ISSUED OCTOBER 7, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JOSE LUIS SOLIS dba La Bamba 4710 Whittier Boulevard Los Angeles, CA 90022, Appellant/Licensee,	)	AB-6957 File: 40-213833 Reg: 97039663
v.	)	Administrative Law Judge at the Dept. Hearing: John P. McCarthy
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	Date and Place of the Appeals Board Hearing: July 8, 1998 Los Angeles, CA

Jose Luis Solis, doing business as La Bamba (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his on-sale beer license for permitting a person to solicit an alcoholic beverage from an undercover Department investigator, under a profit sharing or commission scheme, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §§24200.5, subdivision (b), and 25657, subdivision (b), and Penal Code §303.

[1]The decision of the Department, dated September 25, 1997, is set forth in the appendix.

Appearances on appeal include appellant Jose Luis Solis, appearing through his counsel, Danilo J. Becerra and Veronica Alvarez, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on June 13, 1988. Thereafter, the Department instituted an accusation against appellant charging the above violations.

An administrative hearing was held on July 11, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented that a Department investigator, Robert Rodriguez, entered the premises on February 21, 1997, and ordered and was served a beer for a charge of $3 [RT 10-14]. Investigator Rodriguez observed a female named Lorena Lopez in the bar serving drinks to patrons, and clearing various tables of empty bottles [RT 15-23].

A short time later, Lopez sat at the booth occupied by investigator Rodriguez, and after some conversation in which Lopez stated she worked at the premises part-time, asked if the investigator would like another beer, and then asked if he would buy her a beer [RT 25-27, 54]. Lopez, prior to the solicitation, asked if the investigator was a “cop,” and did a cursory “pat-down” of the investigator [RT 27-29, 68, 70, 77].

After receiving an affirmative answer concerning the drinks, Lopez went to the bar, ordered two beers, and paid for the beers with a $20 dollar bill given to her by the investigator. Lopez returned to the booth. The beers and change were

placed on the bar counter. Thereafter, the bartender served the beers to the investigator and Lopez in their booth, with the bartender giving $5 to Lopez and the remaining $9 to the investigator [RT 30-34, 55, 69-70, 90, 102].

Subsequent to the hearing, the Department issued its decision which determined that counts 1 through 3 had been proven, and revoked the license.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the sole issue that the Administrative Law Judge improperly prohibited appellant's counsel from confronting Tony Pacheco, a non-witness at the administrative hearing proceedings.

The noticed hearing before the Appeals Board was held on July 8, 1998, at the hour of 9 a.m. At approximately 9 a.m., a call was received by the Board from Elizabeth from the office of the counsel for appellant, advising the Board's counsel, that appellant's counsel was engaged in a deposition and arbitration hearing and requested the matter be continued. The caller was informed the request was untimely. Mr. Becerra, counsel for appellant, called at approximately 9:30 a.m. and advised that he would attempt to make the hearing. Later in the hearing proceedings, a note was received that said: "Atty Becerra did not make it [¶] Does not wish to submit, [¶] Will petition for a new hearing." The matter was called at the close of the hearing calendar, with no appearance made by appellant or his counsel.

After due consideration, the Board concluded that the request to continue the matter was untimely. The Board's record shows that notice of the hearing had

been given to appellant's counsel on April 16, 1998, with the Board's hearing calendar being sent to appellant and his counsel on June 4, 1998. Therefore, without a showing of good cause, the Board deemed the matter submitted on the record and briefs on file.

DISCUSSION

Appellant contends the Administrative Law Judge (ALJ) improperly prohibited appellant's counsel from confronting Tony Pacheco, a non-witness at the administrative hearing proceedings. While not directly raising the issue of credibility, appellant argues in his brief that the primary issue in the case was the credibility of his witnesses [App. Brief p. 6]. The ALJ chose not to believe the testimony of appellant's witnesses in some of their testimony (Finding IX, X, and XI). 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].)

Appellant's brief is in error that Pacheco was a witness whose cross-examination was prohibited by the ALJ. We have searched the record and find no indication that appellant called, or attempted to call, Pacheco as a witness, designated adverse or otherwise.

Appellant alleges prior misconduct by Pacheco. Allegedly, Pacheco had improperly touched an arrested employee of appellant, and charges had been filed against Pacheco by that employee. Naturally, this contention goes to a possible

bias and motive Pacheco and investigator Rodriguez might have had to fabricate the evidence, a very serious allegation.[2] [RT 131, and App. Brief, p. 2].

