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

AB-7627

MARCELINO HERNANDEZ dba La Estrella Bar
166 West Kern Street, McFarland, CA 93250,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 42-226963 Reg: 99047584

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

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

ISSUED APRIL 26, 2001

Marcelino Hernandez, doing business as La Estrella Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license and also suspended his license for 45 days for permitting various acts of drink solicitation, 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 §25657, subdivision (b); and Rule 143 (4 Cal. Code Regs. §143).

Appearances on appeal include appellant Marcelino Hernandez, appearing through his counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

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[1]The decision of the Department, dated April 6, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on January 3, 1989. Thereafter, the Department instituted a five-count accusation against appellant charging that, on September 11, 1999, he employed or permitted Maria "Ruby" Villalobos (hereinafter "Ruby") to engage in various acts of drink solicitation. The accusation charged that appellant permitted Ruby to solicit Department investigators Fred Frausto and Paul Fuentes, or others, to buy her drinks under a commission, percentage, salary or other profit-sharing plan, scheme, or conspiracy, in violation of §24200.5, subdivision (b) (counts 1 and 3); employed or knowingly permitted Ruby to loiter in the premises for the purpose of begging or soliciting Frausto and Fuentes, and/or other patrons, to purchase alcoholic beverages for her, in violation of §25657, subdivision (b) (counts 2 and 4); and permitted Ruby to accept a drink purchased by Fuentes, all or part of which was intended for her consumption, in violation of Rule 143 (count 5).

An administrative hearing was held on February 9, 2000, at which time documentary evidence was received, and testimony was presented by Robert Nunn, a deputy who assisted the Department investigators at the premises on September 11, 1999; and Department investigators Jason Montgomery and Paul Fuentes. Appellant called no witnesses.

On September 11, 1999, Fuentes and Frausto, working undercover, entered the premises and observed Ruby sitting at a table drinking and conversing with three men. At some point, Ruby took four beer cans from the table to the bar counter, where she spoke with the bartender, Lourdes De Bolanos, who gave Ruby four more cans of beer.

Ruby gave De Bolanos some money, and De Bolanos made marks on a "tally sheet" she kept near the cash register. Ruby returned to the table with the beers and she and the men resumed their conversation and drinking.

When the men at the table left, Ruby approached the two investigators who were seated at the fixed bar. In the course of conversing with the investigators, Ruby solicited Frausto, who purchased a beer for her. She later solicited Fuentes, who also bought a beer for her.

De Bolanos charged the investigators $2 for each beer they purchased for themselves, and charged them $4 for each beer they bought for Ruby. Each time the investigators purchased a beer for Ruby, De Bolanos made a mark next to Ruby's name on the tally sheet she kept at the cash register. There was no testimony that Ruby was paid any money by De Bolanos or anyone else connected with the premises during the time the investigators were there.

During the follow-up investigation, Ruby told Fuentes that she had worked at the premises for 12 years and appellant had hired her. She confirmed that patrons were charged $4 for beer they purchased for her, while they only paid $2 for beer for themselves, and that marks were placed on a tally sheet to keep track of the drinks patrons bought for her.

Subsequent to the hearing, the Department issued its decision which determined that all counts of the accusation had been established. Appellant thereafter filed a timely appeal in which he raises the following issues: (1) no substantial evidence exists to support a finding that Ruby was an employee, and (2) no substantial evidence exists to support a finding that appellant permitted Ruby to solicit drinks.

DISCUSSION

I

Appellant contends that counts 2, 4, and 5 must be reversed because there is no substantial evidence supporting a finding that Ruby was appellant's employee. Appellant argues that this Board has held, in Rosas (Nov. 20, 2000) AB-7532, that, as a matter of law, one who merely sits and drinks with customers is not an employee, and, since the ALJ found that Ruby did nothing but drink beer with the customers, she cannot be an employee.

Additionally, appellant argues, the only evidence that Ruby worked at the premises for a salary or commission was inadmissible hearsay evidence consisting of investigator Fuentes's testimony about statements he overheard and statements made to him by Ruby about her employment. Under Government Code §11513, appellant states, hearsay may supplement or explain other admissible evidence, but is not sufficient by itself to support a finding, such as the finding that Ruby was an employee.

Appellant's first point is not well taken. The Rosas appeal did not deal with the question of whether one can be employed to loiter, only with employment. In that appeal, on its particular facts, the Board reversed the finding of the ALJ that Martinez, the woman who solicited for drinks, was an employee and violated Rule 143 by her solicitation. The ALJ did not explain why he found the violation, and the Board could find only two possible items of evidence in the record that might support such a finding. One was the hearsay statement of Martinez, testified to by Department investigator Parga, "that she earned her money by working there." The other was testimony that Martinez put her purse on top of a cooler behind the fixed bar. The Board concluded

that these two evidentiary items were insufficient, either separately or together, to support a finding of employment.

