ISSUED OCTOBER 3, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

PABLO CERVANTES PEREZ dba New Hollyway 1616 West Sunset Boulevard Los Angeles, CA 90026, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-6796 File: 48-306730 Reg: 96036613 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: August 6, 1997 Los Angeles, CA

Pablo Cervantes Perez, doing business as New Hollyway (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered his on-sale general license suspended for 20 days, with 10 days thereof stayed for a probationary period of one year, for (1) his agent having sold alcoholic beverages (beer) between the hours of 2:00 a.m. and 6:00 a.m.; and (2) having violated conditions on his license by failing to have the rear entrance sufficiently illuminated and leaving the

[1] The decision of the Department dated December 26, 1996, is set forth in the appendix.

rear door to the premises open while the premises were open, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§25631 and 23804.

Appearances on appeal include appellant Pablo Cervantes Perez, appearing through his counsel, Armando H. Chavira; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general license was issued on May 25, 1995. Thereafter, the Department instituted an accusation alleging that, on August 9, 1995, between the hours of 2:00 a.m. and 6:00 a.m., appellant, acting through an agent, servant or employee, sold alcoholic beverages (beer) to a police officer, in violation of Business and Professions Code §25631, and violated a condition on his license by failing to sufficiently illuminate the rear entrance to the premises,[2] and further alleging that, on December 7, 1995, appellant allowed the rear door of the premises to remain open while the premises were open and operating, also in violation of a condition on his license.[3]

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[2] Condition 6 of the license states: "The rear entrance of the premises shall be equipped with sufficient power to illuminate and make easily discernible the appearance and conduct of all persons entering or exiting the location."

[3] Condition 4 of the license states: "All doors shall be kept closed at all times during the operation of the premises except in the case of emergency, to permit deliveries and for normal passage of patrons when gaining admittance or

An administrative hearing was held on November 18, 1996, at which time oral and documentary evidence was received. At that hearing, Los Angeles police officer Gilbert Silva testified that he went to the premises in response to reports after-hour sales were being made. At approximately 4:40 a.m., he knocked on the rear door of the premises. The door was opened by a man later identified as Guillermo Aguayo. Silva asked him for a six-pack of beer and was told he would have to pay for it. According to Silva, he was told by Aguayo to wait, the door was closed, and Aguayo then returned holding a Budweiser carton containing five cans of beer. Silva was told the price was $8.00, and had been set by "Pablo." Silva gave Aguayo a five-dollar bill and three singles, and walked away. He returned moments later, at 4:46 a.m., accompanied by other officers.

Silva also testified that the premises were adequately lit when he entered, but the lights outside were not on and the outside of the rear entry was dark.

Another Los Angeles police officer, Jerry Garcia, testified that he visited the premises on December 7, 1995, and observed the door to the rear entrance of the premises was propped open for the entire time he was there, approximately 30 minutes.

Guillermo Aguayo testified that he was a drywall finisher working as an independent contractor remodeling a ceiling, bathroom and walls inside the bar. He

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exiting the location."

acknowledged the sale to officer Silva, said it was his own beer, that he sold it to Silva because Silva needed it to party with his girlfriend, who was waiting in the car, but denied that appellant knew anything about the transaction until the police returned and awakened him.

Subsequent to the hearing, the Department issued its decision which sustained the charges of the accusation. Thereafter, appellant filed a timely notice of appeal, and now raises the following issues: (1) Was Aguayo an agent, employee, or servant of appellant at the time he sold the beer?; (2) Was there substantial evidence to support the determination that the rear entrance was insufficiently illuminated, in violation of a license condition, and allowed to be propped open during a time the privileges of the license were being exercised, also in violation of a license condition?

DISCUSSION

I

Appellant contends the Administrative Law Judge's (ALJ) finding that Aguayo was acting as his agent or employee at the time he sold the beer to the officer is not supported by substantial evidence.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 U.S. 474, 477 [71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 747].)

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.2d 658].)

We find it difficult to reconcile the ALJ's finding that Aguayo was acting in the capacity of an agent or employee of appellant (Finding 1 (a)) with his specific, and inconsistent, findings that Aguayo was an independent contractor and sold the officer Aguayo's own beer[4] while appellant was asleep and oblivious to the entire transaction. (Finding 1 (b).)

We also do not believe the ALJ was warranted in concluding that appellant failed to properly supervise the licensed premises. Appellant was asleep at 4:45 a.m., while an independent contractor was engaged in construction remodeling. The independent contractor, totally without appellant's knowledge, sold five cans of his own beer, which he had taken to the jobsite for his own consumption, to a buyer supposedly anxious to please his girlfriend.

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[4] Appellant testified that he sold Budweiser beer only in bottles, and the only brands of canned beer that he sold were Modelo and Tecate. No evidence to the contrary was introduced, and appellant was not cross-examined on the point.

