ISSUED JULY 20, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

IRMA JACINTO ENRIQUEZ dba Taco Naso Restaurant 6106 Rita Street Huntington Park, CA 90255, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-7164 File: 41-321017 Reg: 97041875 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: June 3, 1999 Los Angeles, CA

Irma Jacinto Enriquez, doing business as Taco Naso Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license for various incidents of B-girl activity (solicitation of patrons for beverages) and violation of a condition on the license, being 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, subdivision (b); 25657, subdivisions (a) and (b); and 23084; Penal Code §303a; and Department Rule 143.

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

Appearances on appeal include appellant Irma Jacinto Enriquez, appearing through her counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on November 6, 1996. Thereafter, the Department instituted an 18-count accusation[2] against appellant charging that several women had solicited drinks at the premises, violating various Business and Professions Code sections, a Penal Code section, and a Department rule; that she had permitted dancing on the premises and failed to maintain quarterly records of food and alcohol sales, both in violation of conditions on the license; and that she had sublet the premises to persons not qualified to hold a license, in violation of Business and Professions Code §23787.

An administrative hearing was scheduled for and held on April 2 and 3, 1998. On April 2, no one appeared for appellant, although the Administrative Law Judge (ALJ) waited 40 minutes after the scheduled time before starting and the ALJ found that Notice of Hearing had been properly sent. In addition, one of the Department's witnesses was not available, so the hearing was recessed until the next day set for the hearing, April 3. A notice was posted on the door of the hearing room to inform anyone representing appellant what had transpired, with instructions to contact Department counsel. No one appeared for appellant on April 3 and the hearing proceeded as a default hearing. At that hearing, the Department presented testimony by two Department investigators, Joe Chavez

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[2] The counts are numbered 1 through 17, but two counts are numbered 3, so there are actually 18 counts. The ALJ refers to the two counts numbered 3 as "3 (first)" and "3 (second)."

and Jerry Garcia, and by Huntington Park Police Detective Jack Alirez describing the events of June 14[3] and July 13, 1997, when the violations were alleged to have occurred. Five exhibits were also entered into evidence.

Subsequent to the hearing, the Department issued its decision which determined that cause for discipline was not established as to Counts 1, 3(first), 4, 9, and 12, but that cause for discipline was established as to all the remaining counts. The Department ordered Counts 1, 3(first), 4, 9, and 12 of the Accusation dismissed, but revoked the license on the basis of the remaining counts.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant raises the following issues: (1) the Department amended the Accusation without notice to appellant, in violation of Government Code §11507; (2) the ALJ abused his discretion in not granting a continuance; (3) Count 17 was improperly sustained because based only on uncorroborated hearsay; (4) the findings are not supported by substantial evidence; and (5) the penalty is excessive.

DISCUSSION

I

Appellant contends that the Department violated Government Code §11507 by amending the accusation at the hearing without notice to appellant. At the default hearing on April 3, 1998, the Department moved to amend Count 17 of the Accusation, submitting a written copy of the amendment (Exhibit 3), and the motion was granted [RT 5].

Count 17 of the original accusation stated:

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[3] *The transcript erroneously states this date as July 13, 1997 [RT 38]. However, the Accusation and the decision both use the date June 14 when referring to the events described by Detective Alirez. The numerous other errors in the transcript support a logical inference that the July 13 date used on page 38 of the transcript has been erroneously used in place of June 14.*

> "On or about and between the dates of October 1, 1996 to August 31, 1997, respondent-licensee sublet the restaurant to persons who were not qualified to hold a license, and without approval by the Department, in violation of Business and Professions Code section 23787."

The Department's amendment of this count stated:

> "Commencing on or about October 1, 1996 and continuing through August 31, 1997, respondent-licensee leased the sale and service of meals at the premises to various individuals
> (a) who were not qualified to hold a license in violation of Business and Professions Code Section 23787 or
> (b) without notifying the Department of such leases, without producing such individuals before the Department for the purpose of filing an application to qualify such individuals as lessees, without filing such an application, or without obtaining approval of such individuals as lessees in violation of Chapter 1, Title 4, Section 57.7(a) of the California Code of Regulations."

