ISSUED MARCH 2, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MACARIO M. SANCHEZ dba Hanstad's Bar 2503-05 Pasadena Avenue Los Angeles, CA 90031, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7535 File: 42-91031 Reg: 99046227 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: December 12, 2000 Los Angeles, CA

Macario Sanchez, doing business as Hanstad's Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his on-sale beer and wine public premises license for having employed or permitted persons to engage in drink solicitation conduct, 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

[1]The decision of the Department, dated November 10, 1999, is set forth in the appendix.

§§ 24200.5, subdivision (b);[2] 25657, subdivisions (a) and (b);[3] Department Rule

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[2] **§24200.5 Selling narcotics or soliciting drinks on premises.**

Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds:

(a) If a retail licensee has knowingly permitted the illegal sale, or negotiations for such sales, of narcotics or dangerous drugs upon his licensed premises. Successive sales, or negotiations for such sales, over any continuous period of time shall be deemed evidence of such permission. As used in this section, "narcotics" shall have the same meaning as given that term in Article 1 (commencing with Section 11000) of Chapter 1 of Division 10 of the Health and Safety Code, and "dangerous drugs" shall have the same meaning as given that term in Article 8 (commencing with Section 4210) of Chapter 9 of Division 2 of this code.

(b) If the licensee has employed or permitted any persons to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy."

[3] 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."

143;[4] and Penal Code §303.[5]

Appearances on appeal include appellant Macario Sanchez, appearing through his counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and Joseph Budesky, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine license was issued on August 11, 1980. Thereafter, on April 14, 1999, the Department instituted an accusation against appellant charging that he employed, permitted, or paid Martina Guevara Beltran ("Beltran"), Andrea Vivas ("Vivas"), and Mercedes Fuentes ("Fuentes") to commit acts of solicitation, in violation of the statutes and rule set forth above.

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[4] **143. Employees of On-Sale Licensees Soliciting or Accepting Drinks**.

No on-sale licensee shall permit any employee of such licensee to solicit, in or upon the licensed premises, the purchase or sale of any drink, any part of which is for, or intended for, the consumption or use of such employee, or to permit any employee of such licensee to accept, in or upon the licensed premises, any drink which has been purchased or sold there, any part of which drink is for, or intended for, the consumption or use of any employee.

It is not the intent or purpose of this rule to prohibit the long-established practice of a licensee or bartender accepting an incidental drink from a patron.

[5] **Penal Code §303. Intoxicating liquors; employing person to encourage purchases**; **sale on commission**

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.

An administrative hearing was held on September 29, 1999, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of Jerry Vergara, a Los Angeles police officer; [6] and appellants presented the testimony of Beltran, Vivas, and Fuentes, the three women referred to in the accusation, and that of Maria Valdiva.

Subsequent to the hearing, the Department issued its decision which determined that the violations had occurred as alleged, and ordered appellant's license revoked. The decision contains a summary of the evidence, prefaced with the following comment (Finding of Fact 2):

> "At the hearing in the matter, the evidence was hotly contested with sharply conflicting testimony from Complainant's witnesses on the one hand, and Respondent's witnesses on the other. After a careful review of the evidence, taking into account among other things, the internal consistency of the evidence, credibility and bias and evidence of ability to observe and accurately recollect, the following facts are found to have been established."

Given the nature of the issues raised by appellant, there is no need for this Board to duplicate the summary of the evidence that is in the Department's decision. We will, however, address in the discussion which follows specific evidence which relates to the issues appellant has raised. For the present, our own brief summary will suffice.

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[6] Vergara testified he was a part-time reserve officer, and a full-time employee of the Department of Motor Vehicles. His status as a reserve officer is a factor in one of appellant's issues on appeal.

The testimony of a second Department witness, Jane McCabe, a District Administrator, was excluded because the Department had failed to disclose her name as a prospective witness. As will be seen, the exclusion of her testimony is a factor in the Board's consideration of the issue appellant has raised regarding the certification of the documents purporting to show prior instances of discipline.

Officer Vergara testified that he and a fellow officer went to appellant's bar in an undercover capacity to conduct what he called a "Business and Professions investigation." While he was there, Beltran twice solicited him to buy her a beer, for each of which he was charged $9. The first beer was served by Vivas, the second by Fuentes. On each occasion, according to Vergara's testimony, when returning his change from the transaction, Beltran was given $6, the money being placed in front of her. Vergara and his partner were charged $6.25 for the two beers purchased before Beltran's solicitation. Vergara's testimony that Beltran asked him not to tell the uniformed officers she was an employee, but instead had come to the bar with him, was admitted, over objection, as administrative hearsay.