The Board addressed appellant's contention, and rejected it, in Ramos (March 30, 2000) AB-7327, the facts of which are very similar to those in the present case. In response to the contention in Ramos that employment and loitering are mutually exclusive concepts, the Board stated:

> "Business and Professions Code §25657, subdivision (b), makes it unlawful '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 beverage for the one begging or soliciting.'
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> "In Garcia v. Munro (1958) 161 Cal.App. 2d 425 [326 P.2d 894], 'Jennie' was employed as a bartender or waitress by the licensee and drank with, and solicited drinks from, patrons of the premises. The licensee was charged with violations of Business and Professions Code §25657, subdivision (b), and the question was whether Jennie was employed to loiter to solicit drinks. The court concluded that, although Jennie 'talked with patrons, spent some time with them and solicited some patrons to buy her drinks,' that was not sufficient to 'support a finding that she was employed to "loiter" on the premises to solicit drinks.' This conclusion was based on the lack of 'evidence that she lingered idly by or was loafing on the job.' (Garcia v. Munro, supra, 326 P.2d at 897.)
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> "Notably, however, Garcia makes it clear that 'employment' and 'loitering' are not necessarily mutually exclusive as appellants contend. 'This section [25657, subdivision (b)] was primarily aimed at preventing licensees from hiring persons to loiter on the licensed premises for the purpose of soliciting drinks.'
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> "Garcia demonstrates that persons who are employed as bartenders or waitresses, as long as they are working at their legitimate jobs and not loitering, do not violate §25657, subdivision (b), even if they solicit while performing their jobs. It is in this sense that 'employment' and 'loitering' are mutually exclusive.
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> "However, persons who do not tend bar or wait on tables may nonetheless be employed to loiter and solicit. If a person soliciting drinks has no other obvious duties in the premises and is found to be compensated by the licensee or his employees, that person is considered employed to loiter for the purpose of solicitation.
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> "In the present appeal, Hernandez admittedly solicited drinks. She had no other apparent business or duties in the premises, so she may reasonably be considered to be loitering. The bartender charged the officer a $5.50 premium for the beer he purchased for Hernandez, so it is reasonable to consider that the bartender knew about the solicitation. Hernandez explained to the officer that

> this premium was attributable to her providing him with company. It is reasonable to infer that Hernandez would be paid some or all of the premium by the bartender. Therefore, Hernandez may be considered to be employed by the licensees or their bartender to loiter and solicit.
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> "In addition, since the bartender clearly knew of the solicitation, the bartender knowingly permitted the solicitation. This knowing permission is imputed to the licensees.
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> "There is clearly substantial, unrefuted evidence to prove employment, knowing permission, and loitering. Proof of *either* employment *or* knowing permission is sufficient to show a violation of §25657, subdivision (b). The ALJ's finding that *both* occurred does not make the finding erroneous."

In the present appeal, Ruby said she had been employed by appellant for 12 years, that she was paid an hourly wage, and that she received money for each beer that patrons bought for her. Ruby's statements, testified to by investigator Fuentes, supplement and explain her name on the tally sheet, the bartender marking the tally sheet every time the investigators bought Ruby a drink, the fact that the bartender charged the investigators more for beers purchased for Ruby than for their own beers, and Ruby's open and obvious soliciting of patrons. The statements were properly admissible as administrative hearsay under Government Code §11513, and there was, contrary to appellant's assertion, substantial evidence to support the findings that Ruby was an employee and that §25657 and Rule 143 were violated by her solicitation.

II

Appellant contends he cannot be held to have permitted Ruby's solicitation, since there is no evidence that he or De Bolanos overheard the solicitation. He cites the case of Laube v. Stroh (1992) 2 Cal.App. 4th 364 [2 Cal.Rptr. 2d 779] for the proposition that a licensee can't permit what he doesn't know about. He contends this applies to his situation, saying there was no evidence of appellant's actual or constructive knowledge that the solicitations were happening. However, appellant

ignores the language of the court in Laube v. Stroh, 2 Cal.App. 4th at 379, where it said in regard to a licensee "permitting" unlawful activity:

> "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."

Appellant was on constructive notice that solicitations were occurring or were likely to occur in the premises, having recently completed a three-year probationary period for a stayed revocation arising from, in part, previous violations of the prohibitions against soliciting. Therefore, appellant must be considered to have permitted the solicitations.

ORDER

The decision of the Department is affirmed.[2]

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

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[2]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.

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.