

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

**AB-8073**

File: 40-298169 Reg: 02052346

JUAN MARIO SALAZAR dba Trophy Room  
14444-46 Titus Street, Panorama City, CA 91402,  
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Samuel D. Reyes

Appeals Board Hearing: April 8, 2004  
Los Angeles, CA

**ISSUED JUNE 9, 2004**

Juan Mario Salazar, doing business as Trophy Room (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which revoked his license for having employed persons to solicit the purchase of alcoholic beverages from patrons pursuant to a commission or percentage scheme, and permitted persons to loiter in the premises for the purpose of soliciting the purchase of alcoholic beverages from patrons, violations of Business and Professions Code section 24200.5, subdivision (b) and 25657, subdivisions (a) and (b).

Appearances on appeal include appellant Juan Mario Salazar, appearing through his counsel, Andreas Birgel, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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<sup>1</sup>The decision of the Department, dated December 19, 2002, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on September 7, 1993. Thereafter, the Department instituted an accusation against appellant charging unlawful drink solicitation. An administrative hearing was held on July 9, August 2, September 20, and November 1, 2002, at which time oral and documentary evidence was received

Subsequent to the hearing, the Department issued its decision which determined that the alleged solicitation of alcoholic beverage activities had occurred as alleged, and ordered appellant's license revoked.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant contends that there is insufficient evidence to support the decision, and that the penalty is excessive.

## DISCUSSION

## I

Appellant contends that there is insufficient evidence to show that appellant either knew of or permitted drink solicitation which, according to the testimony of Department investigators, took place a large number of times on March 23, 24, and 30, 2001. He singles out 10 of the administrative law judge's 49 findings of fact which, he contends, mandate the conclusion that he neither permitted nor knew of any drink solicitation, and promptly took action to eliminate such conduct in the future.

Appellant has not challenged any individual finding as unsupported by the evidence. Instead, he sets forth in his brief findings which, for the most part, simply recite what he or his employees said when they testified. They do not, as appellant

would have it, amount to findings sufficient to exonerate him. Appellant sets out the following findings in his brief, ostensibly to demonstrate his ignorance of the existence of solicitation activity:

Finding 5: On the dates of the undercover operation, respondent employed two bartenders, Miriam Fuentes (Fuentes) and Olivia Hernandez Ortiz (Ortiz), and two waitresses, Ana Julia Diaz (Diaz) and Alicia Vasquez (Vasquez). Ortiz and Diaz are long-term employees who work the bulk of the hours the business is open to the public. He employed security guards on Friday, Saturday and Sunday evenings; the guards were primarily deployed at the front door to the establishment.

Finding 30: The establishment was relatively busy all three evenings. Excluding the bartenders and the waitress, at least 35 individuals were in attendance each night. Usually, the two pool tables were in use and the jukebox was in play.

Finding 31: *Respondent was present in the Trophy Room all three nights the investigators were present. As was typical for him, he spent time in the various areas of the business. His tasks took him to his office and the stock room, but he was able to walk through the premises and visit with patrons.*<sup>2</sup> Respondent denied knowledge of any solicitation of alcoholic beverages, as did Ortiz and Diaz. He further denied employing Gonzalez, Lopez, Lopez's sister, Mely, or any other woman, for the purpose of solicitation of the purchase of alcoholic beverages or under any scheme or compensation plan involving the solicitation of said beverages.

Finding 32: Respondent has seen Gonzalez, Lopez, and Mely in the licensed premises, but testified they were there as patrons. Gonzalez worked at the establishment as a bartender and waitress for three to five months about 7 or 8 years before.

Finding 33: Respondent testified he informed his employees after March 30, 2001 that neither Lopez nor Gonzalez were welcome in the establishment. Except for Gonzalez on one occasion in December 2001, he has not seen them in the business since March 30, 2001; on the one occasion he saw Gonzalez, respondent asked her to leave.

Finding 34: Respondent testified Fuentes worked for him for approximately three

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<sup>2</sup> Appellant omitted the italicized sentences from the quoted finding in his brief.

weeks, including the two weekends the investigators were at the establishment. She represented herself as an experienced bartender. She knew Lopez and he observed the two of them talking at times. He stated he terminated Fuentes after receiving complaints from customers about receiving incorrect change.

