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

AB-8239

File: 20-348567 Reg: 03055196

HASSAN AYYAD, dba Lakeside Market
537 East Lake Avenue, Watsonville, CA 95076,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED JANUARY 10, 2005

Hassan Ayyad, doing business as Lakeside Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for his employees purchasing goods they believed to have been stolen and purchasing beer from an unlicensed person, violations of Business and Professions Code section 23402 and Penal Code sections 664 and 496, subdivision (a).

Appearances on appeal include appellant Hassan Ayyad, appearing through his counsel, Henry W. Roux, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

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[1]The decision of the Department, dated January 13, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on February 10, 1999. Thereafter, the Department instituted an accusation against appellant charging that three of his employees, Ziyad Ayyad (Ziyad), Emad Ayyad (Emad), and Mohammed Hamed (Mohammed), attempted to buy stolen property by buying property which they believed to have been stolen. Ziyad and Emad were also alleged to have purchased beer for resale in the premises from a person who did not hold a wholesaler's or other appropriate license.[2]

Another accusation was filed with regard to an off-sale beer and wine license appellant holds for a premises in Davenport. That accusation (the Davenport accusation) charged that Ziyad purchased beer he believed to be stolen, intending it for resale in the Davenport premises. The two counts of the Davenport accusation were also alleged as "Aggravating Circumstances" in the First Amended Accusation which is the subject of this appeal (the Watsonville accusation). Similarly, the nine counts of the Watsonville accusation were alleged as "Aggravating Circumstances" in the First Amended Accusation filed with regard to the Davenport premises.

At the administrative hearing held on October 8, 2003, the ALJ consolidated the two cases for hearing, and the parties stipulated to the facts as stated in the accusations. They also stipulated that, in each case, appellant was not present at the premises when the unlawful transactions were negotiated or completed and he was not

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[2]In the First Amended Accusation, the Department also included a count alleging that Mohammed and Emad possessed on the premises 28 cartons of cigarettes with counterfeit California Tax Stamps, in violation of Revenue and Taxation Code section 30474. The Department's decision found that this count was not proved, and it was dismissed.

personally involved in any of the transactions. Appellant testified regarding the involvement of two of his brothers, Emad and Ziyad, in the management and operation of the stores, and their removal from any involvement in the licensed premises after appellant learned of the unlawful acts.

Subsequent to the hearing, the Department issued its decision which determined that the unlawful transactions had occurred as alleged in the accusations, that they were crimes involving moral turpitude under the circumstances, that appellant was vicariously liable for the unlawful on-premises acts of his employees, and that cause for discipline existed. The Davenport license was revoked, with revocation stayed for a three year probationary period, and the license was suspended for 20 days; outright revocation was ordered for the Watsonville license.

Appellant has appealed the revocation of the Watsonville license. In his appeal, appellant contends that the Department's findings are not adequate to support a decision that good cause exists to revoke his license.

DISCUSSION

Appellant contends it is undisputed that appellant had a policy against the unlawful conduct committed by his employees, instructed the employees to adhere to that policy, was unaware of and uninvolved in the misconduct, and implemented reasonable remedial measures when he discovered the illegal conduct. Under these circumstances, appellant argues, the extreme discipline of revocation is unwarranted. To establish the necessary good cause to justify revocation, appellant asserts, the Department would have to find that "Appellant's conduct was so extreme[,] that it is so vile, and its impact on society so corruptive, as to be repudiated as contrary to the standards of community morality." (App. Br. at p. 7.)

Appellant agrees that a licensee may be disciplined because of the unlawful acts of his or her employees, but contends that the case law relied upon in the decision does not vicariously ascribe an employee's acts of moral turpitude to a licensee who lacks actual knowledge of the unlawful acts.

Appellant is wrong. *Actual* knowledge is not necessary to establish appellant's vicarious liability for the acts of his employees; *imputed* knowledge, based on the employee's knowledge of the unlawful conduct, is sufficient to render appellant liable.

In support of his contention that the Department must show he actually knew of the unlawful conduct and permitted it, appellant relies on the last two sentences of the following passage from *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377 [3 Cal.Rptr.2d 779] (*Laube*):

> 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.

