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

AB-7904
File: 40-293784 Reg: 01050807

RICHARD RENDON dba Las Caricias Bar
15166 Foothill Blvd., Fontana, CA 92335,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED JANUARY 15, 2003

Richard Rendon, doing business as Las Caricias Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his on-sale beer license for permitting loitering and solicitation of drinks and alcoholic beverages under a commission or other profit-sharing scheme, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivisions (a) and (b), arising from violations of Business and Professions Code §§24200.5, subdivision (b); 25657, subdivisions (a) and (b); and California Code of Regulations, title 4, §143 (Rule 143).

Appearances on appeal include appellant Richard Rendon, appearing through his counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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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 license was issued on April 14, 1994. Thereafter, the Department instituted an accusation against appellant charging 37 counts of statute and rule violations. The accusation also alleged that appellant has previously suffered sanctions on his license for essentially the same type violations.

An administrative hearing was held on September 12, 2001, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that 17 of the counts were true.

Two of the counts concerning the operation of a slot machine, determined to be true, are not contested by appellant. Essentially the whole of the appeal concerns only the solicitation matters as the penalty in those matters is revocation of the license.

A prior decision had been entered against appellant's license concerning the same type violations, for solicitations committed on March 25, 2000. The charges now under review were committed, according to the accusation, on June 29, 2000, July 20, 2000, and November 9, 2000.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the issue that the decision and findings of the Department are not supported by substantial evidence, essentially basing his contention on the premise that the foundational evidence was inadmissible hearsay.

DISCUSSION

The following are foundational principles that guide in the review of this matter. The Department is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the continuance of such license would be

contrary to public welfare or morals.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

"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

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[2]The California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App. 4th 1665, 1678 [13 Cal.Rptr.2d 658].)

Appellant argues that the words used by the women in soliciting the drinks concerned, were inadmissable hearsay. The women involved asked the investigator(s) to buy them drinks, in these cases, beer. Evidence Code §1200 defines hearsay:

> "(a)'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to proved the truth of the matter stated."

At first sight, appellant's argument appears rational. However, the crime is not in the furnishing, or the mind set of the solicitor, but in the asking - the solicitation is the crime.

The case of Greenblatt v.Munro (1958) 161 Cal. App. 2d 596 [326 P.2d 929, 932-933], is in point::

> "... 'The theory of the Hearsay rule * * * is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extra-judicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted, the Hearsay rule does not apply.
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> In the instant case the statements of the bartender and female employees were not introduced for truth of the contents but only to show what was said, for what was said is part of the violation itself. It made no difference whether the female employees wanted the beverages or not as long as they did ask the witness to purchase the beverages. As the violation is the solicitation, such can only be accomplished by words."

We will proceed in this review by considering the record in accordance with the statutes alleged to have been violated.[3]

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[3]All beers mentioned in this matter were 12 ounce beers.

Business and Professions Code §24200.5, subdivision (b)

Counts 6, 11, and 21 of the accusation set forth the ultimate facts and the statute violated. The statute states in pertinent part as follows:

> "... 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."

To come within the mandatory revocation-of-license provisions of §24200.5(b), the record must contain substantial evidence that the solicitation was "under any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy."

The word "plan" is defined as "a method of achieving something: a way of carrying out a design." The word "scheme" is defined as a "planned program of something to be done." The word "conspiracy" is defined as an "illegal plan or agreement."[4] These words each imply a prearranged or preplanned course of conduct.

The Appeals Board has previously reviewed §24200.5(b) matters: Cornejo & Grano (1993) AB-6330 (one prior Department decision concerning solicitation of drinks, the solicitation was on one occasion); Macias (1993) AB-6318 (one prior Department decision concerned solicitation of drinks, the solicitation was on one occasion); Almaguer (1993) AB-6166 (note pads were seized as evidence of a plan or scheme, the solicitations were made on four separate occasions over an

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[4]Webster's Third New International Dictionary, pp. 485, 1729, and 2029, respectively.

approximate 30-day period); Herrera (1992) AB-6197 (two prior Department decisions concerned solicitation of drinks, the solicitations were on one occasion); Rodriguez (1992) AB-6167 (one prior Department decision concerned solicitation of drinks, markers were used to show drinks solicited); Perez (1992) AB-6095 (orange tickets were used as markers to show drinks solicited, the solicitations were made on five separate dates); and Chaco Room (1991) AB-6048 (soliciting took place on four separate dates). The commonality of these matters is either (1) a prior history of violations concerning solicitation of drinks, or (2) the use of some type of token, marker, or other record by management impliedly to keep track of the number of the drinks solicited for the compensation of the solicitor. A reasonable inference would be that by a prior history or the use of markers, the licensee had instituted a profit-sharing plan or scheme.