Finding 35. Respondent testified it was not unusual for female customers to approach the fixed bar to purchase beer for their table companions; Ortiz, Diaz, and Vasquez echoed this testimony. Vasquez further testified, however, that it was normal for the women to keep some of the change, as a tip, before giving change to the male patrons that had paid for the beer.

Finding 36. Respondent also testified that he has instructed his employees that solicitation of alcoholic beverages is not permitted. He has posted signs announcing that solicitation was prohibited. Since the March 2001 investigation he has asked the security guards to watch for solicitation activity.

Finding 37. Ortiz testified respondent had explained to her that solicitation of the purchase of alcoholic beverages was not allowed. Ortiz has worked for respondent for approximately nine years and was aware of the two disciplinary actions involving solicitation of alcoholic beverages. Respondent's instructions followed the first violation.

Finding 38. Respondent has obtained the assistance of his father to remain at the business to watch for solicitation of alcoholic beverages. Respondent now rarely visits the licensed premises.

Appellant omits any discussion of those findings which implicate his bartenders in the acts of solicitation (e.g., Findings 7, 9, 11, 14, 18, 20, 21, 24). The record is voluminous, and our review of the transcript satisfies us that there is ample evidence a compensation scheme of solicitation involving the three women was conducted in the immediate presence of the bartender. The evidence showed that the women openly separated the change when the drinks were purchased, placing a portion of it in their clothing and returning the balance to the investigators. Findings 44 and 45 elaborate on the nature of the solicitation:

Finding 44: On several occasions, bartenders Fuentes and Ortiz observed Gonzales, Lopez, and Mely keep change intended for patrons. This fact

establishes knowledge and approval of the payment scheme by both bartenders. Mely's statement to Fuentes, set forth in factual finding 14, inquiring if there was enough money for the beers and for Mely's share, further demonstrates the existence of the payment scheme and Fuentes' awareness of it. Fuentes' knowledge and involvement was further shown by her payment of \$5 to Mely at the fixed bar concurrent with her return of \$10 change to investigator Robles, as set forth in factual finding number 10.

Finding 45: In the existing circumstances, which include multiple solicitations, activities that made Gonzalez, Lopez, and Mely conspicuous and look like employees, payment of \$5 per alcoholic beverage solicited, rapid consumption of said beverages,<sup>3</sup> and knowledge by the bartenders of the conduct and payment scheme, complainant has established that respondent employed Gonzalez, Lopez, and Mely to solicit, procure, and encourage others to buy them drinks in the licensed premises under a commission plan or scheme.

The conduct of appellant's bartenders is imputed to him. 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].)

Moreover, the ALJ concluded that appellant knew of Gonzalez', Lopez' and Mely's activities because of "his presence at the licensed facility and the open, pervasive and conspicuous nature of the women's activities." (Finding 46.)

Appellant's selective reliance on findings which, for the most part, simply recite appellant's self-serving testimony, is misplaced, and does not refute the strong evidence, both direct and circumstantial, of constructive knowledge of persistent drink

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<sup>3</sup> During the March 24 visit, Lopez consumed four beers during the 45 minutes she was at the table of the investigators. Her sister, Mely, consumed two in half the time. (Finding 22.)

solicitation.

## II

Appellant contends that the penalty of revocation is excessive.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (*Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The premises has a history of solicitation activity. (See Finding 3.) Appellant's license was suspended for 30 days, 10 of which were stayed, effective March 27, 1997, for, among other things, employing or knowingly permitting individuals to loiter for the purpose of soliciting the purchase of alcoholic beverages. The license was revoked by an order dated October 1, 1998, again for solicitation conduct violative of Business and Professions Code sections 24200.5, subdivision (b), 25657, subdivisions (a) and (b), Penal Code section 303, and Department Rule 143 (4 Cal. Code Regs., §143). The order of revocation was conditionally stayed for three years. The activity which gave rise to the present case occurred during the period of the stay.

Thus, appellant was clearly on notice of the problem, and the steps he took to correct it were too little and too late. The order of revocation was well within the discretion of the Department. We cannot say the Department acted unreasonably or abused its discretion under the law.

ORDER

The decision of the Department is affirmed.<sup>4</sup>

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

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<sup>4</sup> 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.