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

AB-7741
File: 48-313705 Reg: 99045425

ANN MINSHEW dba Blue Lagoon
923 Pacific Avenue, Santa Cruz, CA 95060,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Lee Tyler

Appeals Board Hearing: October 11, 2001
San Francisco, CA

ISSUED DECEMBER 11, 2001

Ann Minshew, doing business as Blue Lagoon (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which conditionally revoked her license with revocation stayed for a probationary period of one year on condition that a 20-day suspension be served, for permitting the premises to become a disorderly house, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25601.

Appearances on appeal include appellant Ann Minshew, appearing through her counsel, Sally A. Williams, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

---

[1]The decision of the Department, dated November 13, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on February 13, 1996. Thereafter, the Department instituted an accusation against appellant charging violations under the "disorderly house" statute (Business and Professions Code §25601), which states:

> "Every licensee, or agent or employee of a licensee, who keeps, permits to be used, or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety, is guilty of a misdemeanor."

The accusation pursuant to the statute alleged 27 subcounts (violations) over a 28-month period, and police-problem allegations with 172 subcounts (violations) over a 28-month period.

An administrative hearing was held on October 19, 20, 21, and 22, 1999, at which time oral and documentary evidence was received. The Administrative Law Judge (ALJ) in his Proposed Decision dismissed the accusation against appellant. The Department rejected the Proposed Decision and thereafter issued its own decision conditionally revoking the license, pursuant to Government Code §11517, subdivision (c), which decision dismissed 8 of the 27 subcounts of the disorderly house allegation, and all 172 subcounts of the police-problem allegations.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant raises the following issues: (1) the Department failed to issue its decision within the time provided by law; (2) the Department delayed in filing the accusation against appellant, thereby seeking to increase the penalty in an excessive manner; (3) the

findings are not supported by substantial evidence, arguing discrimination by law enforcement, entrapment, the issuance of false reports, admitting hearsay evidence, with many of the special findings being untrue; (4) the Department allowed misconduct in its prosecution; and (5) the penalty is excessive.

DISCUSSION

The Department 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 the 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. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

I

Appellant contends that the Department failed to issue its decision within the

[2]The California Constitution, article XX, §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].

time provided by law.

Appellant argues that the Department failed to provide copies of the proposed decision within the 30-day period stated in the Government Code §11517, subdivision (c)(1). While apparently dilatory and not proper for a public agency, such works no prejudice on appellant (see Kang (1997) AB-6676). The weightier problem raised by appellant concerns the allegation that the decision of the Department was not filed within the 100-day, jurisdictional, period.

The statute states the Department's final decision shall be filed no later than 100 days after receipt of the transcript. The transcripts, four in number, were date stamped as being received by the Department on August 4, 2000. The Department's decision was sent to all parties, hence issued, on November 13, 2000, a period of 101 days. However, the filing is timely since November 12, the 100th day, fell on a Sunday, a holiday. The decision was filed the following business day a Monday, November 13, 2000 (see Code of Civil Procedure §§10, 12).

II

Appellant contends that the Department delayed in the filing against appellant, thereby seeking to increase the penalty in an excessive manner.

Appellant also contends that the Department did not issue warning letters for the alleged violations, "while amassing evidence for an accusation." The accusation alleges (1) two instances of sexually explicit conduct/video showings (the allegations were dismissed after the hearing); (2) one instance of a minor on the premises; (3) four instances of assault and battery on persons; (4) 11 instances of battery (five of the allegations were dismissed after the hearing); (5) one instance of assault with a deadly

weapon (the allegation was dismissed after the hearing); (6) one instance of a disturbance; and (7) seven allegations of intoxication. These allegations occurred according to the accusation, over a 28-month period of time.

The assaults alleged occurred: two on January 25, 1997; one on March 15, 1997; and one on June 9, 1998. The batteries alleged occurred: four on September 13, 1997; one on May 20, 1998, and one on August 9, 1998. The intoxications alleged occurred: one on June 9, 1998, and the remaining six on August 9, 1998. There is one minor-in-the-premises allegation occurring on August 13, 1997.

Appellant contends she should have received warning letters concerning the incidents. We know of no requirement that the Department must issue warning letters. Such warnings are within the discretion of the Department. The process, whether to warn or not to warn, should not be disturbed except upon a showing of illegal, arbitrary, or abusive conduct on the part of the Department (see Felcyn and Suarez (1996) AB-6560). Notwithstanding, when we consider the list of alleged violations, we are not impressed with appellant's complaint she was not warned by letter of matters which appear from the record, she, or her employees should have been well aware. Assaults and batteries took place in 1997 and 1998, which included employees in the confrontations. Whether the alleged violations were proven, or any misconduct amounts to a violation of the "disorderly house" statute, is another issue.

Appellant cites the case of Walsh v. Kirby (1974) 13 Cal.3d 95 [118 Cal.Rptr.1], for the proposition that the Department is prohibited from amassing repeated violations over time to increase a penalty. While appellant's citation of Walsh has applicability against such a practice, Walsh is not in point in this matter. We have considered this

contention in the case of Chavez (1998) AB-6788. As we said in Chavez, "the vice seen by the court (Walsh v. Kirby) was the accumulation of financial penalties to the point where a licensee unable to pay them would be forced into bankruptcy, the equivalent of having his license revoked, coupled with the failure to give the licensee a chance to mend the error of his ways before that occurred."

The only question in this matter is whether the violation of the statute occurred, whether it takes one violation or many violations. We do observe that it does take a period of time and an accumulation of violations to show the elements of the "disorderly house" statute, which speaks to a somewhat continuous series of conduct which disturbs the community, or can be said to be contrary to public safety, welfare, or morals.

