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

AB-8237
File: 48/58-330735 Reg: 03054940

EPIGMENIO E. GARCIA, LAZARO R. GARCIA, and RITA GARCIA, dba Rio Nilo
7466 Monterey Street, Gilroy, CA 95020,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Arnold Greenberg

Appeals Board Hearing: October 7, 2004
San Francisco, CA

ISSUED DECEMBER 29, 2004

Epigmenio E. Garcia, Lazaro R. Garcia, and Rita Garcia, doing business as Rio Nilo (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license, with revocation conditionally stayed for two years, and suspended the license for 20 days, for appellant's employee buying goods he believed to be stolen, in violation of Business and Professions Code section 24200, subdivision (a), and Penal Code sections 496, subdivision (a), and 664.

Appearances on appeal include appellants Epigmenio E. Garcia, Lazaro R. Garcia, and Rita Garcia, appearing through their counsel, Louis Castro, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

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[1]The decision of the Department, dated January 8, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license and caterer's permit was issued on June 24, 1997. On April 28, 2003, the Department instituted a three-count accusation charging that on November 10 and 16, and December 13, 2002, appellants "by [their] agent, employee or servant, . . . attempted to buy, receive, withhold or conceal property, . . . believing said property to have been stolen in violation of Penal Code Section 664 and 496(a)."

At the administrative hearing held on October 21, 2003, documentary evidence was received, and testimony concerning the violation charged was presented by Department investigators Elisardo Favela and Mamie Gon. Co-appellant Lazaro Garcia ("Lazaro" or "appellant") also testified.

On November 10, 2002, Favela, accompanied by two other Department investigators, went to the licensed premises, where Favela was introduced to Francisco Mora, the bar manager. Favela began a conversation with Mora, in the course of which he told Mora that he was selling stolen alcohol and cigarettes and asked if Mora were interested. Mora said he wanted to talk to someone about it, and went over to two men, one of whom was Eduardo Garcia (Eduardo), appellant's son and the premises manager. After talking to Eduardo, Mora returned to Favela and said that his boss was not interested, but that he knew someone who was. Mora indicated he wanted to see what Favela had to sell and Mora, Favela, and the other two investigators went out to Favela's truck, which was parked in front of the premises, about 100 feet away.

As Favela and Mora were negotiating the purchase price, Eduardo came out to Favela's truck and stood three to five feet away from them. While Eduardo was there, Favela said again that the items had been stolen. When the price was agreed upon

between Favela and Mora, Favela moved his truck to a dirt parking area at the rear of the premises, and Mora parked his vehicle next to the truck so they could transfer the goods. Neither Eduardo nor appellant were present in the parking area at the time. Mora paid Favela $100 for four bottles of Remy Martin and two bottles of Johnny Walker Red Label Scotch. The bottles had been marked for identification previously by one of the investigators. Mora indicated he would be interested in purchasing more goods from Favela and they exchanged numbers so they could contact each other later.

On November 16, 2002, Favela spoke to Mora inside the premises and they arranged for Mora to purchase several bottles of distilled liquor, four 12-packs of Corona beer, and four cartons of cigarettes for $140. The goods were again transferred to Mora's vehicle in the back parking area. Neither Eduardo nor appellant were present during any of the negotiations or transfer of goods on November 16, 2002.

On December 13, 2002, Mora was working behind the fixed bar in the premises when Favela came in and said he had stolen a case of Cazadores tequila and 15 cartons of cigarettes. They agreed that Mora would purchase the tequila and cigarettes for a total price of $440. Once again, Mora met Favela in the rear parking area, they transferred the goods from Favela's vehicle to Mora's, and Mora paid Favela the agreed-upon price.

Subsequent to the hearing, the Department issued its decision which sustained the charges of the accusation. Appellants have appealed that decision, making the following contentions: (1) The decision is not supported by the findings and the findings are not supported by substantial evidence; (2) appellants were denied a fair hearing; and (3) appellants did not violate Business and Professions Code section 24200, subdivision (b).

