ISSUED FEBRUARY 11, 1998-

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD-

OF THE STATE OF CALIFORNIA-

JOSE LUIS SOLIS dba Samoan 5167 Whittier Blvd.- Los Angeles, CA 90022, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6824 File: 42-218629 Reg. 96037739- Administrative Law Judge- at the Dept. Hearing: Sonny Lo Date and Place of the- Appeals Board Hearing: October 1, 1997 Los Angeles, CA

Jose Luis Solis, doing business as Samoan (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked appellant's on-sale beer and wine public premises license, for permitting a female to loiter in the premises for the purpose of soliciting alcoholic beverages for her own consumption, 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, chargeable against appellant under authority of Business and Professions Code §24200, subdivision (b).

Appearances on appeal include appellant Jose Luis Solis, appearing through his counsel, Danilo J. Becerra, Jr.; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department dated February 20, 1997, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on August 16, 1988. The historical record shows that on February 23, 1996, pursuant to a written stipulation and waiver form signed by appellant, his license was revoked with execution stayed for a probationary period of three years. The grounds for the revocation order were violations of Business and Professions Code §25657, subdivision (b), and Penal Code §303a (loitering to solicit the purchase of-alcoholic beverages -- the same violation as is alleged in the present appeal).

Thereafter, the Department instituted another accusation which is the focal point of the present appeal. The accusation alleged six counts of solicitation and loitering by one female on April 27, 1996, for the purpose of obtaining alcoholic beverages for her own consumption. An administrative hearing was held on January 23, 1997, at which time oral and documentary evidence was received.

Subsequent to the hearing, the Department issued its decision which determined that four of the counts of the accusation concerning employee solicitation were not proven, but the two counts concerning patron solicitation contrary to Penal Code §303a, were proven true. Appellant's license was ordered revoked. Appellant thereafter filed a timely notice of appeal.

In his appeal, appellant raises the issue that the findings of the Administrative Law Judge stated the female solicitor was not an employee, which finding precluded the finding that appellant in fact permitted the solicitation.

DISCUSSION

Appellant contends that the findings of the Administrative Law Judge stated the soliciting female was not an employee, which finding precluded the finding that appellant in fact permitted the solicitation. Appellant is correct in his argument if the Penal Code section as alleged in his argument was in fact the code section at

issue in the present appeal, which is not the case.

The Administrative Law Judge dismissed four of the six counts, with the four dismissed counts essentially alleging employment, and a payment scheme between the soliciting female and employees of appellant. The two counts found proven were crimes under Penal Code §303a, which states as follows:

> "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."[2]

Penal Code §303a targets the illegal conduct of any person soliciting alcoholic beverages from another, for the consumption of the soliciting person. It is the individual soliciting person's illegal conduct that is the focus of the statute. (Determination of Issues II-C). The record shows the solicitation and therefore, the commission of an unlawful act. The Department seeks to sanction appellant's license for appellant "permitting" the crime, through the "negligence" of his bartender.

Count 3 of the accusation states that the cashier (Hernandez) permitted the solicitation. However, the investigator, while observing Hernandez mark a sheet each time a solicited drink was ordered and paid for,[3] testified that Hernandez was

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[2]The Department in its accusation and Penal Code citation, mislabeled the section as "Section 303(a)."

[3]The sheet while in evidence, apparently was not considered by the Administrative Law Judge as he dismissed all counts which concerned possible employment and knowledge of sharing money schemes by employees with Berta, of which the seized sheet would normally be supportive.

12 feet away from him and that due to the noise within the premises, she could not hear the conversations between the soliciting female and the investigator [RT 17, 40]. Under those circumstances, a finding of "permitting" the crime is not supported by substantial evidence. We conclude that Determination of Issues II-E (as to count 3), is erroneous, having little, if any, support in the findings, and such findings, if any, which are supporting, have no rational support by substantial evidence.

Appellant cites the case of McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8], for the proposition that appellant or his employees did not know of the illegal actions of the soliciting female, and therefore, her illegal acts should not be a basis for sanctions against appellant under the "permitting" theory of responsibility. The McFaddin 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 is not applicable.

Appellant and the Department cite Laube v. Stroh (1992) 2 Cal.App.4th 364

[3 Cal.Rptr.2d 779], a consolidated case composed of two cases--Laube and De Lena, both of which involved restaurants/bars.

The Laube portion dealt with surreptitious contraband transactions between patrons and an undercover agent--a type of patron activity concerning which the licensee had no indication and therefore no actual or constructive knowledge--and the court ruled the licensee should not have been required to take preventive steps to suppress that type of unknown patron activity. The De Lena portion of the Laube case concerned employee misconduct, issues not applicable in the present appeal due to employee related counts having been dismissed.

The Department's decision also cited Munro v. Alcoholic Beverage Control Appeals Board (1957) 154 Cal.App.2d 326, 329-330 [136 P.2d 401, 403], for the proposition that if a violation occurs, the licensee is responsible. While as a general statement it is true, considering the facts of the Munro case and the facts of the present appeal, the Munro decision is not applicable.[4-]

The cited Laube case, however, is on point in this review:

> "The Marcucci case perhaps states it best ... A licensee has a general affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly. Once a licensee knows of a particular violation of the law, that duty becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from recurring, once the licensee knows of it, is to 'permit' by a failure to take preventive action...."
> (2 Cal.App.4th at 379.)

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[4]Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1157 [278 Cal.Rptr. 614].

The issue in the present appeal is whether the Department's conclusions in Determination of Issues II-D and II-E are sufficiently legally correct that appellant's employees were not "diligent" in "anticipating" the solicitations by Berta. The basis of Determination of Issues II-D and II-E, appears to be Findings III, IV and V.