Appellant argues that this amendment added a violation and notice to appellant was required, but not given. In addition, appellant contends, the Department should have allowed appellant an opportunity to prepare her defense to the "new charge" pursuant to Government Code §11507, and appellant should have been allowed to submit a discovery request pursuant to Government Code §11507.6 in response to the "new pleading" submitted by the Department by its amendment of Count 17.

The Department argues that the amendment did not state any new facts or new violations, but merely clarified Count 17. That count originally charged violation of Business and Professions Code §23787, and was amended by referring to Rule 57.7(a). Since Rule 57.7(a) is related to §23787, being promulgated pursuant to that statute, there was no prejudice to appellant caused by this amendment. In any case, the Department states, appellant did not appear at the hearing where the amendment was made. The Department also analogizes to civil cases, which generally do not allow amendments alleging new facts, but do allow those alleging new legal theories based on the same facts.

Government Code §11507 provides:

> "At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be notified thereof. If the amended or supplemental accusation presents new charges the agency shall afford respondent a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or supplemental accusation may be made orally and shall be noted in the record."

The amended accusation did add a new charge in Count 17 by specifying a violation of Rule 57.7 in addition to §23787. Although the two provisions are related, the requirements for compliance with each are not the same. Appellant was not notified of the amendment or afforded an opportunity to prepare her defense to the additional charge. Government Code §11507 says that the "parties shall be notified" of an amendment to an accusation, but there is no sanction stated for failure to notify any party. In such a situation, fairness to the parties can be achieved by striking the new provision. The two parts of Amended Count 17 are separable and the new Rule 57.7 charge can be stricken without affecting the validity of the §23787 charge. The findings and determination regarding Rule 57.7 should be stricken, leaving only the findings and determination establishing that §23787 had been violated.

II

Appellant contends that the ALJ abused his discretion in not granting a continuance when good cause was shown.

The short answer to this allegation is that appellant never requested a continuance. Neither the Department's attorney nor the ALJ were approached by any representative of appellant before the hearing, and no one appeared for appellant at the hearing. A continuance must be requested before one can be granted. (Nelson v. Gaunt (1981) 125 Cal.App.3d 623, 637-38 [178 Cal.Rptr. 167, 174-75.)

Appellant has in no way complied with Government Code §11524, subdivision (b), which provides:

> "When seeking a continuance, a party shall apply for the continuance within 10 working days following the time the party discovered or reasonably should have discovered the event or occurrence which establishes the good cause for the continuance. A continuance may be granted for good cause after the 10 working days have lapsed if the party seeking the continuance is not responsible for and has made a good faith effort to prevent the condition or event establishing the good cause."

No continuance was sought, no effort was made to establish good cause for granting a continuance, and there was no indication that appellant made a good faith effort to prevent any condition or event that would necessitate a continuance.

III

Appellant contends that Count 17 was improperly sustained because the determination was based on uncorroborated hearsay.

Count 17 involved the unauthorized subletting of the food service portion of the premises. Investigator Garcia identified one of the letters making up Exhibit 5 as prepared by him and the other as addressed to and received by him in the normal course of business. The letter received by him from appellant's attorney included the information that appellant had sublet the food service without Department approval of the sublessees. Garcia also testified that he reviewed appellant's Department file, which revealed that appellant had not notified the Department nor sought the Department's approval of any sublessee.

The letter from appellant's attorney is admissible under the business records exception to the hearsay rule. It is also excepted from the rule as an admission on behalf of appellant. Garcia's testimony about his telephone conversations with appellant's attorneys is hearsay, but it corroborates the other evidence in the letter.

The ALJ properly considered the letters in Exhibit 5. Since hearsay may be used to explain other evidence, the ALJ could also consider Garcia's testimony.

IV

Appellant argues that the facts do not support findings of violations of Penal Code §303a; Business and Professions Code §§24200.5, subdivision (b), and 25657, subdivisions (a) and (b); and Rule 143.

With regard to Penal Code §303a, which the ALJ found to have been violated (Det. of Issues IV), the accusation did not charge violation of that section. Count 3(second) charged the violation of Penal Code §303, not §303a. Since §303a was not charged, Determination of Issues IV should be reversed.