Appellant's witnesses uniformly denied that any drink solicitation had occurred. Beltran testified she had never been to the bar before, but came there with a friend. She denied asking for a beer, testifying instead that Vergara offered to buy it for her on each occasion. Vivas and Fuentes each denied giving Beltran any money, claiming the $9 charge was for three beers. Valdiva testified that Beltran had asked her to come to the bar to give her a ride home.

In his timely appeal, appellant raises the following issues: (1) the penalty violated due process; (2) the finding that Beltran was an employee was not supported by substantial evidence; (3) there was no admissible evidence to establish the knowledge requirement of Business and Professions Code §25657, subdivision (b); (4) the ALJ acted unreasonably in holding a reserve officer to a lower standard than regular officers; (5) the ALJ failed to make findings regarding all elements of Penal Code §303; (6) the Department abused its discretion by

penalizing appellant multiple times for a single set of events; (7) the Department failed to consider appellant's lack of knowledge and direct involvement as a mitigating factor; and (8) the Department may have improperly alleged the past disciplinary history. Issues (3) and (7) are essentially duplicative.

DISCUSSION

I

Citing Cohan v. Department of Alcoholic Beverage Control (1978) 76 Cal.App.3d 905 [143 Cal.Rptr. 199], appellant contends that his due process rights were violated by the Department because it sustained an accusation which alleged statutory as well as rule violations.

Cohan involved multiple penalties for violation of a statute and a condition, so is not strictly applicable here.

It is not unusual, nor is there anything improper, for an accusation to challenge a single course of conduct under different theories premised upon different statutes or rules. That does not mean that if the proof is such that all of the elements of each of the statutory and rule violations are met, multiple punishments are permissible.

However, this is simply not a case of multiple punishment. The order of revocation is a single disciplinary penalty. Under the circumstances of the stay order under which appellant was operating (see text, infra), any of the individual counts, if sustained, would have been sufficient to support an order of revocation.

II

Appellant contends that the finding that Beltran was an employee was not supported by substantial evidence.

We believe that this contention has merit, and that counts 4 and 5 of the accusation, the only counts dependent solely upon an employment relationship, will have to be reversed.

The only evidence of possible employment is Vergara's testimony that Beltran told him the $6 was her cut from the $9 paid for the beer. This was admitted as administrative hearsay after the Administrative Law Judge (ALJ) had first appeared to reject the Department's arguments that it was a full exception to the hearsay rule, either as a contemporaneous statement or a declaration against penal interest [RT 17-28]. Vergara was not permitted to answer a follow-up question whether Beltran made any statements concerning salary [RT 28-31].

We agree with the apparent thinking of the ALJ that Beltran's statement was neither a contemporaneous statement nor a declaration against penal interest, so as to qualify as an exception to the hearsay rule. Beltran was responding to a question asked by Vergara, and there is no evidence she had any reason to believe a statement about receiving a share of the price of the drink was against her penal or other interest. (See Evidence Code § 1230.)

Under Government Code 11513, subdivision (c), hearsay testimony may be admitted when it has a tendency to explain or supplement other evidence, but, by itself, is not sufficient to support a finding.

Nor was Beltran's request that Vergara not tell the uniformed officers she worked at the premises evidence of employment. The statement is as much

hearsay as if she had said she was an employee, and unless supported by other evidence, can not establish an employment relationship.

III

Appellant contends there was no evidence that he had any knowledge that Beltran was soliciting drinks. He contends the Department at least had to prove he was on the licensed premises when the events transpired, but asserts the only evidence of that was "the double hearsay testimony of Officer Vergara," that another officer had said he had spoken with appellant.

In view of our determination that Beltran was not an employee, a finding of violation of §25657, subdivision (b), requires proof that appellant knowingly permitted Beltran to loiter in the premises.

Appellant did not attend the hearing. Any evidence as to whether he had the requisite knowledge must be found elsewhere, if at all.

Contrary to appellant's representation, there is evidence appellant was on the premises at the time. Vivas, whose testimony strongly suggests that she was trying to shield her employer, admitted that she "remembered him walking around ... making sure everything is okay" [RT 154].

Vergara had earlier observed the man he was told was appellant walking around the premises and going behind the bar counter [RT 57]. It appears reasonable to draw an inference that this was appellant, since Vivas also said appellant was "walking around ...making sure everything is okay."

Although not overwhelming, this evidence, we think, is sufficient to support a finding of knowledge, in the absence of anything to the contrary. The solicitation

activity took place in an open area of the bar, within viewing range of a person who might have been walking around the premises, as appellant was said to have been.

For these reasons, there was no basis for the ALJ to consider appellant's "absentee ownership" as an element of mitigation.

IV

Appellant contends that the ALJ, in deeming Vergara's testimony credible, held him to a lower standard, because of Vergara's status as a part-time reserve police officer, than that which would be applied in evaluating the credibility of a full-time police officer. Appellant states that the ALJ's reasoning implies that, had Vergara been a full-time officer, the ALJ would have given much more weight to the fact that the written police report omitted a number of facts.

