

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

AB-8809

File: 40-424467 Reg: 07064666

JACUALITO LOPEZ, INC., dba Mi Jacualito Restaurant
10685 San Fernando Road, Pacoima, CA 91331,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 4, 2008
Los Angeles, CA

ISSUED JUNE 1, 2009

Jacualito Lopez, Inc., doing business as Mi Jacualito Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked its license, with revocation stayed for a probationary period of one year, and suspended its license for 30 days, for knowingly permitting Imelda Perez² to loiter in the premises for the purpose of soliciting patrons to buy alcoholic beverages for her, a violation of Business and Professions Code³ section 25657, subdivision (b).

¹The decision of the Department, dated January 18, 2008, is set forth in the appendix.

²Although the decision spells her name "Ilmelda" other documents in the record indicate her name is properly spelled "Imelda," which is the spelling we use.

³Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

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

FACTS AND PROCEDURAL HISTORY

On December 1, 2006, the Department instituted an accusation against appellant charging violations of sections 24200.5, subdivision (b), and 25657, subdivision (b), both of which involve drink solicitation activities.

At the administrative hearing held on October 31, 2007, documentary evidence was received and testimony concerning the violations charged was presented by Francisco Alferez, a police officer for the City of Los Angeles.

Alferez went to the licensed premises with another officer on September 7, 2006. Both officers were working undercover. An employee later identified as Eva Montes took their order for two beers and brought them to the table. Alferez apparently also bought a beer for Montes, although she did not solicit him for it. Alferez did not pay for the beers when they were brought to the officers, but a "tab" was kept that he would pay when he was ready to leave.

At some point, Alferez spoke to a woman near their table who was later identified as Imelda Perez. She asked if they wanted more beer and when Alferez told her they did, she went the beer cooler near the cash register and got two beers. She brought them back to the table and asked Alferez if he would buy her a beer. When he agreed to do so, she went back to the cooler and took out a beer for herself. Before she returned to the table with her beer, Alferez saw Perez talking with Montes and pointing in the direction of the officers' table. Perez then returned to the table, asked Alferez to open her beer, which he did, and she drank some of the beer.

Alferez conversed with Perez, asking her how long she had worked at the premises. She told him she had worked there for three years. She also told him she got \$5 for each beer purchased for her.

Cecilio Lopez, the manager of the licensed premises, was present during the period Alferez was in the premises. Alferez stated that Lopez, whom he recognized from previous visits to the premises, remained around the register area of the restaurant, in a position to observe what was going on in the premises. Lopez was near the cooler where Perez obtained the beer and Alferez saw Lopez speak to Montes.

When Alferez told Perez that he had to leave, Perez waved to Montes, who came to the table and gave Alferez a receipt. It showed six beers at \$5.50 each, for a printed total of \$33. In handwriting was written \$38.00 with a circle around it. Alferez asked Perez, "\$33 and \$5 for you?" and Perez said, "Yes." Alferez gave Montes a \$50 bill which she took to the cash register to ring up. When she returned, she gave Alferez \$12 in change and handed \$5 to Perez. The officers left the premises, notified the backup officers of the solicitation, and those officers went in and completed the enforcement action.

Subsequent to the hearing, the Department issued its decision which determined that count 1, charging a violation of section 25657, subdivision (b), was proved. It also determined that there was insufficient evidence to establish a violation of section 24500, subdivision (b), as charged in count 2, and that count was dismissed. The penalty of revocation stayed for one year, with a 30-day suspension, as recommended by the Department at the hearing, was imposed. Appellant filed a timely appeal contending the finding that section 25657, subdivision (b), was violated is not supported by substantial evidence.

DISCUSSION

Appellant contends "[t]here was not substantial evidence that the licensee hired Perez to loiter in the premises for the purpose of soliciting drinks in violation of Section 25657(b)."

Section 25657, subdivision (b), provides:

It is unlawful: ¶ . . . ¶ (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 any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting.

"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 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].)

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, supra*, 100 Cal.App.4th at p. 1254; *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].)

Appellant appears to misread the statute. It is not necessary to show that appellant *employed* Perez to loiter in the premises in order to solicit patrons to buy drinks for her; the statute also prohibits a licensee from knowingly permitting a person to do so.

The administrative law judge stated, in Determination of Issues 1:

Count 1 of the accusation alleging a violation of Business & Professions Code Section 25657(b) was established. Although the evidence did not show Ilmelda [*sic*] Perez to be a stranger to the premises neither did it show she was employed as a waitress. The evidence supports the proposition that the licensee through waitress Montes knowingly permitted Perez to loiter in the premises for the purpose of soliciting patrons to buy her alcoholic beverages.

On this record, we cannot say the finding that Perez was knowingly permitted to loiter in order to solicit drinks was unreasonable or an abuse of discretion.

ORDER

The decision of the Department is affirmed.⁴

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
ALCOHOLIC BEVERAGE CONTROL

⁴This 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.

APPEALS BOARD