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

**AB-8495**
File: 48-359046 Reg: 05059364

MARIA ELISA LOPEZ and MANUEL KENNETH LOPEZ, dba Las Potrillas Bar
16013 Amar Road, Valinda, CA 91744,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria
Appeals Board Hearing: September 7, 2006
Los Angeles, CA

**ISSUED JANUARY 16, 2007**

Maria Elisa Lopez and Manuel Kenneth Lopez, doing business as Las Potrillas Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for permitting drink solicitation activities in violation of Business and Professions Code[2] section 24200.5, subdivision (b), and suspended the license for 10 days for substituting one brand of beer for another in violation of section 25614.

Appearances on appeal include appellants Maria Elisa Lopez and Manuel Kenneth Lopez, appearing through their counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

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[1]The decision of the Department, dated November 3, 2005, is set forth in the appendix.

[2]Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on October 28, 1999. On April 14, 2005, the Department filed an accusation charging appellants with violations of various statutes prohibiting drink solicitations (Bus. & Prof. Code, §§ 24200.5, subd. (b); 25657, subds. (a) & (b); 4 Cal. Code Regs., § 143) on January 22, January 25, and February 5, 2005 (counts 1-10), and substituting one brand of beer for another (Bus. & Prof. Code, § 25614) on February 5, 2005 (count 11).

At the administrative hearing held on September 9, 2005, documentary evidence was received and testimony concerning the violation charged was presented by Department investigators Enrique Alcala and Anthony Poesada. Co-licensee Manuel Lopez also testified.

Investigator Alcala went to appellants' premises on January 22, 2005, ordered a Bud Light beer from the bartender, paid $3.50 for the beer, and went to sit at one of the tables about 25 feet from the bar counter. Maria Flores, sitting at an adjacent table with another woman named Gabby, began talking with Alcala and asked him if he would buy beer for the two women. Alcala asked how much it would cost and Maria told him it would be $20. When Alcala agreed to buy the beer, Maria went to the bar and brought back two Bud Light beers, giving one to Gabby and keeping the other for herself. Alcala gave Maria a $20 bill. During their conversation with Alcala, both Maria and Gabby told him that they worked at the premises.

Maria later asked Alcala if he would buy more beer for Gabby and her. When Alcala agreed, Maria went to the bar counter where the bartender, Martina Flores, filled two mugs from a tap labeled Bud Light. Maria brought the beers back to the table and Alcala gave her a $20 bill. She took the money to the bar counter and gave it to

Martina, who then handed Maria something. Alcala could not see what Martina handed to Maria.

When Maria asked Alcala to buy her a third beer, he again agreed. Maria went to the bar counter, where Martina filled Maria's mug from the Bud Light tap. Maria paid Martina with money Alcala had given her, and Martina gave Maria what appeared to be a coin from the cash register.

On January 25, 2005, Alcala returned to the premises, where he was greeted at the bar counter by Maria, who was bartending that night. Alcala sat at the bar and ordered a Bud Light beer, for which Maria charged him $4. Maria asked Alcala if he would buy her a beer. He agreed to buy the beer for her and she filled a mug for herself from one of the taps. Alcala gave Maria a $20 bill and received $10 in change. When Alcala ordered another beer from Maria, she asked if he would buy her another one, and he agreed. Maria served him a Bud Light beer and refilled her mug from a beer tap. Alcala gave Maria a $20 bill and she gave him $6 in change.

Alcala went once more to the premises, on February 5, 2005. He ordered a beer from Martina, who was bartending that night, and she charged him $3.50. Alcala sat at a table with his beer, and shortly thereafter Maria came in and sat at his table. She asked him to buy her a beer, he agreed, and Maria went to the bar counter. Martina filled a mug for Maria from a tap labeled "O'Doul's." Maria gave Martina the $20 bill given her by Alcala. Martina returned bills to her in change and also gave her something small that looked like a coin. When Maria returned to the table, she gave Alcala $10 in change. Maria asked Alcala to buy her a second beer, and again received from Martina both change and what appeared to be a coin. Later, Maria solicited a third beer from Alcala.

On each of the three nights Maria solicited Alcala for beer, co-licensee Maria Lopez was present in the premises and walked by Alcala's table.

When Maria was questioned later, she told Alcala that she worked at the premises soliciting drinks from patrons on the weekends, charging $3.50 for a patron's beer and $10 for beer they bought for her. She also told Alcala she was given a token, in the form of a multicolored painted penny, for each drink she solicited. She gave him two such tokens, taken from her purse, that she said had been given to her by Martina, the bartender.[3]

During the subsequent inspection of the premises on February 5, 2005, several multicolored pennies were discovered in the cash register drawer and more were found in a metal box in an open desk drawer in the office. Photographs of the multicolored pennies and the locations of their discovery were admitted into evidence. (Ex. 3-B, 3-C, 3-E, 3-F, 3-G.)

Exhibit 2 documents appellants' previous stipulation to 21 counts of drink solicitation violations that occurred in October and November 2001. For those violations, the license was revoked, but revocation was stayed for three years, during which time the stay could be vacated and the license revoked if cause for disciplinary action occurred. The violations alleged in the present case occurred during the stayed revocation period.

