violation of Penal Code §303. This contention has merit.

Penal Code §303, the violation of which was charged in the accusation, is entitled “Intoxicating liquors; employing person to encourage purchases; sales on commission,” and provides:

“It shall be unlawful for any person engaged in the sale of alcoholic beverages, other than in the original package, **to employ upon the premises** where the alcoholic beverages are sold any person for the purpose of procuring or encouraging the purchase or sale of such beverages, **or to pay any person a percentage or commission** on the sale of such beverages for procuring or encouraging such purchase or sale. Violation of this section shall be a misdemeanor. (Emphasis supplied.)

The ALJ found that neither of the two critical elements of employment had been established. (See Finding III.)

Penal Code §303a, entitled “begging or soliciting purchase of alcoholic beverages,” provides:

“It shall be unlawful, in any place of business where alcoholic beverages are sold to be consumed upon the premises, for any person 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 beverage for the one begging or soliciting. Violation of this section shall be a misdemeanor.”

The ALJ appears to have blurred the substantially different requirements for

Penal Code §§303 and 303a. Although the decision professes to find a violation of §303, the underlying conduct upon which the decision appears to base that determination is not that described in §303, but, instead, that described in §303a, the violation of which was not charged. Having found for purposes of Count 1 (charging a violation of Business and Professions Code §25657, subdivision (a)) that appellant was not employed for the purpose of soliciting, the ALJ, for consistency's sake, should have also dismissed Count 2.

The net result was to find that appellant was found to have violated a statute he had not been charged as having violated.

The Department argues that it is enough that Dominguez was employed and permitted to loiter for the purpose of soliciting drinks. The problem with this is that §303 requires that the employment be **for the purpose** of soliciting. Mere employment accompanied by loitering and solicitation is not enough.

II

Appellant contends that the ALJ erred in using a 1995 violation as the basis for imputing to appellant knowledge of the solicitation, and argues there is no substantial evidence that appellant permitted the violation.

There is no dispute that Pachuko bought two beers for Dominguez, and that she drank them. Dominguez admitted this [RT 18].

The ALJ correctly read Laube v. Stroh (1992) 2 Cal.App.4th 364, 379 [3 Cal.Rptr.2d 779], to impose an affirmative duty upon a licensee, once that licensee is aware of possible unlawful activity, to take such action as will prevent that violation from reoccurring. Not only did appellant not take such action, the record clearly indicates that, contrariwise, it was a regular practice for his employees to violate Rule 143 by their

acceptance of drinks. Given the evidence of this practice, and appellant's knowledge of the earlier violation for similar conduct, there was ample basis for the ALJ's findings and determinations.

Dominguez testified:

"Q. Is it -- is it pretty common place, ma'am, that customers offer to buy you soda or beer or juice, things like that?

A. Since we dance and sometimes we're hot, there's people we know and they say, 'Whatever you want to drink, they say.' [RT 8-9]."

When questioned by the ALJ, Dominguez reaffirmed the practice:

"Q. Now, what exactly was it that your employer told you not to do?

A. It's prohibited there to ask for beer to the clients. And for dancing, certain things that you cannot do while you're dancing, not to be touched.

Q. All right. In terms of alcohol.

A. The alcohol, it's prohibited to ask for beer to the clients.

Q. But it's all right to accept a beer?

A. Yes. If they invite us, yes." [RT 20].

Othne Paz, the bartender, gave similar testimony:

"Q. Do customers purchase beers for the dancers, the girls who dance?

A. If they invite.

Q. Do they? Yes or no, sir.

A. Yes.

Q. And that's authorized or allowed there at the club for the girls to drink beer when they're offered beer by customers?

A. Yes. Juice, beer." [RT 25].

Appellant's denial of any knowledge of a violation of Rule 143, in the face of this

evidence, must be rejected.²

ORDER

The decision of the Department is affirmed with respect to the charge that Rule 143 was violated, and reversed with respect to the charge under the Penal Code. The case is remanded to the Department for reconsideration of the penalty.³

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

² *It should be noted that appellant's brief focused only on that portion of Rule 143 directed at drink solicitation, and totally ignored the portion of the rule extending the same illegality to the acceptance of drinks. Even if it might be assumed (which we do not) that there was some basis for overturning the ALJ's finding that Dominguez solicited drinks, there was still a violation of Rule 143.*

³ *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.