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

AB-8312
File: 21-308805 Reg: 03056362

SAAD J. EWDISH, dba Prime Market & Liquor
4161 Voltaire Street, San Diego, CA 92107,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 5, 2005
Los Angeles, CA

ISSUED JULY 12, 2005

Saad J. Ewdish, doing business as Prime Market & Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for his employee selling, and appellant knowingly permitting the selling of, controlled substances in the licensed premises, and for possessing controlled substances in the premises for the purpose of sale, violations of Business and Professions Code section 24200.5, subdivision (a), and Health and Safety Code sections 11351, 11352, and 11378.

Appearances on appeal include appellant Saad J. Ewdish, appearing through his counsel, William R. Winship, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated July 15, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 14, 1995. On December 21, 2003, the Department instituted an accusation against appellant charging that his employee, Nabil Zaitona, sold cocaine on July 3, 8, and 10, 2003, in violation of Health and Safety Code section 11352 (counts 2, 4, 7); that appellant, on July 3, 8, 9, and 10, 2003, knowingly permitted the sale of narcotics in the licensed premises, in violation of Business and Professions Code section 24200.5, subdivision (a) (counts 1, 3, 5, 6); and that, on July 23, 2003, appellant possessed, for the purpose of sale, cocaine and methamphetamine in the licensed premises in violation of Health and Safety Code sections 11351 and 11378 (counts 8, 9).

At the administrative hearing held on May 25, 2004, appellant stipulated that Zaitona, who is appellant's brother, sold cocaine to Officer Anderson[2] on July 3, 8, and 10, 2003. He also stipulated that, on July 23, 2003, the San Diego Police Department discovered numerous postage-stamp sized baggies, 65 containing cocaine and 37 containing methamphetamine, during a search of the premises pursuant to a search warrant. The parties also stipulated that:

> At all times and dates mentioned in the Accusation, the Respondent was not present at the premises or known to the investigating officers. Additionally, Officer Anderson never saw, met or spoke to the Respondent and never had an awareness that the Respondent was at all involved in any of the stipulated transactions mentioned above or involved with the controlled substances that were discovered at the premises on July 23, 2003.

(Findings of Fact III, ¶ 6.)

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[2]The record does not reveal what law enforcement agency employs officer Anderson, but we assume she is a member of the San Diego Police force, since the San Diego Police Department conducted the search of appellant's premises.

The only testimony at the hearing was presented by witnesses for appellant, including Zaitona, concerning circumstances in mitigation and appellant's lack of knowledge of the illegal activity.

Subsequent to the hearing, the Department issued its decision which determined that all the violations charged (with the exception of count 5, which was dismissed) were established and revocation was the appropriate penalty.

Appellant filed a timely appeal raising the following issues: 1) The Department's finding that appellant knowingly permitted the drug sales was based entirely on the rebuttable presumption in Business and Professions Code section 24200.5, subdivision (a), and appellant's evidence that he had no knowledge effectively rebutted the presumption, and 2) the penalty of revocation was an abuse of discretion.

DISCUSSION

I

Business and Professions Code section 24200.5, subdivision (a) (section 24200.5(a)), provides that the Department "shall revoke a license . . . ¶ (a) If a retail licensee has knowingly permitted the illegal sale . . . of narcotics or dangerous drugs upon his licensed premises. Successive sales . . . over any continuous period of time shall be deemed evidence of such permission."

Appellant stipulated to the illegal sales of narcotics charged in the accusation, but did not stipulate to the charges that he knowingly permitted the sales. The Department, appellant points out, produced no evidence whatsoever tending to show that appellant had knowledge of or permitted the illegal sales, instead basing the revocation of his license solely on the presumption created by section 24200.5(a). Appellant asserts that he overcame this presumption because he proved by a

preponderance of the evidence that he had absolutely no knowledge or awareness of his brother's illegal activity, and did not knowingly permit the activity.

Although couching his appeal in somewhat different terms, appellant is alleging that there is not substantial evidence to support the Department's finding that he knowingly permitted his brother's illegal activity. "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 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].) 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] (positions of both the Department and the license-applicant supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [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].)

Appellant states that the presumption in section 24200.5(a) is a rebuttable presumption that affects the burden of proof. Such a presumption "impose[s] upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact," ordinarily by a preponderance of the evidence. (Evid. Code, § 606.) Appellant appears to be relying, in part, on the fact that a presumption is not evidence. (Evid. Code, § 600, subd. (a).) While that is true, the effect of the presumption requires the party against whom the presumption is invoked to persuade the trier of fact, by a preponderance of the evidence, that the presumed fact does not exist.

Every person at the hearing, appellant asserts, was convinced that appellant had no knowledge or awareness of his brother's illegal activities at the premises. Since the Department presented no evidence, appellant concludes, it did not meet its burden of proof that appellant knowingly permitted the activity.

Pursuant to Evidence Code section 606, it is appellant who had the burden of convincing the ALJ that he did not knowingly permit the illegal activity; the presumption carried the Department's burden of proof unless and until appellant convinced the ALJ otherwise.[3] Clearly, at least one person in the hearing room was not sufficiently

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[3]The California Law Revision Commission comments to Evidence Code section 606 explain the effect of the different presumptions in terms of a jury trial, where the jury is the trier of fact. Putting the comments into the context of an administrative hearing, in which the ALJ is the trier of fact, the comments explain:

> If the basic fact from which the presumption arises is so established that the existence of the basic fact is not a question of fact . . . (as, for example, . . . by stipulation of the parties), the judge should [consider] that the existence of the presumed fact is to be assumed until [he or she] is persuaded to the contrary by the . . . preponderance of the evidence . . . .

convinced by appellant's evidence. Unfortunately for appellant, that person was the ALJ. It is the ALJ who makes determinations as to credibility, weighs the evidence, and resolves conflicts, and it was up to the ALJ to decide whether appellant carried his burden of showing that the presumed fact did not exist. (See *Estate of Gelonese* (1974) 36 Cal.App.3d 854, 863 [111 Cal.Rptr. 833].)

II

Appellant contends that the penalty of revocation is excessive and an abuse of the Department's discretion. Revocation of his license, appellant asserts, will effectively put him out of business since his cost of operation cannot be met without the proceeds from the sale of alcoholic beverages.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but 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].) 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].)

If the penalty imposed is one within reason, 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].)

In this case there was evidence that the drug sales were more than casual. Although the baggies of cocaine and methamphetamine were small, there were 102 of them altogether, 65 containing cocaine and 37 containing methamphetamine. It is reasonable to infer that more sales of narcotics occurred than the three that were made to the police officer. 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.[4]

SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]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.