Subsequent to the hearing, the Department issued its decision which determined that counts 2, 3, 4, 6, 7, 9, and 10 of the accusation were not proved, but the violations of section 24200.5, subdivision (b), alleged in counts 1, 5, and 8 were proved, as was

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[3]The two multicolored pennies retrieved from Maria's purse were admitted into evidence as exhibit 5.

the violation of section 25614 alleged in count 11. Appellants filed an appeal contending the evidence does not support the findings, the administrative law judge (ALJ) made improper evidentiary rulings, and it was not proper to impute knowledge of any violations to the licensees in this instance.

DISCUSSION

I

Appellants contend the finding that Maria Flores solicited drinks is not supported by substantial evidence since the only evidence of solicitation consists of inadmissible hearsay which is not sufficient by itself to support a finding. They also argue there was not substantial evidence to support the finding of a profit-sharing scheme, one of the necessary elements to establish a violation of section 24200.5, subdivision (b).[4]

Appellants' first contention may be answered swiftly. Since the requests themselves constitute the violations, they are considered "operative facts," and not hearsay. (See 1 Witkin, Cal. Evidence (4th ed. 1997) Hearsay, §§ 31-34, and cases cited therein.)

We approach appellants' second contention mindful of the principles of appellate review that guide our analysis. "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269

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[4]Section 24200.5, subdivision (b), provides for license revocation 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.

Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113, 465 P.2d 1].)

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends [Inc. v. Alcoholic Beverage Control Appeals Board* (2002)] 100 Cal.App.4th [1250,] 1254 [[122 Cal.Rptr.2d 914]]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

The finding with regard to the existence of a scheme is found in section V, paragraph B, of the Department's decision:

> The evidence also established that there was a scheme in place at the premises whereby female employees and/or female patrons solicited male patrons to buy drinks for them. A male patron was charged either three dollars and fifty cents or four dollars when he purchased a Bud Light beer for himself. However, he was charged ten dollars for the same or similar beer when the patron purchased a beer for the females. Additionally, the evidence established that the females were given a token consisting of a multicolored penny by the bartender when a drink was

> solicited. Two such multicolored pennies were retrieved from the purse of Maria Flores on February 5, 2005 and similar multicolored pennies were found in the premises case register and in a desk drawer in the premises office.

Appellant points out that Alcala did not actually see the tokens given to Maria and there was no evidence presented that the tokens were redeemed by Maria for money. These deficiencies, however, do not mean that the finding of a commission or profit-sharing scheme is unsupported by substantial evidence. The tokens in Maria's purse and those in the cash register and desk drawer were deemed "significant" by investigator Poesada because, based on his experience conducting between 50 and 100 "B-girl" investigations, "frequently tickets and/or tokens are kept by the management of the bar in order to keep count of how many beverages the solicitors solicited that night." [RT 113.] Based on this evidence, the ALJ made reasonable inferences that resulted in the finding of a profit-sharing or commission scheme.

II

Appellants contend that the ALJ erred in allowing the Department to recall investigator Alcala after the Department had rested its case. This was compounded, they assert, by permitting the investigator to testify about the two coins in exhibit 5 even though the investigator had been present during the discussions of counsel and the ALJ about the evidentiary problems connected with this exhibit.

This contention arose from the ALJ sustaining appellants' objection to admission of exhibit 5 (consisting of the two coins Alcala had retrieved from Maria's purse) into evidence at the conclusion of the Department's case. Appellants objected to admission because the Department had not shown the chain of custody for the exhibit. The ALJ sustained the objection, saying "Exhibit 5 will not be admitted based on the testimony that I have."

He then asked counsel for the Department whether he wished to rest his case or to present any additional evidence. Counsel responded, "I rest but I would like the opportunity to cross-examine the licensee," by which he meant co-licensee Maria Lopez. However, when it became apparent that Maria Lopez was not available, the ALJ again gave the Department the option to rest or to present additional evidence.

The Department then recalled investigator Alcala, who testified, over appellants' objection, regarding the chain of custody. At the conclusion of Alcala's additional testimony, including cross-examination by appellants, the ALJ again heard appellants' objections to admission of the exhibit, but overruled them and admitted exhibit 5 into evidence.

Appellants' position appears to be that the Department was not entitled to present the evidence of chain of custody because the ALJ had already ruled that the exhibit was not admissible and the Department had rested its case. Appellants admitted at the hearing that they knew of no authority for their position, and they state no authority for their position on appeal.

Appellants appear to contest the procedure rather than the admission of the evidence, but in either case, we can see no basis for reversal. Even if we were to conclude it was error to allow the testimony or to admit the evidence, appellants have not shown that they were prejudiced in any way.

Even if the two coins had not been admitted into evidence, the record would still contain the testimony of Alcala and Poesada about Maria's receipt of something like a coin from the bartender, the marked coins in Maria's purse, the similarly marked coins in the cash register and desk, the significance of the tokens, and the photographs of the marked coins where they were found. That, in combination with the huge disparity in

price between the drinks for Alcala and those for Maria, supplemented by the information Maria gave Alcala during questioning, is surely sufficient to support the finding that there was a profit-sharing scheme.

III

Appellants contend it was erroneous to hold that, because they were aware that similar violations had occurred before, they permitted the violations in this case. They contend that knowledge is not properly imputed to a licensee where there is no evidence of a profit-sharing scheme.

Obviously, the stated basis for this contention is erroneous. There *was* evidence of a profit-sharing scheme and knowledge of the violations was properly imputed to appellants, since they were on notice that such violations had occurred before.

ORDER

The decision of the Department is affirmed.[5]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5]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.