We now turn to a consideration of count 4, which concerns the possible knowledge of the solicitation by the bartender. Berta (the soliciting female) approached a Department investigator who was at the bar counter drinking a beer. Berta solicited a beer from the investigator and, upon receiving an affirmative response, called the bartender "over" and placed the order [Finding III, RT 6, 13,16-17, 63-64]. The bartender had not seen the investigator on any prior occasions, but had previously seen Berta in the premises [RT 49, 59]. Upon delivery of the beer, the investigator gave Berta $20, who gave the money to the bartender, who observed the change of money from the investigator to Berta [Finding II & III, RT 56-58, 63-64]. There were three solicitations by Berta which all occurred in the same manner, and before the same bartender [RT 16, 18, 20-22, 76].

The bartender testified:

> "... Mr. Pacheco [the investigator] was drinking right there in front of me. And then -- and then Berta was -- I don't know. All of a sudden, I saw her there ...." [RT 55]

The bartender further testified during the following colloquy:-

> "Q. Before April 26, 1996 ... did you ever have any instructions with regards to permit [sic] any -- any women to -- whether or not women were permitted to come in and solicit men to buy drinks?
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> "A. No. There's always been a lot of couples that come in, women with

friends or husbands. I don't know what they do. I just serve, and that's all. I don't know about anything else.

"Q. Okay. Have you -- in connection with your duties as a waitress at La Samoan bar, were you instructed on whether or not it would be improper for you to be dividing the change between a female asking for a drink to be purchased and a male patron?

"A. Well, yes, that has never been permitted.

"Q. Okay, And did you receive instructions about not permitting that at the bar?

"A. Yes.

"Q. Did you permit that type of activity to take place at the bar, the La Samoan bar?

"A. No, because whenever we noticed anything strange, we would mention it to Mr. Solis [appellant] or to the manager, Jorge Carrillo." [RT 52-53].

Appellant testified that he knew that solicitation was a problem in his area: for women to come into the local bars and solicit drinks. Appellant and his manager had been to the Department's seminars which discussed the problems associated with drink solicitations [RT 82-83, 86]. Appellant further testified in the following colloquy:

"Q. Now, how -- what do you do if you see a -- do you have any particular policy if you see a female sitting at the bar with a male in terms of finding out whether or not she is doing anything illegal in asking drinks be purchased for her?

"A. Yes. Usually, I have a custom of -- especially after we started attending all these seminars a few years back, if we see someone, I approach the bar to become aware if something is going on, something irregular. And the same way with some sign or several other ways that I instructed the people there to communicate.

"Q. Okay.

"A. So that they are very careful with that type of problem, and they can detect them.

"Q. So you did -- you yourself and your employees did attempt to do that before April of 1996?

"A. Yes. [RT 85.]

The Administrative Law Judge in finding VII dismissed count 2, finding that appellant (or his employees) did not knowingly permit Berta to loiter for the purpose of soliciting alcoholic beverages. In so finding, the Administrative Law Judge held that appellant could not be held responsible for the soliciting by Berta he did not know about, himself or through his employees, and therefore did not knowingly permit, the solicitations, under Business and Professions Code §25657, subdivision (b). The problem is that the same facts that support the dismissal of count 2, also support the finding that count 4's allegations were true.

This apparent dichotomy is illusory only. The dismissal of count 2 rests on the finding that there was no actual knowledge by the bartender that there was an illegal act being perpetrated before her. This comes from a reading of Business and Professions Code §25657, subdivision (b), that "It is unlawful ... to ... knowingly permit anyone to loiter ... for the purpose of ... soliciting ...."

But count 4 rests on the crime committed by Berta and any liability through the bartender to appellant by way of failure to take reasonable steps to prevent the crime. Once there was reasonable knowledge that a crime was being committed, the Laube decision as set forth above applies. The Laube court, supra, speaks to the situation where a licensee knows of certain unlawful acts, and because of that

knowledge, must stop all recurrences, with failure to do so creating the legal premise that the licensee permitted the continuance of the unlawful behavior.

The Administrative Law Judge had the following facts before him in finding liability against appellant through his bartender:

(1) the "responsibility" as addressed in Laube, supra;

(2) the bartender saw money passing from a male who the bartender did not personally know, to Berta who the bartender did personally know, and then the funds were given from Berta to the bartender;

(3) the bartender saw the same scenario three times in succession, that same evening;

(4) the bartender's testimony that when something appears strange, she would call for management, which in the present matter, she failed to do;

(5) appellant testified that he knew of the unlawful practice of solicitation of drinks in his own bar, as well as in other bars in his area;

(6) appellant had instructed his employees of this potential for unlawful conduct; and

(7) appellant at the time of the unlawful conduct, was under the penalty of revocation, stayed during a probationary period, for the same violation as is being considered in the present appeal.

We determine that the bartender should have had a suspicion that an unlawful act was being committed before her. By time of the second act, or at least by the third, the bartender's failure to act in accordance with her duty to

maintain a lawful premises as set forth in Laube, supra, was in itself unlawful. Having seen on three occasions the illegal conduct before her (the bartender), the bartender failed in her duty by not being diligent in anticipating the unlawful behavior of Berta, and the bartender's "failure to take preventive action" created the violation which is chargeable to appellant.

CONCLUSION

The decision of the Department is affirmed as to Determination of Issues I, II-B through D and E as E applies to count 4, III-A through B, and IV, but reversed as to Determination of Issues II-E, as it applies to count 3, and the order of revocation is affirmed.[5-]

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5]This final decision is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.-