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

AB-8670
File: 48-373463 Reg: 05061218

YU LING HUANG and WEN NING KUO, dba Christys Bar & Grill
309 Airport Boulevard, South San Francisco, CA 94080,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: October 2, 2008
San Francisco, CA

ISSUED JANUARY 8, 2009

Yu Ling Huang and Wen Ning Kuo, doing business as Christys Bar & Grill (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for co-licensee Wen Ning Kuo ("Kuo"), on four separate dates in September 2005, having purchased cigarettes and distilled spirits believing them to have been stolen, a violation of Penal Code sections 664/496, subdivision (a), an offense involving moral turpitude.

Appearances on appeal include appellants Yu Ling Huang and Wen Ning Kuo, appearing through their counsel, Lien Lac, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

---

[1]The decision of the Department, dated December 14, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on March 9, 2001. On November 29, 2005 the Department instituted an accusation against appellants charging that co-licensee Kuo purchased cigarettes and distilled spirits on four separate dates in September 2005, believing them to be stolen, in each case a violation of Penal Code sections 664/496, subdivision (a).

At an administrative hearing held on October 11 and 12, 2006, documentary evidence was received and testimony concerning the violations charged was presented by Department Investigators Joe McCullough and Brandon Knott. Kent Sato, appellants' manager, and father of Kuo's daughter, testified on behalf of appellants. Kuo did not testify.

The evidence established that on September 7, 2005, co-licensee Kuo purchased two bottles of Hennessey cognac and two cartons of cigarettes from investigator McCullough for $70.00; on September 21, 2005, Kuo purchased two bottles of Grey Goose vodka, one bottle of Hennessey cognac and two cartons of cigarettes from McCullough for $115.00; on September 27, 2005, Kuo purchased 12 bottles of Hennessey cognac and two cartons of Marlboro cigarettes from McCullough for $200.00; on September 28, 2005, Kuo purchased a bottle of vodka from McCullough, but declined to purchase two bottles of tequila he offered. On each occasion, McCullough told Kuo the distilled spirits and cigarettes had been stolen from Costco. An investigation of the premises by other Department investigators shortly after the September 28 transaction led to the discovery of three pre-marked bottles of Grey Goose vodka and eight pre-marked bottles of Hennessey cognac, along with eight empty pre-marked bottles. Sato testified that he had been approached twice by McCullough offering him the opportunity to buy liquor left over from a party, and told him

appellants were not interested. Sato denied knowing of Kuo's purchases until she was arrested. Appellants conceded the transactions took place, but claimed Kuo had been taken advantage of by McCullough. McCullough, in rebuttal testimony, denied having met with Sato, as Sato claimed. McCullough had earlier testified that Kuo admitted her fear that she was risking arrest when she made the purchases, and had asked McCullough to keep the transactions secret, as she intended to do, even to the point of not informing Sato.

Subsequent to the hearing, the Department issued its decision which determined that the purportedly stolen property transactions had occurred, as alleged in the accusation, and that appellants had failed to establish any affirmative defense.

Appellants have filed an appeal making the following contentions: (1) Kuo was unfairly taken advantage of, induced, and aggressively baited by the Department's undercover investigator; and (2) the penalty is excessive.

DISCUSSION

Since Kuo did not testify, there is no direct evidence that Kuo was unfairly taken advantage of, or aggressively baited by McCullough. McCullough's testimony revealed that Kuo was concerned that law enforcement agencies, including the police and the Department of Alcoholic Beverage Control might take action against her if they learned of the transactions, and had even asked McCullough if he was a police officer. His testimony that she voluntarily and knowingly undertook the risks involved in return for the ability to purchase the distilled spirits and cigarettes at bargain prices stood unrefuted.

Appellants' claim that McCullough unfairly took advantage of Kuo is essentially a claim that she was the victim of entrapment. Without Kuo's testimony, there is no evidence that meets the test for entrapment laid down by the California Supreme Court.

That test was stated in the California Supreme Court case of *People v. Barraza* (1979) 23 Cal.3d 675, 689-690 [153 Cal.Rptr. 459]:

> [We] hold that the proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect - for example, a decoy program - is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime. [Fn. omitted.]

The administrative law judge (ALJ) found that the recorded conversations between McCullough and Kuo did not support a showing of unsophistication or naivete on the part of Kuo (Determination of Issues III) and that McCullough "did nothing more than provide Kuo an opportunity to engage in illegal conduct for profit, and she voluntarily accepted. Kuo's offense in this matter involved moral turpitude." (Determination of Issues V).

II

Appellants argued at the administrative hearing that Kuo's conduct warranted only a suspension that could be resolved by payment of a fine. The ALJ obviously disagreed. Making essentially the same arguments in this appeal, appellants claim that his order of revocation is "unduly harsh."

It is well settled that the Appeals Board may 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 can examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control*

Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

In discussing what an appropriate penalty would be, the ALJ stated (Determination of Issues VII - IX):

> DI VII: The Department asks for revocation of the license urging that the evidence shows purportedly stolen property was sold to co-licensee Kuo on four separate occasions and that she was aware of the status of said items. The Department correctly notes that there is no evidence to support Kuo's contention that she felt threatened. She told the undercover operative she was concerned he might be employed by the F.B.I. or the ABC and that her conduct might be discovered. If so, she would be in trouble. The Department argues, correctly, that she was aware of the illegal nature of her conduct and yet voluntarily participated in the transactions. She never advised her boy friend/manager and never contacted the police.
>
> DT VIII: Respondents ask for probation and the opportunity to pay a fine.
>
> DT IX: The Department's view of the evidence is substantially correct. Kuo saw an opportunity to buy liquor at a good price and willingly did so. She knew what she wanted and did not want. The only mitigation established by respondents is their clear prior record that, under the circumstances, does not come close to outweighing the gravity of the violations.

Appellants make the same basic argument to the Appeals Board that they made to the ALJ - that "had it not been for Kuo's naivete and simplemindedness, a violation ... would not have occurred" (App.Br., p.8). The argument lacks the same support here that it lacked at the administrative hearing; the testimony of Kuo making such a claim, were that the case, could have been placed in evidence at the administrative hearing. Sato, having an obvious bias in light of his close relationship with Kuo, was no substitute for evidence that might have supported such a finding.

Appellants make much of the fact that they had suffered no prior discipline. While that may well be a factor in mitigation as pointed out in the Department's Penalty Schedule in Rule 144 (4 Cal. Code Regs., §144), the ALJ 's determination that the violations far outweighed any mitigation cannot be said to be unreasonable. The

violations were committed knowingly and willing on the premises by a licensee fully aware that the consequences of her actions could be serious and incriminating, but willing to risk her livelihood against the opportunity for immediate financial gain.

ORDER

The decision of the Department is affirmed.[2]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.