III

Appellant contends that the findings are not supported by substantial evidence, arguing discrimination by law enforcement, entrapment, the issuance of false reports, admitting hearsay evidence, with many of the special findings being untrue.

We find little supportive evidence in the record concerning discrimination by law enforcement, and the issuing of false reports. Considering the disposition in this matter, this argument need not be pursued.

We also find little supportive evidence in the record concerning entrapment. The test for an entrapment defense is whether the conduct of the public agent was such that a normally law-abiding person would be induced to commit the prohibited act. Official conduct that does no more than offer an opportunity to act unlawfully is permissible. (People v. Barraza (1979) 23 Cal.3d 675 [153 Cal.Rptr. 459].)

Appellant has filed an Appellant's Request for Judicial Notice in Support of Appellant's Opening Brief. Appellant complains of two sentences in a memorandum from the Department's local office to the Northern Division headquarters concerning whether the ALJ's Proposed Decision should be adopted by the Department or the Department issue its own decision. While most of the memorandum is a rehash of police involvement at the premises and police concerns, appellant focuses on two points: (1) it is an ex parte communication, and (2) the possible too-close relationship between the Department and law enforcement. There is no improper communication in the memorandum, but a local office communicating its view of the matter to those above, who must make the final decision to accept or reject the ALJ's Proposed Decision. The second concern speaks to a possible strain of credibility if the Department allows the Proposed Decision to stand. While much can be read into that comment, we view the comment as just an overstated scenario and concern by the local office which must deal with the local police on a day-to-day basis.

The main thrust of appellant's arguments goes to whether there is substantial evidence supportive of the findings. "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 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 conflicts 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].)

It may be well to again set forth the definition of a "disorderly house:"

> "Every licensee, or agent or employee of a licensee, who keeps, permits to be used, or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety, is guilty of a misdemeanor."

The test as to the disorderly house complaint is "not one of simply counting numbers. Common sense tells us that some conduct is more socially troublesome than others, and the human frailty will emerge in almost every context. People who drink sometimes fight. It is not enough merely to employ a staff of security personnel capable of breaking up fights. The failure to remove from the premises persons who have become intoxicated invites fights to occur. People who become intoxicated suffer from impairment, and may be more likely to become pugnacious than if sober." (See VE Corporation (1998) AB-6797.)

We now proceed with our review:

Count 1, subcounts 3 and 4.

There is no substantial evidence to support these subcounts. The officer did not see the battery. The officer only saw two persons outside the premises who were in the

officer's opinion, intoxicated. All the other "facts" of the finding are hearsay, and based on the most speculative of assumptions, which while plausible, are also subject to many equally speculative scenarios, hence the use of a reasonable inference is not proper.

Count 1, subcount 5.

There is no substantial evidence to support this subcount. The officer saw only a person outside the premises, whose face was red and swollen, indicative to the officer as one who had been hit. The assumptions of the finding could or could not be true, hence not subject to one inference only.

Count 1, subcount 6.

This finding is supported by substantial evidence. The patron, while inside the premises, was under 21 years of age. While good faith attempts were made by management in guarding against a violation, such attempts failed.

Count 1, subcounts 7, 8, 9, and 10.

There is substantial evidence to support this subcount. The officer observed the patrons coming out of the premises in a fighting mode. It can be reasonably inferred from the fight scene, the "pouring out" of the fight into the outside of the premises, that the fight had originated within the premises. Inspection of the patrons showed signs consistent with what the officer observed, i.e., a continuous fight in progress.

Count 1, subcount 17.

There is no substantial evidence to support this subcount. This extremely weak case finds no support by the use of rank hearsay.

Count 1, subcount 18 and 19.

There is no substantial evidence to support the findings. The only non-hearsay

evidence was the officer observing a person on the ground with another person, a premises' employee on top of the other person. While the officer concluded the person on the ground was intoxicated, it cannot be inferred that person was in the premises prior to the observation by the officer. Such conclusionary view would open the door to much speculation not based on a sure foundation.

Count 1, subcount 20.

There is substantial evidence to support the finding, where the officer testified to what he observed of the fighting scene within the premises.

Count 1, subcount 21.

There is no substantial evidence to support the finding, with the evidence being hearsay.

Count 1, subcounts 22, 23, 24, 15, 26, and 27.

There is no substantial evidence to support the findings.

In subcount 22, the officer testified to the symptoms of intoxication observed, but there is no substantial evidence that the alleged patron was inside the premises, creating a violation of a duty not to allow such intoxicated persons within the premises. All the officer observed was the patron being escorted out of the premises. Whether the employees allowed the intoxicated person to remain some length of time, or stopped him at the entrance, is highly speculative.

Subcount 23 only states the officer found intoxication, a mere conclusion without supporting testimony.

Subcount 24, 25, 26, and 27, can only be described as an assumption of intoxication based on the fact the officer arrested the persons. Proper testimony is non-

existent.

IV

Appellant contends that the Department allowed misconduct in its prosecution. We find no prosecutorial misbehavior on the part of the Department in the prosecution of this matter. What appellant alleges in her brief as to improper conduct of the police is covered in the contention just considered.

V

Appellant contends that the penalty is excessive. The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Considering our conclusions as to the subcounts considered, the penalty must be reversed and remanded for reconsideration as to appropriate penalty.

ORDER

The violations sustained do not come up to the level of a place to which people resort to disturb the area. The number of incidents and intensity of the problems seem too few and not onerous, insufficient to call the premises a disorderly house. While the premises appears to have some rather heavy problems as to clientele and control, the problems as set forth in the accusation, in the main, were poorly presented and not properly proven. The major whole of the matter was based on innuendos and

speculation.

The decision of the Department is reversed.[3]

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

[3]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.