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

AB-7653

JUAN B. CARBAJAL dba El Ojo De Agua Bar
1287-B East Lincoln Avenue, Anaheim, CA 92805,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 42-266177 Reg: 99046927

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: August 16, 2001
Los Angeles, CA

ISSUED OCTOBER 12, 2001

Juan B. Carbajal, doing business as El Ojo De Agua Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for having possessed cocaine inside his licensed premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Health and Safety Code §11350, subdivision (a).

Appearances on appeal include appellant Juan B. Carbajal, appearing through his counsel, James Toledano, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated June 1, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on November 21, 1991. On August 5, 1999, the Department instituted a single-count accusation against appellant charging him with possession of cocaine in violation of Health and safety Code §11350, subdivision (a). The accusation was amended twice. The third amended accusation ultimately consisted of counts charging appellant with possession of cocaine for sale, in violation of Health and safety Code §11351, and charging Sergio Mendoza in his capacity as an agent, servant or employee of appellant, with possession and possession for sale of cocaine, in violation of the same code provisions.

An administrative hearing was held on April 14, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Anaheim police officer Rick Wagner. In brief, Wagner testified that while engaged in a search in appellant's bar for a suspect in a narcotics transaction, he encountered appellant leaving a small office room. Appellant greeted Wagner, and shook his hand. Still holding appellant's hand, Wagner asked appellant to step aside, wanting to see if anyone else was in the room. Pushing against resistance, Wagner pushed the door open. He saw two individuals in the room, Mendoza and Chavez, and on a desk he saw a small pile of a white powdery substance which he thought might be powder cocaine. He also saw Mendoza withdrawing his arm from the area of the desk on which an otherwise empty flower pot containing an open baggie of cocaine was found. Both Mendoza and Chavez later pleaded guilty to criminal charges of possession of cocaine, and, in sworn statements, said the cocaine was possessed jointly with

appellant Carbajal. Appellant presented no witnesses on his behalf.

Subsequent to the hearing, the Department issued its decision which determined that the possession of cocaine charge of the accusation was true, and ordered appellant's license revoked.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the evidence is not consistent with a finding that appellant knew there was cocaine in his office; and (2) the knowledge and possession of Mendoza should not have been imputed to appellant. The two issues will be discussed together.

DISCUSSION

Appellant argues that the evidence is not consistent with a finding that appellant knew there was cocaine in his office. He argues that it would have been totally irrational for him to leave a pile of cocaine on his desk while knowing there were police officers in the bar, having been alerted to that fact by a surveillance camera, a monitor for which was in that same office. He argues further that his denial of knowledge is buttressed by the lack of any discernible reaction on his part to the officers' presence upon emerging from the office, rather than an attempt to alert Mendoza and Chavez of the police presence.

The Department argues, on the other hand, that it was reasonable to infer that appellant was simply attempting to distract the officer from entering the office. It suggests that appellant was surprised by the search, and may not have been watching the monitor. Further, the Department points to the restricted dimensions of the office, and the unlikelihood that appellant could have been unaware of the cocaine on the

desk within such close confines.

The Administrative law Judge sustained the possession charge, but found the evidence insufficient to support the possession for sale charge. His assessment of the facts relating to the possession charge is set forth in Determination of Issues I:

> "The location of both quantities of cocaine in respondent's office, an area over which he exercised control and had the right to exercise control, is enough on the evidence in the record to hold respondent, Juan B. Carbajal, liable for simple possession. Hardly any time elapsed between Carbajal's leaving the office area and its being secured by the police officers. The absence of fingerprints on the bag containing the largest quantity suggest [sic] it was not hurriedly placed in the flower pot. The statements by both Chavez and Mendoza in their plea agreements that they possessed the cocaine *with* respondent Carbajal support and explain this determination. The circumstances of the discovery of the cocaine require a great deal of speculation to arrive at any other conclusion."

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Here there are no serious conflicts in the evidence. Appellant would simply have the Board believe that the cocaine was poured or spilled onto the desk during the brief moments between appellant's leaving his office and officer Wagner entering it. It would seem to us more reasonable to agree with the Department that the pile of cocaine was already on the desk when appellant became aware of officer Wagner's presence, and that he left the office in an attempt to stall the police, and induce them not to enter the office. It is equally reasonable to infer that appellant must necessarily have been aware

of, if not a participant in, whatever sort of drug transaction was underway in appellant's office while he was present.

Appellant suggests that, had he truly been involved in the drug transaction, he would have attempted to hide the cocaine that was on the desk rather than leave his office to greet the officer. It appears to us just as likely that appellant knew there was no chance of removing the cocaine from the desk and the office before the police might enter, and decided instead to try and distract officer Wagner. Whatever his thoughts, his emergence from a private office where, only seconds later, a pile of cocaine is found in open view, virtually compels the conclusion that he was aware of and connected to its presence.

However, the alternative ground for revocation, the imputation to appellant of the wrongdoing of an employee, is, in our view, erroneous.

Officer Wagner testified that appellant stated that Mendoza "was a regular customer of the bar and that he occasionally cleans up at the bar." [RT 35.] On the basis of this statement, the ALJ concluded [Determination of Issues II] that "Carbajal's admission that Mendoza occasionally worked to clean the premises establishes an employer-employee or master-servant relationship between the two. Mendoza's wrongdoing on the licensed premises is imputed to the licensee."

We do not agree that the statement supports the conclusion that Mendoza was an employee while in the office with appellant and Chavez. It is unreasonable to infer an existing employment relationship when the only evidence is that the "employee" may have performed odd jobs in the past. There is no evidence that Mendoza was currently employed by appellant. Indeed, Mendoza's statement that he and appellant held the cocaine jointly suggests that, while they were together in the office, the relationship was

something other than employment in nature. Mendoza obviously was not "cleaning up."

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[2] 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 final 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.