Appellant argues in his brief that "Appellant was not allowed to confront PACHECO regarding his personal vendetta with Mr. SOLIS in violation of Appellants [sic] right to confront witness [sic] guaranteed by the Constitution." [App. Brief, p. 4-5]. However, appellant has failed to cite the record where it sets forth facts in support of his contention.

The Appeals Board views the practice of mere allegations without some support in the record as irresponsible. The Board is not required to make an independent search of the record for error not pointed out by appellant and supported by citations to the record. It is the duty of appellant to advise the Appeals Board that the claimed error exists and to aid the Board in setting forth the areas in the record that support, or tend to support that argument. Lacking that assistance, the Board must speculate as to what portion of the record appellant deems supportive. Without such assistance by appellant, the Board may deem the general contentions waived or abandoned. (Horowitz v. Noble (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710] and Sutter v. Gamel (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].) However, due to the seriousness of

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[2]While the issue was not raised at the administrative hearing, we view the use of Mr. Pacheco in this undercover operation against this licensee under the circumstances of the serious allegations raised, a serious breach of police responsibility. Where such allegations have been made, founded or unfounded, placing Mr. Pacheco into a situation where an issue of impropriety could be, and is, raised, creates a public perception of poor judgment by the Department's supervision.

the allegations and the penalty proposed, the Board has canvassed the record for support for or against this contention, to ensure the rights of appellant are not abridged.

Investigator Pacheco acted as a backup outside the premises on the night of the solicitation [RT 11-12]. Pacheco was not called as a witness by the Department, or by appellant, at the administrative hearing. Pacheco was designated as the investigating officer to sit with the Department's counsel during the administrative proceedings [RT 7]. Pacheco was present during the administrative hearing and was accessible to appellant as a witness for cross-examination.

On cross-examination of investigator Rodiguez, the Department's sole witness, Rodriguez testified that Pacheco was not his immediate supervisor, only senior in Department service, and that Rodriguez did not know of any prior complaints against Pacheco [RT 43-45]. Rodriguez was on loan from the Department's Van Nuys district office to the El Monte office where the undercover investigation of appellant's premises was planned. Rodriguez was loaned due to his bilingual capabilities [RT 133, 135].

Appellant argues:

> "The Administrative Law Judge relied on the testimony of RODRIGUEZ and PACHECO and did not allow appellant to cross-examine and confront said officers regarding PACHECO's bias and motive for fabricating evidence as a complaint of sexual misconduct and sexual fondling had been filed against PACHECO by an employee of Mr. SOLIS's establishment. In refusing to allow Appellant to inquire and confront PACHECO's bias and possible motive, the Administrative Law Judge failed to weigh the truthfulness and credibility of the testimony of three witnesses [appellant's]". [App. Brief p.2; see also, p. 6].

Contrary to such argument, Pacheco did not testify at the hearing. We note from the record that appellant testified that Pacheco lied on another occasion and made threats about appellant, all apparently, communicated to appellant by others [RT 110]. After inquiring if appellant had any firsthand knowledge of these statements, and after

receiving a negative answer, the ALJ disallowed further inquiry into these second-hand allegations [RT 111].

Appellant called Isela Hernandez (the employee who filed the charges against Pacheco) as a witness at the administrative hearing. The ALJ refused Hernandez' testimony as to the facts that resulted in her complaint, but allowed testimony about her filing of the complaint [RT 129]. During the colloquy between counsel for appellant and the ALJ, the ALJ stated that Pacheco had not as yet been called as a witness [RT 126-128].

CONCLUSION

While not directly raised on appeal, the question of the severity of the penalty is always a consideration where the license is to be revoked. In most cases, as seen in prior decisions of the Department reviewed by the Appeals Board, revocation on the first violation is a rarity.

In the present appeal, the record shows that at the time of the present violation, appellant had been sanctioned with a stayed revocation for violation of the same types of violations. Such past history clearly shows appellant was and is conversant with the problems associated with these types of violations. Additionally, Solis (1998) AB-6824, a case not cited by the Department as a prior violation (as it was pending at the time of the present matter was filed), reveals appellant's knowledge of the problems associated with these types of violations. That 1998 case shows that appellant knew of solicitation schemes in other local area bars, as well as in his own bar; and that he had attended Department seminars

at which the solicitation problem was discussed. We cannot say that the decision of the Department to revoke the appellant's license is unreasonable, given the state of the record.

The decision of the Department of Alcoholic Beverage Control is affirmed.[3]

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

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[3]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.