

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

FELISNANDO MONARREZ and	)	AB-6535
MARIA G. MONARREZ)	
dba Paso del Norte	)	File: 40-291332
4164 Cesar E. Chavez Avenue	)	Reg: 94031367
Los Angeles, CA 90063)	
Licensees/Appellants,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Robert A. Neher
)	
THE DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	April 3, 1996
	)	Los Angeles, CA

Felisnando Monarrez and Maria G. Monarrez, doing business as Paso del Norte (appellants), appealed from a decision of the Department of Alcoholic Beverage Control¹ which conditionally revoked appellants' on-sale beer license for appellants' agent selling a controlled substance while within the premises, being contrary to the general public welfare and morals provisions of the California Constitution, Article XX, §22, Health and Safety Code §11351, and Business and Professions Code §24200(a).

Appearances on appeal included appellants Felisnando Monarrez and Maria Monarrez, appearing through their counsel, Jack D. Janofsky; and the Department of

¹The decision of the department dated May 11, 1995 is set forth in the appendix.

Alcoholic Beverage Control, appearing through its counsel, John P. McCarthy.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on January 11, 1994. Thereafter, the department instituted an accusation against appellants on November 8, 1994, alleging a violation of the Health and Safety Code.

An administrative hearing was held on April 14, 1995, at which time oral and documentary evidence was received. At that hearing, it was determined that the son-in-law of the bartender was, at the time of the sale, behind the bar and acting as an agent of appellants.

Subsequent to the hearing, the department issued its decision which conditionally revoked the license, stayed execution of the penalty for two years, and ordered an actual suspension of 30 days. Appellants thereafter filed a timely notice of appeal.

In their appeal, appellants raised the issue that the crucial findings were not supported by substantial evidence.

DISCUSSION

It is the department which is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals.

The scope of the appeals board's review is limited by the California Constitution,

by statute, and by case law. In reviewing a department's decision, the appeals board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the department are supported by substantial evidence in light of the whole record, and whether the department's decision is supported by the findings.²

The term "substantial evidence" is defined as relevant evidence which reasonable minds would accept as a reasonable support for a conclusion (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477, 95 L.Ed. 456, 71 S.Ct. 456, and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871, 269 Cal.Rptr. 647). When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the appeals board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874, 197 Cal.Rptr. 925). Appellate review does not "...resolve conflict[s] in the evidence, or between inferences reasonably deducible from the evidence..." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678, 13 Cal.Rptr. 658).

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Appellants contended that the crucial findings were not supported by substantial evidence.

²The California Constitution, Article XX, Section 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 84 Cal.Rptr. 113.

On July 13, 1994, at about 9 p.m., two uniformed police officers entered the unlocked rear door of the premises and observed two patrons drinking from beer cans and playing a game of pool. They also observed a person, later identified as Eugenio Reyes, the brother-in-law of appellants' bartender, behind the long bar, estimated to be 20 to 25 feet in length, and located in an adjoining room. The bartender, later identified as Pablo Vasquez, was one of the "patrons" playing pool [R.T. 7-10, 38-39]. The officers observed a patron on the customer side of the bar across from Reyes. There was an exchange of money and Reyes was seen shaking a bindle from a beer can into the hand of the patron [R.T. 9, 19]. Upon seeing the officers enter the premises, the patron who received the bindle fled from the premises out the unlocked front door. The two patrons at the pool table also fled out the rear door [R.T. 29, 31-32]. Reyes tried to hide the can which contained 14 wrapped bindles of cocaine and was subsequently arrested. Reyes apparently was concerned about the premises and asked the officers to lock the premises, with Reyes providing a key to do so [R.T. 10, 17-18, 25-26, 28].

Co-appellant Felisnando Monarrez testified that he had never met Reyes, who was not an employee or had not worked at the premises [R.T. 36-37]. Felisnando also testified that Reyes was at the premises that evening to take Vasquez to the airport [R.T. 40]. Additionally, appellants argued that the premises was open only on Thursday through Sunday, but the incident occurred on a Wednesday [finding IV]. Apparently, on the day of the violation, Felisnando left early and Vasquez, who was in charge, was to close the premises [R.T. 38, 40].

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Appellant's counsel raised the argument that Vasquez's status as the bartender was proven only by objectionable hearsay. However, Felisnando testified that "...Mr. Vasquez, my bartender, told me...." [R.T. 39].

When all the persons in the premises fled (which included Vasquez, the bartender), the only persons left were the police officers and Reyes, who provided a key to the police officers in order that the premises could be locked.

A licensee is vicariously responsible for the unlawful on-premises acts of its agents and employees. Such vicarious responsibility is well settled by case law (Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172, 17 Cal.Rptr. 315, 320; Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504, 22 Cal.Rptr. 405, 411; and Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149, 2 Cal.Rptr. 629, 633.

Vasquez, appellants' bartender, was an employee and Reyes provided the key to lock the premises, thereby creating an inference of agency, either by appellants to Reyes or by Vasquez to Reyes.

In accordance with Civil Code §§2232 and 2299, an agency is created only by the express authorization of the principal. Notwithstanding the code sections, Civil Code §2298 states: "An agency is either actual or ostensible." Civil Code §2300 defines "ostensible" agency: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him."

As the record shows, the premises was open in front and rear, and the bartender was present playing pool, with his son-in-law behind the bar negotiating a criminal act. We determine appellants cannot claim that there was no agency intended by them. Appellants allowed their bartender to close the premises on the date of the violation, and turned apparent responsibility over to their bartender. Felisnando had been at the premises but had left early. Reyes had possession of the key to the premises and turned over that key to ensure that the premises was locked before Reyes was taken away by the police officers. Such misplaced trust in their bartender cannot shield appellants from some sanction for the negligent act of the bartender in trusting Reyes with the key to the premises.

CONCLUSION

The decision of the department is affirmed.³

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.