Appellant argues that there was no evidence of a commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy, which are necessary elements for a violation of Business and Professions Code §24200.5, subdivision (b). There is evidence of both payments of commissions and of a plan to do so. A waitress, Maria, twice gave Theresa, who had solicited beer from one of the investigators, $4 out of the change for the beers [RT 42, 44]. One of the bartenders gave part of the change from the investigator's purchase of a beer directly to another of the B-girls [RT 26]. Alicia Rodriquez, another B-girl, while standing in front of Daysi Rico, a bartender, twice counted out and kept $8 from the investigator's change [RT 11, 16]. These incidents are substantial evidence of the payment of commissions under a plan, and thus satisfy Business and Professions Code §24200.5, subdivision (b).

Business and Professions Code §25657 provides:

> 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.
> Every person who violates the provisions of this section is guilty of a misdemeanor.

Appellant states that, with regard to subdivision (a), there is no evidence that the B-girls were paid a salary or commission. Subdivision (a), however, also prohibits employment of a person for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages. The only count left charging §25657, subdivision (a), is Count 2, which charges appellant with employing Maria for the purpose of soliciting. There was substantial evidence that appellant employed Maria for the purpose of soliciting. Maria asked Detective Alirez if he wanted a girl to sit with him, told him he would have to buy the girl a drink, and brought Theresa over to the table [RT 41]. Maria also told Alirez when she sat down with him, that her *patrona*, her boss, didn't like her to sit down unless she was drinking a beer [RT 45].

Appellant argues that there is no evidence of loitering as required by subdivision (b).

Counts 10 and 13 charge appellant, under subdivision (b), with permitting Alicia Rodriquez and Maria Hernandez to loiter for the purpose of soliciting. "Loiter" means to linger idly, to idle, or to loaf. (Wright v. Munro (1956) 144 Cal.App.2d 843, 847 [301 P.2d 997, 999].) Both Alicia and Maria spent substantial amounts of time with the investigators from whom they solicited drinks and were with the men continuously from the time they first joined them. It is not required that the idling continue for a particular length of time to constitute loitering, and Wright v. Munro, supra, found loitering on facts similar to the ones in the present matter.

In Count 5, appellant is charged under subdivision (b) with employing Maria (not Maria Hernandez) for this purpose. As discussed above, appellant's employee, Maria, sat with the investigator and solicited a beer from him. She told him, in essence, that her *patrona* expected her to solicit when she was sitting down. This is sufficient evidence to support the charge in Count 5.

Appellant argues that there "is no evidence establishing an employment relationship between the licensee and the individuals involved in the activity alleged in the Accusation" to have violated Rule 143. Rule 143 prohibits permitting any employee of a licensee to solicit or accept a drink purchased for the employee. Maria, the waitress, was the only person mentioned in the two charges involving Rule 143. As discussed above, there is substantial evidence that she was employed by appellant. In addition to the evidence mentioned above, Maria was seen waiting on people and cleaning tables.

V

Appellant argues that the penalty of revocation is excessive and an abuse of discretion by the Department. Appellant points out that she had no prior disciplinary action and "Much, if not all, of the Accusation was not proved." (App. Br. at 19.)

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].)

While it is unusual for the Department to order revocation on the first disciplinary action against a licensee, it is not automatically an abuse of discretion for it to do so.

This case involved numerous solicitations conducted openly and with the blatant participation of several of appellant's employees. Three of the counts found established were violations of Business and Professions Code §24200.5, subdivision (b), which states that the Department *shall* revoke the license for such violations. On these facts we cannot say that it was an abuse of discretion for the Department to order revocation in this matter.

Five of the 18 counts of the Accusation were dismissed by the Department decision, and this Board has found that the determinations in Count 3(second) and part of amended Count 17 should be reversed. That still leaves 12 counts found to have been established, three of which were violations of Business and Professions Code §24200.5, subdivision (b), which mandates revocation.

Where some of the charges of an accusation are not sustained, the matter will be remanded to the Department where there is "real doubt" that the Department would, after a proper review of the evidence, assess the same penalty as in the instant matter. (Miller v. Eisenhower Medical Center (1980) 27 Cal.3d 614 [166 Cal.Rptr. 826].) In this case, there is no “real doubt” that the same penalty would be assessed upon remand. Under the circumstances, it would be a futile and unnecessary act to remand the matter for reconsideration of the penalty and the Appeals Board declines to do so.

ORDER

The decision of the Department is affirmed with the exception of Determination of Issues IV and Determination of Issues IX, to the extent that it finds a violation of Rule 57.7, which are reversed.[4]

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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.*

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

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.