DISCUSSION

I

Appellants contend that the findings do not support the determination of appellants' liability for the violations, and substantial evidence does not support the findings. They argue the evidence and the decision show that the actual sales took place off the premises, and any conversations inside the premises were solely between Favela and Mora. In addition, of all the alcoholic beverages and cigarettes sold to Mora, only four marked bottles of liquor were found in the premises' storage room. There is no evidence, they assert, that Lazaro had any actual knowledge, and by imputing Mora's knowledge to Lazaro under these circumstances, the Department is using an unacceptable standard of strict liability.

It is well settled in Alcoholic Beverage Control Act case law that an employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. etc. Appeals Bd*. (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377 [3 Cal.Rptr.2d 779]; *Kirby v. Alcoholic Bev. Etc. Appeals Bd*. (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].)

Appellants contend that the conduct of Mora, the employee, cannot be imputed to the Lazaro, the licensee/employer, unless Lazaro had actual or constructive knowledge of the acts and there was some nexus between the acts and the sale of alcoholic beverages. They rely on *Laube v. Stroh*, *supra* (*Laube v. Stroh*), and *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1999) 76 Cal.App.4th 570 [90 Cal.Rptr.2d 523] (*Santa Ana Food Market*), as the bases for their contention.

Appellants quote the following language from *Laube v. Stroh*, *supra*, 2 Cal.App.4th at page 377:

> We respectfully differ with the Board's perception of *McFaddin* and its antecedents, and hold that a licensee must have knowledge, either actual or constructive, before he or she can be found to have "permitted" unacceptable conduct on a licensed premises. It defies logic to charge someone with permitting conduct of which they are not aware. It also leads to impermissible strict liability of liquor licensees when they enjoy a constitutional standard of good cause before their license—and quite likely their livelihood—may be infringed by the state.

Appellants believe this statement supports their position, but they have overlooked crucial parts of this language and of the facts and disposition in *Laube v. Stroh*. The language they overlook is the holding of the court "that a licensee must have knowledge, *either actual or constructive*," to be found to have permitted the violative conduct. We have italicized the crucial words: the licensee's knowledge must be *either actual or constructive*. While there may have been no proof in the present case of Lazaro having *actual* knowledge of Mora's unlawful conduct, he is deemed to have *constructive* knowledge because Mora's conduct and knowledge are imputed to Lazaro.

Laube v. Stroh, supra, was a consolidation of two cases–*Laube* and *De Lena*–both of which involved disciplinary action by the Department because the licensees allegedly "permitted" drug sales in their licensed establishments.

William Laube and his partners did business as the Pleasanton Hotel, which included a dining room and a cocktail lounge. The licensees were charged with permitting surreptitious drug transactions between a patron and undercover investigators. The ALJ found that neither the licensee nor his employees knew, or had reason to know, that these transactions were occurring, but the Department imposed

discipline because the licensee had not undertaken "all reasonable steps to prevent such activity form occurring." (*Laube v. Stroh*, *supra*, 2 Cal.App.4th at p. 369.) The Court of Appeal ruled that it was unreasonable and illogical to charge the licensee with "permitting" the unlawful conduct of which he was neither actually nor constructively aware.

Richard De Lena operated a bar and restaurant in Sebastopol. He was charged with permitting five drug transactions that occurred on the premises, four of which involved sales of methamphetamine by an off-duty employee of the licensee. The licensee had taken steps to prevent drug activity in the premises, and there was no evidence that the licensee knew of the sales, including those by his employee. The Department's decision found that the licensee "permitted" the sales on two grounds: first, the employee's knowledge of the illegal sales was imputed to the licensee, and second, even if the licensee had no actual or constructive knowledge, he had failed to take all reasonable measures to prevent drug transactions.

