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

AB-8068
File: 48-263968 Reg: 02053402

BUL YA SONG, INC., dba Extasis Caliente Nightclub
11316 Beach Boulevard, Stanton, CA 90680,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Timothy S. Thomas

Appeals Board Hearing: December 2, 2003
Los Angeles, CA

ISSUED JANUARY 20, 2004

Bul Ya Song, Inc., doing business as Extasis Caliente Nightclub (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license for various drink solicitation activities and drug sales on the premises, violations of Business and Professions Code sections 24200.5, subdivisions (a) and (b); 25657, subdivisions (a) and (b); rule 143 (4 Cal. Code Regs., § 143); and Health and Safety Code section 11352.

Appearances on appeal include appellant Bul Ya Song, Inc., appearing through its counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated November 27, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on September 20, 1991. Thereafter, the Department filed an accusation against appellant charging drink solicitation and drug sale violations on March 1, 16, and 22, and April 6, 2002.

At the administrative hearing on October 8, 2002, documentary evidence was received and testimony concerning the violations charged was presented by Department investigators Paul Camacho, Jeff Bishop, and Naureen Zaidi, and by appellant corporation's president, Larry Fees, who represented appellant at the hearing.

Camacho and Bishop, working undercover, went to appellant's premises on March 1 (Camacho only), March 16, March 22, and April 6, 2002. On those occasions the investigators bought beers for themselves for $3.25 or $3.75, depending on whether the beer was domestic or imported. On March 1, Camacho saw "Anna Maria"[2] cleaning tables, taking drink orders, and serving drinks to patrons. When Camacho could not get the attention of the bartender, he asked Anna Maria if she worked there. She replied that she did and took Camacho's order for beer. She brought the beer to the table and charged him $3.75. Camacho asked her to sit with him, and she said she would if he bought her a beer. He agreed, and she went to the bar, where she and the bartender conversed. The bartender got her a beer which she took with her when she returned to sit at Camacho's table. Anna Maria charged Camacho $10 for her beer. Camacho gave her a $10 bill and received no change. During their conversation, Anna Maria told Camacho that she had worked at the premises for about a year.

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[2]"Anna Maria," it was later discovered, was a male cross-dresser whose real name is Jose Ricardo Romero. We will refer to him using the female gender and include him when we refer collectively to the women who solicited.

Camacho asked Anna Maria if she knew where he could get $20 worth of cocaine. She told him she did not know specifically who sold cocaine there, but directed him to the men's bathroom to obtain some. Shortly thereafter, Camacho went to the men's room, where he purchased cocaine from two men there. He received a plastic bindle containing a white, powdery substance. At the police station later, Camacho tested the powder, and it tested positive for cocaine. The powder was later sent to a police laboratory, and the lab report showed the substance to be cocaine.

On March 16, Camacho and Bishop went into the premises where they saw a woman, who later identified herself as "Maria," cleaning tables, taking drink orders, and interacting with patrons. Shortly thereafter, they went outside near the front entrance, where a number of patrons were standing and smoking. Maria was there, moving among the patrons, and Camacho asked Maria if she knew where they could get $20 worth of cocaine. She said she did and instructed them to wait for her inside. When she came to their table later, she said she could get the cocaine for them. The investigators gave her $20, and she returned shortly with a bindle containing a white, powdery substance that later tested positive for cocaine. Maria then agreed to sit with Camacho if he would buy her a beer. He agreed, she went to the bar, got a beer from the bartender, came back to the table and charged Camacho $10 for her beer. During their conversation, she told Camacho that she worked as a waitress at the premises Thursday through Sunday, that she solicited beers to make extra money, and that she paid for the beer and got to keep the difference between the regular price of the beer and the $10 she charged for it.

On March 22, Camacho and Bishop returned to the premises, where "Leticia" asked if they would like to order beers. After they ordered, she asked if they would buy

beers for her and for another woman, Margarita. They agreed, and Leticia went to the bar, got four beers from the bartender, and brought them to the table. The investigators were charged $3.75 for each of their beers, and $10 each for the beers for Leticia and Margarita.

