ISSUED MARCH 30, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

FRANCISCO and REFUGIO RAMOS dba Mi Tenampa 9765 Laurel Canyon Blvd. Pacoima, CA 91331, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-7327 File: 42-280089 Reg: 98044027 Administrative Law Judge at the Dept. Hearing: Arnold Greenberg Date and Place of the Appeals Board Hearing: February 3, 2000 Los Angeles, CA

Francisco and Refugio Ramos, doing business as Mi Tenampa (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for permitting a person to loiter in the premises for the purpose of soliciting patrons to buy alcoholic beverages for her, and for permitting a person under the age of 21 to enter and remain on the premises, both being contrary to the universal and generic public welfare and morals provisions of the

[1]The decision of the Department, dated December 17, 1998, is set forth in the appendix.

California Constitution, article XX, §22, arising from violations of Business and Professions Code §§25657, subdivision (b), and 25665.

Appearances on appeal include appellant Francisco and Refugio Ramos, appearing through their counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public premises license was issued on February 4, 1993. Thereafter, the Department instituted an accusation against appellants charging that appellants' employees sold or furnished an alcoholic beverage to an obviously intoxicated patron, in violation of §26502, subdivision (a) (Count 1); employed or knowingly permitted Concepcion Hernandez ("Hernandez") and another person to loiter in the premises for the purpose of soliciting alcoholic beverages, in violation of §25657, subdivision (b) (Counts 2 and 3); appellant Francisco Ramos permitted a person under the age of 21 to enter and remain in the premises, in violation of §25665, and to consume an alcoholic beverage, in violation of §25658, subdivision (b) (Counts 4 and 5).

An administrative hearing was held on October 16, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the above charges by Moises Martinez (the under-age person named in Counts 4 and 5; hereinafter "Martinez") and by Guadalupe Ruiz, a Los Angeles Police Department officer.

Subsequent to the hearing, the Department issued its decision determining that Counts 1, 3, and 5 should be dismissed, and Counts 2 and 4 were proven.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) as to Count 4, there was no substantial evidence to prove the minor's true age, and (2) as to Count 2, there was not substantial evidence to support the finding that Hernandez had been employed to loiter in the premises for the purpose of solicitation.

DISCUSSION

I

Appellants contend that the true age of Martinez is not known and was not proven by the birth document that Martinez had at the hearing. They also point out that the ALJ, in Finding IV stated: "Mr. Martinez appears to be over age 21 in that he is short, stocky, dark complexioned, and balding."

Exhibit A is a copy of a document in Spanish that was translated by the court interpreter. The translation is Exhibit B. The document translated is a copy of the registration of the birth of Moises Martinez Trujillo, made by his mother, Ofelia Trujillo, on January 22, 1979, before the official in charge of the Civil Register in Union de San Antonio, Jalisco, Mexico. Ofelia Trujillo stated that Moises Martinez Trujillo was born to her and her husband, Leocadio Martínez, on September 4, 1977, at home, in Union de San Antonio.

The document and its translation were introduced into evidence by counsel for appellant "for the limited purpose of impeachment as to the correct age, but not as to anything else" [RT 82].

Martinez testified that he was born on September 4, 1977, and was 20 years old on the date he was in appellants' premises. Martinez admitted that the

only way he knew he was born on September 4, 1977, was because his mother told him that. [RT 26.]

Appellants' argument is totally unfounded. "A person's age may be proved by his own testimony, and the fact that knowledge of that age is derived from statements of the parents, or from family reputation, does not render it inadmissible." (California v. Ratz (1896) 115 Cal. 132, 133 [46 P. 915, 915-916], overruled on other grounds, California v. Hernandez (1964) 61 Cal.2d 529 [393 P.2d 673, 39 Cal.Rptr. 361]; California v. Lew (1947) 78 Cal.App. 2d 175, 179 [177 P.2d 60].)

The testimony of Martinez was enough to prove his age, and the document, even if hearsay, merely explains his testimony, and was not necessary for the finding.

II

Appellants contend there was no evidence of employment, of loitering, of appellants or their bartender hearing Hernandez solicit a beer, or of any money or commission being paid to Hernandez. They also argue that the decision should be reversed because the ALJ found that they had *employed* Hernandez to loiter for the purpose of soliciting, and "employment" and "loitering" are mutually exclusive concepts.

Finding XIII states:

> "[T]here is clear and convincing evidence that [appellants] employed and knowingly permitted . . . Hernandez to loiter in the premises for the purpose of begging and soliciting patrons to purchase alcoholic beverages for her. The beer was ordered from [appellants'] female bartender who requested a

> $5.50 premium for the beer served Ms. Hernandez. Accordingly, [appellants] have violated Code Section 25657(b) of the Business and Professions Code."

Business and Professions Code §25657, subdivision (b), makes it unlawful

> "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 beverage for the one begging or soliciting."

In Garcia v. Munro (1958) 161 Cal.App. 2d 425 [326 P.2d 894], "Jennie" was employed as a bartender or waitress by the licensee and drank with, and solicited drinks from, patrons of the premises. The licensee was charged with violations of Business and Professions Code §25657, subdivision (b), and the question was whether Jennie was employed to loiter to solicit drinks. The court concluded that, although Jennie "talked with patrons, spent some time with them and solicited some patrons to buy her drinks," that was not sufficient to "support a finding that she was employed to "loiter" on the premises to solicit drinks." This conclusion was based on the lack of "evidence that she lingered idly by or was loafing on the job." (Garcia v. Munro, supra, 326 P.2d at 897.)

Notably, however, Garcia makes it clear that "employment" and "loitering" are not necessarily mutually exclusive as appellants contend. "This section [25657, subdivision (b)] was primarily aimed at preventing licensees from hiring persons to loiter on the licensed premises for the purpose of soliciting drinks."

Garcia demonstrates that persons who are employed as bartenders or waitresses, as long as they are working at their legitimate jobs and not loitering, do not violate §25657, subdivision (b), even if they solicit while performing their jobs. It is in this sense that "employment" and "loitering" are mutually exclusive.

However, persons who do not tend bar or wait on tables may nonetheless be employed to loiter and solicit. If a person soliciting drinks has no other obvious duties in the premises and is found to be compensated by the licensee or his employees, that person is considered employed to loiter for the purpose of solicitation.

In the present appeal, Hernandez admittedly solicited drinks. She had no other apparent business or duties in the premises, so she may reasonably be considered to be loitering. The bartender charged the officer a $5.50 premium for the beer he purchased for Hernandez, so it is reasonable to consider that the bartender knew about the solicitation. Hernandez explained to the officer that this premium was attributable to her providing him with company. It is reasonable to infer that Hernandez would be paid some or all of the premium by the bartender. Therefore, Hernandez may be considered to be employed by the licensees or their bartender to loiter and solicit.

In addition, since the bartender clearly knew of the solicitation, the bartender knowingly permitted the solicitation. This knowing permission is imputed to the licensees.

There is clearly substantial, unrefuted evidence to prove employment, knowing permission, and loitering. Proof of *either* employment *or* knowing permission is sufficient to show a violation of §25657, subdivision (b). The ALJ's finding that *both* occurred does not make the finding erroneous.

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[2]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.