

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

AB-7615

MARIA L. DIAZ and DANIEL RAMIREZ dba Tenampa
13465 E. Imperial Highway, Whittier, CA 90605,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 42-318391 Reg: 99047616

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: March 1, 2001
Los Angeles, CA

ISSUED MAY 30, 2001

Maria L. Diaz and Daniel Ramirez, doing business as Tenampa (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for permitting soliciting of drinks, 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), and Penal Code §303.

Appearances on appeal include appellants Maria L. Diaz and Daniel Ramirez, appearing through their counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The decision of the Department, dated March 16, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public premises license was issued on May 13, 1996. Thereafter, the Department instituted an eight-count accusation against appellants charging that, on August 20, 1999, appellants permitted various acts of drink solicitation in the premises.

An administrative hearing was held on February 2, 2000, at which time documentary evidence was received and testimony was presented by two Department investigators concerning the allegations. Appellant Daniel Ramirez also testified regarding his knowledge of the events alleged in the accusation.

Subsequent to the hearing, the Department issued its decision which determined that counts 2, 4, 7, and 8 should be dismissed because there was not an employer-employee relationship between appellant and Susana Angelica Villasenor, the alleged solicitor; count 3 should be dismissed because there was no showing that Villasenor was permitted to loiter; and that count 1 [violation of Business and Professions Code §24200.5, subdivision (b)] and counts 5 and 6 [violation of Penal Code §303] should be sustained.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) there was not substantial evidence to support a finding and determination that Business and Professions Code §24200.5, subdivision (b), was violated; and (2) the penalty is excessive.

DISCUSSION

I

Appellants contend that §24500.5, subdivision (b), was not shown to have been

violated because the first solicitation occurred outside the presence of the bartender, who was serving other customers, and it was not until after the solicitation that Villasenor and the bartender agreed to a solicitation plan.

Finding III states:

"A. A woman, later identified as Susana Angelica Villasenor, was also seated at the bar counter. She asked the investigator to buy a beer for her. The investigator replied that he would.

"B. Villasenor, who was at the premises to apply for a job as a bartender, then asked Rodriguez [the bartender] if it would be all right for her, Villasenor, to solicit customers to buy beer for her. Rodriguez replied that she could, but only until [appellant] Daniel Ramirez arrived.

"C. Villasenor asked Rodriguez to bring her a beer. Rodriguez brought a bottle of 12-ounce Bud Light beer to Villasenor, and the investigator paid for it with a ten-dollar bill. Rodriguez gave three dollars to Villasenor, and four dollars in change to the investigator."

Business and Professions Code §24200.5, subdivision (b), provides:

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

"(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."

Appellants argue that "[t]he plain language of Section 24200.5(b) requires employment or permission prior to the solicitation. In this case, there was not a violation of the statute since Rodriguez was not present at the time of the solicitation and the first conversation between Rodriguez and Villasenor occurred after Villasenor had already solicited Chavez [the investigation]."

Appellants may be right with regard to the drink solicited by Villasenor while Rodriguez was bartending. However, shortly thereafter, Angelica Martinez began her shift as bartender and Villasenor again solicited the investigator. Martinez charged the

investigator six dollars for Villasenor's beer and gave three dollars to Villasenor. There was no evidence presented as to when Villasenor and Martinez may have reached agreement regarding the solicitation, but it had obviously already occurred by the time Martinez brought the beer to Villasenor.

Count 1 does not specify which of appellants' bartenders permitted Villasenor to solicit under a commission or other profit-sharing scheme. It is sufficient for either one of the bartenders to have done so; the actions of either are imputed to appellants.

II

Appellants contend revocation is not warranted because the evidence does not support a finding that §24200.5, subdivision (b), was violated, and the Department's decision "made clear that the order of revocation related to Section 24200.5(b) in Count 1." They contend the remaining violations under counts 5 and 6 do not warrant revocation, because the evidence did not show that appellants were aware of their employees' conduct. Appellants ask that the case be remanded for reconsideration of the penalty because of the evidence of mitigation that was presented.

Appellants note in mitigation that the evidence clearly showed that the bartenders had a "side business" of solicitation, which the bartenders kept hidden from appellants, in spite of appellants' warning that solicitation was not allowed. They also point out that the ALJ found that neither of the licensees was present at the time, neither was aware that the bartenders permitted the solicitation, and the bartenders were fired immediately.

Appellants' argument fails at the outset because we have already found there was a violation of Business and Professions Code §24200.5, subdivision (b). That

section says that the Department *shall revoke* a license under the solicitation circumstances described in subdivision (b).

The ALJ specifically rejected considering any elements in mitigation because the license was under a stayed revocation when this violation occurred. The Board has observed before that "mitigation of a penalty is more a matter of grace than of right." (The Southland Corporation and Mouannes (3/21/00) AB-6985a.) We see no reason that appellants should now be entitled to have mitigation considered, where the Department had already refrained from ordering outright revocation for previous violations of the same type.

ORDER

The decision of the Department is affirmed.²

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

²This 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.