Camacho asked Leticia if she knew where he could get cocaine, and shortly thereafter she got up and brought a man to the table whom Leticia indicated would help them. The investigators went into the men's bathroom where they purchased a white, powdery substance from the man. The powder later tested positive for cocaine. Leticia solicited several more beers from Camacho and told him that she had worked there for a while and was allowed to sit with customers to make extra money soliciting beers. After buying her several beers, Camacho refused another request for beer, and Leticia left the table. She proceeded to clean off tables, take drink orders, and sit with other patrons.

Margarita sat at the table with Bishop, and after the investigators returned from buying the cocaine, Margarita asked Bishop to buy her a beer. He agreed, she went to the bar and got a beer from the bartender, and returned to the table. She asked Bishop for $10 for the beer, which he gave her. During their conversation, Bishop asked Margarita if she worked at the premises and she said she did. Later, she left the table and began clearing other tables and serving drinks to other customers.

On April 6, Camacho and Bishop went again to the premises. Leticia came to them and took their order for beers. She asked if they would buy one for her, and they agreed. She got the beers from the bartender, took them to the table, and charged $7.50 for the investigators' two beers and $10 for hers. Later, she asked for another beer, for which Camacho also paid $10.

After a while, Maria came to the table. She asked Camacho if he wanted to order a beer, and if he would buy one for her. He agreed, she got the beer from the bartender, and charged Camacho $10 for her beer. Bishop asked her how much a gram of cocaine would cost, and she told him $50. He gave her $50, and she returned shortly with a white, powdery substance in a plastic bindle, wrapped in a napkin. She later solicited another $10 beer before the investigation ended.

Subsequent to the hearing, the Department issued its decision which determined that the violations charged had been proven. Appellant filed a timely appeal making the following contentions: 1) The findings with regard to the drink solicitation charges were not supported by substantial evidence, and 2) there was no foundation for the findings on the narcotics charges.

DISCUSSION

I

Appellant contends the statements made by the women regarding their employment and solicitation activities were inadmissible hearsay and not sufficient to support the findings. It argues that, although no hearsay objection was made at the hearing, a blanket hearsay objection was timely made in appellant's petition to the Department for reconsideration, citing Government Code section 11513, subdivision (d) (section 11513(d)). That subdivision provides:

> 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. An objection is timely if made before submission of the case or on reconsideration.

The Department contends that a request for reconsideration does not preserve the objection. It asserts that the language of the statute saying that an objection may

be timely made "on reconsideration" means that reconsideration must be granted for the objection to be effective. Otherwise, the Department argues, the parties have no meaningful opportunity to argue the merits of the objection, and the ALJ is not able to rule on the objection.

The California Law Revision Commission (CLRC) Comment for Government Code section 11513 states, in pertinent part:

> Subdivision (d) of Section 11513 is intended to avoid or eliminate routine objections to administrative hearsay. If a proposed finding is supported only by hearsay evidence, a single objection at the conclusion of testimony, or *on petition for reconsideration* by the agency, is sufficient and timely. [Emphasis added.]

While the Department's argument has some initial appeal, we believe that the CLRC comment should be followed, both because of the authoritative nature of CLRC comments, and for policy reasons.

Generally, CLRC comments are accorded considerable weight:

> "Explanatory comments by a law revision commission are persuasive evidence of the intent of the Legislature in subsequently enacting its recommendations into law." (*Brian W. v. Superior Court* (1978) 20 Cal.3d 618, 623 [143 Cal.Rptr. 717, 574 P.2d 788].) "This is particularly true where the statute proposed by the commission is adopted by the Legislature without any change whatsoever and where the commission's comment is brief, because in such a situation there is ordinarily strong reason to believe that the legislators' votes were based in large measure upon the explanation of the commission proposing the bill." (*Van Arsdale v. Hollinger* (1968) 68 Cal.2d 245, 250 [66 Cal.Rptr. 20, 437 P.2d 508].)

(People v. Garfield (1985) 40 Cal. 3d 192, 199 [219 Cal. Rptr. 196].)

In the case of Government Code section 11513, the recommendation of the CLRC was adopted by the Legislature with only minor changes. Therefore, the CLRC comment is entitled to substantial weight.