It is true that the ALJ took into consideration in evaluating Vergara's testimony the fact that he was only a part-time police officer. However, appellant mischaracterizes how he did so.

The key finding is Finding of Fact 11:

> "Voir dire examination of the witness demonstrated that in fact his testimony was truthful and accurate, although not consistent with standard police practice of reducing all relevant facts to writing while fresh in one's memory. Officer Vergara is not a regular officer but a reserve officer and his part-time status as a police officer most likely allowed him the luxury of having less clutter from which to recollect events from memory with accuracy."

We do not see any application of a lower standard. Instead, we see the ALJ expressing the view that Vergara could remember details which might have been omitted from the written police report because he had participated in fewer investigations, so had less to remember. The mere fact he had participated in from

75 to 125 investigations in and of itself tells us very little. What is important is how many of those led to an arrest, or an ensuing accusation, and how many of those involved drink solicitation. Further, even an incomplete report has the capacity of refreshing recollection.[7]

Appellant has not persuaded us that any specific aspect of Vergara's testimony is so inherently improbable as to warrant its rejection. As appellant acknowledges, 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].)

Based upon our own review of the record, we are satisfied that the ALJ's assessment of the testimony of the five witnesses was well within the bounds of discretion.

V

Appellant contends that counts 6 and 7, which charged violations of Penal Code §303, must be reversed because the ALJ failed to find as a necessary element of such violation that appellant was engaged in the sale of alcoholic beverages other than in the original package.

Appellant suggests that, had the evidence shown that the beer was served in

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[7] Given time and incentive, probably any police report could be found to contain omissions. Obviously some omissions may be critical, others not. We are unable to say that any of the omissions developed by counsel rose to the level of criticality.

a glass, the Penal Code provision would have been satisfied.

We applaud appellant's ingenuity in asserting this argument, but suggest it is fundamentally flawed. If Beltran was able to consume beer from a bottle from which the cap had not been removed, appellant might have a point. But once the cap is removed, the beer is no longer in its original package, which was a closed container. When delivered to Beltran, the evidence indicates, the beer had been opened.

It follows that appellant was engaged in the sale of alcoholic beverages other than in the original package. Any more explicit finding was unnecessary.

VI

Appellant contends that "it is clear that perhaps" the main reason for the order of revocation was the number of counts which were sustained, even though they were premised on two acts of solicitation, on a single occasion involving the same two individuals.

Appellant is correct that all of the counts of the accusation were premised on two acts of solicitation, on a single occasion, involving the same two individuals. It does not follow, however, that the order of revocation was based simply on the number of counts sustained.

At the time of the violation, and at the time of the decision, appellant was operating under a stayed order of revocation, the stay conditioned upon there being no cause for discipline occurring during the period of the stay, that is, until March 10, 2001. This order, part of Exhibit 1, was entered following appellant's stipulation and waiver to accusations charging drink solicitation conduct on

February 3, 1996, and September 20, 1996.

Thus, any one of the counts which were sustained and which survives this appeal would, by itself, be legally sufficient to justify an order of revocation.

VII

Appellant questions whether the certification by District Administrator Jane McCabe of the documents establishing appellant's prior disciplinary history is that of a lawful custodian of records.

Appellant cites the statement in the Board's decision in Santa Ana Shell (1998) AB-7103 describing a proper certification, one of the essential elements being the signature of the lawful custodian, and says that the certifications fail to state they are signed by a lawful custodian of records.

We may take official notice that, in the Department's hierarchy, a district administrator is the person in charge of a district office. As such, that person is charged with the supervisorial responsibility over all activities within that office. Presumably, that would include the supervisorial responsibility for the filing and maintenance of official records of that office.

In the absence of any specifically designated person as an official custodian, it seems eminently reasonable to deem the person in overall charge to be a lawful custodian, capable of certifying a copy of a public document such as involved in this case. That the certification does not include within it the phrase "lawful custodian" is not a fatal defect.

Appellant has cited no authority to the effect that a certification by a person in a position equivalent to that of a district administrator is inadequate, and we are

aware of none.

Nor has appellant offered any evidence to suggest the documents lack trustworthiness, or that the prior disciplinary history reflected in such documents was inaccurate.

ORDER

The decision of the Department is affirmed in all respects except as to counts 4 and 5, which are reversed.[8] We do not believe a remand is required, since it appears to us that, in all likelihood, the Department would simply reimpose the order of revocation. While it is true that, when there is real doubt that an administrative body would impose the same penalty upon remand, after some of the charges are not sustained, a remand is in order (see Miller v. Eisenhower Medical Center (1980) 27 Cal.3d 614, 635 [166 Cal.Rptr. 826], this is not such a case.

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[8] 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.