The Court of Appeal held that De Lena's discipline could not be based on the absence of preventative steps, but remanded the matter for reconsideration of the discipline based solely on imputing the off-duty employee's illegal acts to the licensee. The rule of imputing an employee's knowledge and conduct to a licensee/employer was not changed by *Laube v. Stroh, supra.*

Appellants also cite *Santa Ana Food Market, supra,* in which the Department had ordered the license suspended for a single, surreptitious, illegal purchase of food stamps by an employee. The Court of Appeal reversed, holding that in this case the rule of imputed knowledge should not apply. The court carefully limited application of this holding, however, saying:

> By concluding the ABC's action in this case was an abuse of discretion, we do not intend to change the basic rules for suspension of licenses or unduly restrict the ABC from exercising its discretion. But where, as here, a licensee's employee commits a single criminal act unrelated to the sale of alcohol, the licensee has taken strong steps to prevent and deter such crime and is unaware of it before the fact, suspension of the license simply has no rational effect on public welfare or public morals.

(*Santa Ana Food Market, supra,* 76 Cal.App.4th 570, 576.)

Appellants attempt to draw parallels between the facts in *Santa Ana Food Market* and their own case, but their attempt is unavailing. The present case involves not one illegal act, but three; the acts involved the purchase of alcoholic beverages, several of which were found on the storage shelves of the premises from which appellants' employees draw the stock to be sold in the bar; and Lazaro's statement to his employees that they should not make illegal purchases is not the equivalent of "strong steps to prevent and deter such crime."

Appellants also argue that the transactions occurred in public parking areas in front of and behind the premises, and the Department's jurisdiction extends only to the licensed property. Therefore, they contend there is not substantial evidence to support the findings and determination.

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Board* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to

reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

It is not the job of the Appeals Board to reweigh the evidence, but to evaluate the decision in the light most favorable to the Department. All the transactions started in the premises, while Mora, appellants' bar manager, was working there. In at least one of the transactions, the negotiations took place inside the premises. Although the transactions were not complete until the exchange in the parking lot, part of the activity took place inside the premises. In addition, at least some of the bottles of alcohol ended up in the premises, although it is not known how they came to be there. This constitutes substantial evidence supporting a finding that there was sufficient nexus between the illegal activities and the licensed premises to impute the acts of Mora to the licensees. Substantial evidence is all that is required.

II

Appellants contend that they were denied a fair hearing on three grounds: the ALJ assumed the role of prosecutor, appellants' accuser acted as Lazaro's interpreter, and some of the findings "indicate a propensity to predetermine appellant[s'] guilt." (App. Br. at p. 12.)

With regard to their contention that the ALJ acted as a prosecutor, appellants assert that, in about 20 pages of transcript, the ALJ interrupted Department counsel to ask at least "60 questions pertaining to who, what, where, and when, of the Department's case in chief[,] . . . questioning Favela and eliciting answers to prove the Department's case . . . ." (Apps. Br. at p. 10.) In contrast, appellants assert, the ALJ did not interrupt appellants' counsel's cross-examination of the investigator.

Appellant's contention is not well founded. While it is true that the ALJ asked a number of questions during investigator Favela's direct testimony, the vast majority were to confirm or clarify particular facts, such as chronology or identities. The ALJ committed no error in doing so. "Within reasonable limits, it is not only the right but the duty of a trial judge to clearly bring out the facts so that the important functions of his office may be fairly and justly performed." *(Schonberg v. Perry* (1966) 247 Cal.App.2d 436, 439 [55 Cal.Rptr. 579]; *Gerson v. Kelsey* (1935) 4 Cal.App.2d 158, 162-163 [40 P.2d 543].) We carefully examined the hearing transcript and found no indication the questions asked by the ALJ were in any way biased against or prejudicial to appellants.

Appellants also argue that they were denied a fair hearing because investigator Favela, described by appellants as their accuser, served as translator for Lazaro when he testified. They allege that Favela paraphrased Lazaro's answers rather than translating literally.