Allowing the hearsay objection to be made and preserved in the petition for reconsideration also comports with the reality of administrative proceedings and with fairness. The reality is that many licensees, as in this case, appear at the administrative hearing without legal counsel, but obtain counsel after the Department issues its decision. This may be the first time in the proceeding that anyone on the licensee's behalf recognizes the implications and necessity of making a hearsay objection. Disallowing the hearsay objection unless reconsideration is granted puts the licensee's ability to preserve the objection wholly, and unfairly, in the hands of the Department. If reconsideration is denied and the licensee appeals, the petition for reconsideration is part of the record before this Board, and the parties then have a "meaningful opportunity" to argue the merits of the hearsay objection. We conclude that the hearsay objection may be preserved by raising it in a petition for reconsideration.

Appellant contends there is not substantial evidence to support the charges related to solicitation because only inadmissible hearsay evidence supports the findings of solicitation and of the solicitors' employment by appellant. However, substantial admissible evidence exists supporting the findings.

With respect to all four of the persons alleged to have solicited, appellant argues there is not evidence "other than [their] alleged request[s] for beer." Since the requests themselves constitute the violations, they are considered "operative facts," and not hearsay. (See Witkin, Cal. Evid. (4th ed.) Hearsay, §§ 31-34, and cases cited therein.)

The investigators testified that they saw each of the four solicitors performing duties commonly performed by waitresses. Normally, employees of a premises perform such duties. The four solicitors also told the investigators that they were employed at

the premises. The statements supplement or explain the actions the investigators observed. This is the classic role of what has been called "administrative hearsay" (Gov. Code, § 11513.)[3] The combination of the waitress-like activity with the statements that the solicitors were employed at the premises is sufficient to support a finding that the solicitors were employed by appellant.

Because the women were appellant's employees, their solicitation and acceptance of drinks from patrons is sufficient to sustain the counts charging violations of rule 143. However, appellant also argues that there is no admissible evidence that appellant employed or permitted the women to solicit drinks. We disagree.

The women stated they were paid for working at the premises; at least two of the four stated they were allowed to solicit for extra money; they sat openly with customers, at least as long as the customers bought beers for them; they charged $10 for beer otherwise priced, at most, $3.75; and they frequently, and openly, pocketed the change received after paying the bartender for their beer. Their statements are admissible administrative hearsay, explaining why they charged more for beer bought for them. In addition, their actions and statements clearly imply that the bartender, at a minimum, allowed them to solicit in the premises. Solicitation by these women appears to have been specifically allowed and to be an integral part of their employment as waitresses, leading to the reasonable inference that they were employed to solicit drinks as well as to work as waitresses. Even if appellant's principals did not know of the practice, which seems highly unlikely, the bartender did, and his knowledge is imputed to appellant.

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[3]Additionally, the statements may be an exception to the hearsay rule, called "verbal acts," which are statements accompanying, and explaining, the declarant's actions.

We conclude that substantial admissible evidence supports the findings and determinations regarding solicitation.

II

Appellant makes several contentions related to its assertion that the findings on the narcotics charges lacked foundation:

- Testimony that the white, powdery substance purchased by the investigators was cocaine lacked foundation since no criminologist testified as to the chemical composition of the substance.
- The testimony of the investigators that the substance was cocaine was inadmissible hearsay, and neither investigator was qualified as an expert witness.
- The sales of narcotics alleged in counts 7, 15, and 22 were the "personal conduct" of the women involved and there was no evidence that appellant had actual or constructive knowledge of the sales.

Appellant's first two contentions, challenging the findings that the substances purchased were cocaine, are groundless. At the conclusion of testimony, Fees, appellant's representative, stipulated that the powdery substance in the four packages purchased by the investigators were tested by the Orange County Sheriff's Forensic Science Services and the results were positive for cocaine. [RT 154-155.] There is no evidence that Fees failed to understand the stipulation or its implications, and the stipulation is not invalidated by Fees' status as a layman rather than an attorney.

Even if the sales of narcotics were the "personal conduct" of the women involved, the women were employees and their conduct is imputed to the licensee. A licensee is vicariously responsible for the unlawful on-premises acts of his employees. Such vicarious responsibility is well settled by case law. (*Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504, 514 [22 Cal.Rptr. 405]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 172, 180 [17

Cal.Rptr. 315]; and *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149, 153 [2 Cal.Rptr. 629].)

ORDER

The decision of the Department is affirmed.[4]

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

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[4]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.