The Department argues that Aguayo was both an agent and an independent contractor, citing City of Los Angeles v. Meyers Bros. Parking System, Inc. (1975) 54 Cal.App.3d 135. That case is distinguishable. It involved the tax liability of a manager and operator of a parking garage pursuant to a management agreement with the owner of the garage. The court held that one who contracts to act on behalf of another and is subject to the other's control is both an agent and an independent contractor. Here, Aguayo had not contracted to act on behalf of appellant, but, according to the evidence, only to remodel portions of the premises.[5]

The Department also cites two decisions of the Board (Basra, Inc., AB-6548 (1996)) and (Felisnando Monarrez, AB-6535 (1996)) which it contends found licensees liable for acts of their agents who were also independent contractors. Both of those cases are also distinguishable. Basra, Inc. involved entertainers claimed to be independent contractors, but who were employed by the licensee and subject to a number of its controls over their conduct. As in the City of Los Angeles case, supra, the entertainers had contracted to act on behalf of the licensees to entertain patrons. Monarrez found a licensee responsible for the negligence of his bartender in permitting the bartender's brother-in-law to possess keys to the premises, enabling him to conduct narcotics transactions from behind the bar during normal business hours.

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[5] It is worth noting the court's statement in City of Los Angeles that independent contractor and servant or employee are mutually exclusive legal categories, in light of the ALJ's conclusion that Aguayo was acting as appellant's "agent, employee or servant" while also an independent contractor.

The Department cites a third Board decision (Tae Eo Shin, AB-63200 (1994)), a case in which the licensee's daughter was found to have been an ostensible agent of the licensee when she sold an alcoholic beverage to a minor, even though she had been told only to watch for thieves and not to sell anything. In that case, the licensee was standing next to the daughter when she made the sale.

The Department argues Aguayo held himself out as an agent by selling the beer to the police officer, and that appellant permitted him to do so by failing properly to supervise him. The sale in question took place at approximately 4:40 a.m., several hours after the bar closed, and during a time when appellant had no reason to expect the arrival of anyone seeking to buy alcoholic beverages. Under such circumstances, it cannot be said that appellant, while asleep, permitted Aguayo to hold himself out as appellant's agent. This case more resembles cases where someone with a legitimate reason to be in the premises engages in conduct of which the licensee has no knowledge.

McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8], concerned several transactions which occurred on the premises involving patrons selling or proposing to sell controlled substances to undercover agents. While the licensee and its employees did not know of the specific occurrences, they knew generally of contraband problems and had taken numerous preventive steps to control such problems. The McFaddin court held that since (1) the licensee had done everything it reasonably could to control contraband problems, and (2) the licensee did

not know of the specific transactions charged in the accusation, the licensee could not be held accountable for the incidents charged. Similarly, there is no evidence in the present case that appellant was put on notice or had any reason to believe the transaction might occur.

Similarly, in the case of Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779] (actually two cases--Laube and De Lena, both of which involved restaurants/bars, consolidated for decision by the Court of Appeal), the Laube portion of the decision dealt with surreptitious contraband transactions between patrons and an undercover agent--a type of patron activity concerning which the licensee had no indication and therefore no actual or constructive knowledge. The court ruled the licensee should not have been required to take preventive steps to suppress that type of unknown patron activity.

In the present case, it was not a patron who committed the acts for which the Department would hold appellant responsible, but, instead, an independent contractor on the premises at a time when the business was not open. Under such circumstances, it seems extremely unfair, and, therefore, unreasonable, to charge appellant with the acts of an independent contractor occurring in the early morning hours while appellant was asleep and the bar was closed.

II

Appellant sets forth as an issue on appeal the question whether there was substantial evidence in the record to support the determination that the rear entrance to

the premises was not equipped with sufficient power to illuminate and make easily discernible the appearance and conduct of all persons entering the premises. However, appellant does not discuss this issue in his brief.

The Appeals Board is not required to make an independent search of the record for error not pointed out by appellant. It was the duty of appellant to show to the Appeals Board that the claimed error existed. Without such assistance by appellant, the Appeals Board may deem the general contentions waived or abandoned. (Horowitz v. Noble (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710] and Sutter v. Gamel (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].)

Officer Silva testified that the outside lights were off when he entered the premises through the rear door, and this fact formed the basis for the finding appellant had violated the condition on his license relating to illumination of the rear entrance. Appellant testified the light operated properly both before and after the date in question, and had not been repaired in the interim, so it necessarily must have been on when Officer Silva was there.

In concluding the light was not on, the ALJ implicitly rejected this testimony.

III

Appellant also lists as an issue on appeal, but does not brief, the question whether there is substantial evidence appellant permitted the rear door of the premises to remain open, in violation of a license condition.

The testimony of Department investigator Garcia [RT 51-52] that the rear door

was propped open for approximately one-half hour at 11:40 p.m. on the day in question would appear to be ample support for the Department's decision. If the door had initially been propped open by a patron, without appellant's knowledge, either appellant or his employees would have had ample time to become aware it was open, and close it. That it remained open for the period of time shown by the evidence would appear to be a clear violation of the license condition.

CONCLUSION

The decision of the Department is affirmed as to count 2 of the accusation (conditions requiring illumination of rear entrance and closing of same). The decision of the Department as to count 1 of the accusation is reversed (sale of beer). The penalty is reversed and this matter is remanded to the Department for reconsideration in light of this decision.[6]

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

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[6] 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 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.