Half of Lazaro's direct testimony was accomplished without a translator, and it appeared at times that he had some difficulty accurately expressing what he wanted to say. About eight pages into Lazaro's testimony, it became clear that he needed a translator [RT 100-101]:

> **Q.** [Mr. Martinez, appellant's attorney at the hearing]: Have you ever purchased any stolen goods for your Rio Nilo location?
> **A.** [Lazaro Garcia]: Yes.
> **Q.** He has a problem with English. Have you ever bought stolen goods for the Rio Nilo? Do you understand the question?
> **A.** My English is not very good.
> **JUDGE GREENBERG**: Wait just a moment. I could swear you in as a translator. (Addressing Investigator Favela.) Do you wish to do that?
> **MR. MARTINEZ**: I wouldn't object to that.
> **JUDGE GREENBERG**: I know you could translate.
> **MR. MARTINEZ**: I could verify it's accurate.

Appellants acknowledge that their hearing attorney did not object to Favela as translator, but they fail to mention the attorney's *immediate agreement* with the proposition. Martinez clearly approved the plan when he said that he could verify the translation was accurate. Under the circumstances, we cannot see how paraphrasing Lazaro's testimony could have prejudiced appellants. If Favela did not accurately reflect what Lazaro said, Martinez was there to correct or clarify the translation. There was no unfairness in the appointment of Favela to translate.

Appellants assert they were denied a fair hearing because some of the findings "indicate a propensity to predetermine appellant[s'] guilt." They criticize the ALJ's assertions in Determination of Issues V that appellants should have observed the additional bottles of Remy Martin and Johnny Walker Red, that Eduardo denied knowing about the stolen items, and that Eduardo's failure to testify, even though he attended the hearing, made Eduardo's contentions untrustworthy.

The ALJ's inferences about what appellants should have observed with respect to their supplies of Remy Martin and Johnny Walker Red appear, at the very least, to stretch the bounds of reasonableness. Even if the inferences made by the ALJ were unreasonable, however, they would have no effect on the decision, because it is not based on appellants' actual knowledge. Their liability is simply based on imputing Mora's knowledge and conduct to the them.

The ALJ's statement that "Eduardo denied knowing" makes it sound as if Eduardo testified. However, as appellants point out, Eduardo did not testify, so Eduardo's statements were simply hearsay. Appellants do not explain what the prejudicial effect of this statement is, nor can we discern one. Whether or not Eduardo knew about the "stolen" items, appellants would still be liable by virtue of Mora's conduct and knowledge being imputed to them. For the same reason, it makes no difference for this decision whether Eduardo's statements were untrustworthy or not. The result would be the same because of Mora's conduct.

Even if appellants' criticisms were valid, we could not say that the statements criticized were prejudicial to them or had any effect on the result.

We disagree with appellants' contention that the statements show bias on the part of the ALJ. While appellants may disagree with the inferences drawn by the ALJ, the findings and inferences he made are not evidence of bias.

> When making a ruling, a judge interprets the evidence, weighs credibility, and makes findings. In doing so, the judge necessarily makes and expresses determinations in favor of and against parties. How could it be otherwise? We will not hold that every statement a judge makes to explain his or her reasons for ruling against a party constitutes evidence of judicial bias.
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> "[W]hen the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of

> the witnesses and the evidence given during the trial of an action, it does not amount to that prejudice against a litigant which disqualifies him in the trial of the action. It is his duty to consider and pass upon the evidence produced before him, and when the evidence is in conflict, to resolve that conflict in favor of the party whose evidence outweighs that of the opposing party. The opinion thus formed, being the result of a judicial hearing, does not amount to [improper] bias and prejudice . . . ." (*Kreling v. Superior Court* (1944) 25 Cal.2d 305, 312 [153 P.2d 734].)

(Moulton Niguel Water Dist. v. Colombo (2003) 111 Cal.App.4th 1210, 1219-1220 [4 Cal.Rptr.3d 519].)