The language appellant overlooks is the statement "that a licensee must have knowledge, *either actual or constructive*," to be found to have permitted the violative conduct. At page 367, the *Laube* court explained:

> The factual discussion involves the element of the licensee's knowledge of illegal or improper activity on his or her premises; this knowledge may be either actual knowledge or *constructive knowledge imputed to the licensee from the knowledge of his or her employees*. (See *Fromberg v. Dept. Alcoholic Bev. Control* (1959) 169 Cal.App.2d 230, 233-234 [337 P.2d 123]; *Endo v. State Board of Equalization* (1956) 143 Cal.App.2d 395, 401-402 [300 P.2d 366].) [Italics added.]

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*, *supra*; *Kirby v. Alcoholic Bev. Etc. Appeals Bd*. (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].) "The owner of a liquor license has the responsibility to see to it that the license is not used in violation of law and as a matter of general law the knowledge and acts of the employee or agent are imputable to the licensee." (*Munro v. Alcoholic Bev. Control Appeals Bd.* (1960) 181 Cal.App.2d 162, 164 [5 Cal.Rptr. 527].) While there may have been no proof in the present case of appellant having *actual* knowledge of his employees' unlawful conduct, he is deemed to have *constructive* knowledge because the conduct and knowledge of his employees is imputed to him.

In *Mantzoros v. State Board of Equalization* (1948) 87 Cal.App.2d 140,144 [196 P.2d 657], the court said, in response to the licensees' contention that they should not be held liable for an unlawful after-hours sale by their employee made without their knowledge or authorization:

> The licensee, if he elects to operate his business through employees, must be responsible to the licensing authority for their conduct in the exercise of his license, else we would have the absurd result that liquor could be sold by employees at forbidden hours in licensed premises and the licensees would be immune to disciplinary action by the board.

Appellant bears responsibility for the violation whether or not he was present at the time:

> Even though the owners elected to remain absent from the premises . . . and to delegate the management of the premises to the bartender . . . they could not thereby render themselves immune from their responsibilities, under the license, on the asserted basis that they did not have actual knowledge of the acts of their employee. Under such a

> method of operating the business, it is obvious that the owners would never be in a position to observe the acts of their employee while he was representing them in the position of bartender. The licensee had the responsibility to see to it that the license was not used in violation of law.

(Harris v. Alcoholic Bev. Control Appeals Bd. (1961) 197 Cal.App.2d 172, 180-181.)

In the present case, appellant put his brother, Emad, in charge of the Watsonville store as manager, and he never reviewed the store's inventories done by Emad. Appellant personally manages the Davenport store, working there 10 to 12 hours a day. In addition, he testified, he works seven or eight hours a day at other stores that he or his family owns.

Appellant had, in effect, abandoned his responsibility and stewardship of the licensed premises in Watsonville, just the circumstance for which the rule of imputed knowledge was designed. He turned the stewardship over to his brother, undoubtedly relying on Emad's honesty and good judgment to see that illegal acts and other violations did not occur. Unfortunately for appellant, his brother was not worthy of his trust, resulting in not just one violation, but several over the course of six months. While we can sympathize with appellant's difficult position – obviously, he cannot be in two (or more) places at one time nor keep a watchful eye on the operations of several enterprises all the time – this does not absolve him of responsibility for the acts of his employees.

The Department, not the courts or the Appeals Board, has been granted discretion to determine whether good cause exists to revoke a license. *(Easebe Enterprises, Inc. v. Alcoholic Bev. etc. Appeals Bd.* (1983) 141 Cal.App.3d 981, 985 [190 Cal.Rptr. 678].) "Where the determination of the Department is one which could have been made by reasonable people, the Appeals Board or the courts may not

substitute a decision contrary thereto, even though such decision is equally or more reasonable in the premises." (*Sepatis v. Alcoholic Bev. etc. Appeals Board.* (1980) 110 Cal.App.3d 93, 102 [167 Cal.Rptr. 729].)

The Appeals Board will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

While opinions might differ on whether these violations merit revocation, we cannot say that the Department's decision is clearly unreasonable or arbitrary. Under the circumstances, the Department's decision must be upheld.

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.