Direct payments of money were in most cases given to the soliciting women by the bartender.

The basic question under this statute is whether Maritza Romero (Romero) or Marta Cruz (Marta) were employed or were permitted to solicit customers to purchase drinks under some type of profit-sharing scheme.

The record shows that Department investigators purchased and were served beers over the course of the three dates of investigation with charges of $4 each (RT 12, 25); $3 each (RT 72, 93); and $2.50 each (RT 21, 34).

On June 29, 2000, Romero asked a Department investigator for a beer (RT 15). She charged the investigator $17 – $13 for her beer and $4 for the investigator's beer (RT 17-18). Romero was seen cleaning tables, and serving other customers with drinks

on the June 29, 2000, investigation, but not on the July 20, 2000, investigation (Finding III-E, and RT 19).

On July 20, 2000, while Romero and a Department investigator were seated in conversation at the fixed bar, the bartender placed an unsolicited beer in front of Romero (RT 22). Thereafter, Romero asked the investigator if he wanted another beer. After an affirmative answer, the bartender placed a beer in front of Romero and a beer in front of the investigator, for a charge to the investigator of $29 ($13 for the previously unsolicited beer to Romero, $13 for the then presently presented beer to Romero, and $3 for the beer to the investigator (RT 22, 23-25)).

On July 20, 2000, Marta asked an investigator for a beer, and then after consent, placed the order with the bartender. The beer was served but payment was not requested (RT 74-75). The investigator placed $20 on the bar counter, and Marta took $10 (RT 76). Marta later asked for another beer with the same conduct repeated (RT 77-78). Then Marlene Cruz (Marlene) approached and Marta asked the investigator to purchase Marlene a beer. After consent, the bartender placed beers in front of Marlene and Marta (RT 79-81). The investigator handed the bartender $40, with the bartender handing Marlene and Marta $10 each (RT 81-82).

On November 9, 2000, Marta approached a Department investigator and asked for a beer. Marta ordered a beer from the bartender who served the beer and asked the investigator for $20, with the bartender giving the change to Marta, who took $10 and gave the remainder to the investigator (RT 93-96). Later, Mirna Cruz (Mirna) approached and Marta asked the investigator for a beer for Mirna. The order was filled by the bartender, one beer for Mirna and one beer for Marta. $20 was paid by the

investigator to the bartender who asked for $26 instead, which the investigator paid. The bartender gave $20 to Marta and told her to give "Mirna her money" (RT 97-100).

Romero, Marta, Marlene, and Mirna solicited, or received money for the beers they caused to be ordered and they received. All received money paid to the bartender or within the knowledge of the bartender, then to them in the presence of the investigator(s).

Business and Professions Code §25657, subdivisions (a) and (b)[5]

Counts 7, 12, 17, 22, and 32 of the accusation set forth the ultimate facts and the (a) portion of the statute violated. The (a) portion of the statute states in pertinent part as follows:

> "... 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 the procuring or encouraging the purchase or sale of alcoholic beverages on such premises."

This portion of the statute appears to have been violated by the four women under the facts as set forth.

Counts 8, 13, 18, 23, and 33 of the accusation set forth the ultimate facts and the (b) portion of the statute violated. The (b) portion of the statute states in pertinent part as follows:

> " (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 a patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting."

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[5]The transactions for Romero are at RT 17, 19, 22, and 25; Marta at RT 76, 78, 95, 97, and 100; Marlene at RT 81 and 82; and Mirna at RT 99 and 100, in addition to other citations to the record set forth in this matter.

The (b) portion of the statute appears to have been violated by three of the four women (RT 34-52). Romero by implication of her performing waitress duties, should not come within the "loitering" intent of the statute. The other women were shown to have loitered.

Rule 143

The violations concerning the rule are set forth in counts 4 and 29 of the accusation. The rule states in pertinent part as follows:

> "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 drink is for, or intended for the consumption or use of any employee."

Both Romero and Mayra Oyuela were seen performing the duties of waitresses, and by reasonable inference, were employees (RT 67). Both solicited and accepted beers, all which come within the Rule.

ORDER

The decision of the Department is affirmed, except count 8 (that portion applicable in finding III) which is reversed, with the penalty affirmed.[6]

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

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[6]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.