The disqualification of an ALJ for bias or prejudice is governed by section 11425.40[2] of the Administrative Procedure Act (Gov. Code, § 11400 et seq.). With certain limited exceptions, not applicable here, an ALJ can be disqualified under this provision only upon a showing of *actual* bias or prejudice; the appearance of bias is not sufficient. (*Andrews v. Agricultural Labor Relations Board* (1981) 28 Cal.3d 781, 792 [171 Cal.Rptr. 590] (*Andrews*); *McIntyre v. Santa Barbara County Employees' Retirement System* (2001) 91 Cal.App.4th 730, 735 [110 Cal.Rptr.2d 565]; *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 220-221 [79 Cal.Rptr.2d 910]; *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 582 [257 Cal.Rptr. 427].)

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[2]Section 11425.40, subdivision (b), provides that a presiding officer may be disqualified "for bias, prejudice, or interest in the proceeding," but not solely because the presiding officer:

> (1) Is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group. [¶] (2) Has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding. [¶] (3) Has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding.

In the present case, we have no evidence that ALJ Greenberg was actually biased or prejudiced. "A party must allege concrete facts that demonstrate the challenged judicial officer is contaminated with bias or prejudice. 'Bias and prejudice are never implied and must be established by clear averments.'" (*Andrews*, *supra*, 28 Cal.3d at p. 792, quoting *Shakin v. Board of Medical Examiners* (1967) 254 Cal.App.2d 102, 117 [62 Cal.Rptr. 274].)

It is the responsibility of this Board to affirm the findings and determinations of the ALJ and the Department unless they are clearly shown to be unsupported or unreasonable. We cannot say that the statements at issue here have been clearly shown to be unsupported or unreasonable. Nor do we find that they constitute evidence of bias against appellants or prejudgment on the part of the ALJ.

III

The Department's decision states that appellants violated Business and Professions Code section 24200, subdivision (b) (section 24200b), and Penal Code sections 496, subdivision (a) (section 496a), and 664 (section 664). (Determinations of Issues VI, VII, VIII, & IX.) Section 24200b states that a ground for disciplinary action is:

> The violation or the causing or permitting of a violation by a licensee of this division . . . or any rules of the Department adopted pursuant to the provisions of this division, or any other penal provisions of law of this state prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding, or mislabeling of alcoholic beverages or intoxicating liquors.

Appellants contend that because the Penal Code sections are not "penal provisions . . . prohibiting or regulating the sale, exposing for sale, use, possession, [etc.] of alcoholic beverages," they may not be the basis for disciplinary action under Business and Professions Code section 24200b.

Appellants are correct that the Penal Code sections regarding attempts to buy stolen property are not the type of statutes specified by 24200b. However, they cite no authority for their contention that discipline cannot be imposed because the determination states the incorrect subdivision of section 24200.

We have found no case precisely on point. However, we believe that the determinations must stand, based on the presumptive correctness of the Department's decision and the rule that an appellate tribunal reviews the ruling, not the reasoning of the decision.

> "The fact that the action of the court may have been based upon an erroneous theory of the case, or upon an improper or unsound course of reasoning, cannot determine the question of its propriety. No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." (*Davey v. Southern Pacific Co*. (1897) 116 Cal.325, 329 [48 P. 117].)

(D'Amico v. Bd. of Medical Examiners (1974) 11 Cal.3d 1, 18-19 [520 P.2d 10].)

This is not a case where appellants have been prejudiced by an erroneous or misleading statutory reference in an accusation. The accusation asserts that grounds for discipline exist and continuation of the license "would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section(s) 24200 (a) and (b) of the Business and Professions Code." Appellants were able to prepare and present their defense, with no indication that they were surprised by any of the issues or evidence at the hearing.

Determinations of Issues I and II refer to section 24200, subdivisions (a) and (b), respectively. Determination of Issues IX states that "[t]he uninterrupted continuation of

the license would be contrary to public welfare and morals," which is the language of section 24200, subdivision (a). It appears that the reference to section 24200b was erroneous and inadvertent, simply a mistake.

We fail to see how appellants were prejudiced in any way by the ALJ's misstatement of the applicable section. The hearing was over, it was obvious what the ALJ intended, and an error that appears to be nothing more than a typographical error cannot be the basis for reversal of the decision.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.