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

AB-7901
File: 42-278768 Reg: 01050462

JESUS PADILLA dba The Island
14533 Leffingwell Road, Whittier, CA 90604,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: August 15, 2002
Los Angeles, CA

ISSUED OCTOBER 9, 2002

Jesus Padilla, doing business as The Island (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for having employed a person under salary or commission to solicit drinks from patrons, 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 sections 24200.5,subdivision (b); 25657, subdivision (a); and Rule 143.

Appearances on appeal include appellant Jesus Padilla, appearing through his counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated October 25, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on sale beer and wine public premises license was issued on December 9, 1992. Thereafter, the Department instituted an accusation against appellant, four counts of which charged violations involving drink solicitation, and one count charging the dispensing of beer from an unlabeled spigot.[2]

An administrative hearing was held on July 13 and August 28, 2001, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that each of the charges of the accusation had been established, and ordered the license revoked for the solicitation violations and suspended 15 days for the violation involving the unlabeled spigot.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant contends that the findings in support of the solicitation violation are based on inadmissible hearsay evidence.

DISCUSSION

The Legislature, by statute, and the Department, by rule, have made it clear that drink solicitation in establishments licensed for the sale of alcoholic beverages is unacceptable conduct.

Business and Professions Code section 24200.5 provides, in pertinent part:

> Not withstanding 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.

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[2] Appellant has not contested that portion of the Department's order concerning the dispensation of beer from an unlabeled spigot.

Business and Professions Code section 25657, subdivision (a), provides:

> It is unlawful:
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> "(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.

Department Rule 143 (4 Cal. Code Regs., §143) provides, in pertinent part:

> No on-sale retail 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 is for, or intended for, the consumption or use by any employee.

Appellant contends that the Department's decision which found these statutes and rules violated was based upon inadmissible hearsay. Specifically, appellant challenges the findings that Alma Garcia, the person who solicited drinks, was employed by appellant. Appellant appears to concede that Garcia solicited drinks, but, citing *Laube* v. *Stroh* (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], contends the evidence is insufficient to show that the bartender or appellant had any knowledge of Garcia's solicitation conduct. Thus, alleges appellant, the Department's decision is not supported by substantial evidence.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corporation* v. *National Labor Relations Board* (1951) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales USA, Inc.* v. *Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant matter, the findings are attacked on the ground that there

is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers* v. *Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser* v. *State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

Department investigator Juan Torres testified that he was charged $2.50 for a beer he had ordered while in the premises. He then struck up a conversation with Garcia, who was sitting next to him. A few minutes later, Garcia asked him to buy her a drink. He gave Garcia $6, Garcia paid for the beer, and was given change by the bartender, the change consisting of an unknown number of dollar bills, which Garcia placed in her bra. Garcia later asked for another beer. This time, Torres gave the bartender a $10 bill. The bartender handed the change to Garcia, who, in turn, gave Torres $6 and kept the rest of the change in her hand.[3]

In the course of Torres' conversation with Garcia, she told him she had been employed for a year, and was paid $5 an hour. Appellant's counsel objected on hearsay grounds. Department counsel argued that Garcia's statements were a declaration against penal interest, and the objection was overruled. Another Department investigator, Anthony Pacheco testified that Garcia also told him she was employed by appellant, that she was payed $5.50 per hour, plus a $3 commission on each beer she

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[3] If, as Pacheco later testified (see infra) and the Administrative Law Judge found, Garcia received a commission of $3 on each beer solicited, this instance must have been an exception, since the $6 returned to Torres plus the standard $2.50 charge for the beer left only $1.50 for Garcia.

solicited.

Acknowledging the limitation on the use of hearsay contained in Government Code section 11513,[4] the Administrative Law Judge concluded that the hearsay statements attributed to Garcia explained the acts of solicitation to which Torres had testified (Finding of Fact 8):

> "Turning to the out-of-court hearsay statement by Garcia that she was employed by the licensee and was in effect receiving a kick-back of $3.00 per drink for each drink she solicited from a patron, although objected-to hearsay, still can be used under 11513 to explain crucial parts of the testimony of Investigator Torres. It clarifies and explains the purpose of Garcia's solicitations, as well as the act of the bartender in returning change for the purchase of Garcia's beer to Garcia instead of to investigator Torres to whom it properly belonged. It also explains Garcia's retaining a portion of the change for herself as her commission.
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> "The picture which emerges from the evidence shows the licensee engaged in a scheme of employing Garcia under a salary or commission to solicit or encourage patrons to buy her drinks in violation of Business and Professions Code Section 24200.5, as well as other violations of law and the rules,
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> "That Garcia was an employee of the establishment was not disputed by any of the evidence."

Appellant appears to argue that Garcia's solicitations are themselves hearsay, suggesting that the Department has bootstrapped its way to its decision. We disagree. When Garcia asked Torres to buy her a beer, her request was an operative fact and an issue in the case - did she solicit? (See 1 Witkin, Cal. Evidence (4th Ed. 2000) Hearsay, §31, p. 714.) Garcia's hearsay statements about her employment and manner of compensation explain the reasons the bartender returned the change from the purchases to her rather than to Torres - doing so was consistent with the manner in

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[4] Government Code §11513, subdivision (c), provides that hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

which she was being compensated.[5]

The bartender's conduct in returning the change to Garcia is strong evidence of his awareness of the commission scheme, and his knowledge is imputable to appellant. (See *Harris* v. *Alcoholic Beverage Control Appeals Board* (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315]; *Mack* v. *Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629].)

Given appellant's prior disciplinary record for similar violations, *Laube* v. *Stroh* provides him little solace. As the court there said, in language which clearly fits this case,:

> A licensee has a general, affirmative duty to run 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 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.

(Laube v. *Stroh* (1992) 2 Cal.App.4th 364, 379 [3 Cal.Rptr.2d 779].)

ORDER

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[5] Appellant's argument there was no evidence that Garcia performed employee-like duties, such as acting as a waitress or bartender, undercuts his position that appellant had no knowledge of her solicitation activities. According to Investigator Pacheco, appellant admitted to him that Garcia was an employee. What then were her duties, if they did not include being a waitress or a bartender? The inference is inescapable.

The decision of the Department is affirmed.[6]

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

[6] 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.