ISSUED JULY 18, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JUDY TORRE dba Smuggler's Bar & Grill 844 Ryde Avenue Stockton, CA 95203 Appellant/Licensee, v. THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6586 File: 47-272774 Reg: 95032002 Administrative Law Judge at the Dept. Hearing: Ruth S. Astle Date and Place of the Appeals Board Hearing: June 5, 1996 Sacramento, CA

Judy Torre, doing business as Smuggler's Bar & Grill (appellant), appealed from a decision of the Department of Alcoholic Beverage Control[1] which conditionally revoked her on-sale general public eating place license with the revocation stayed for a probationary period of 180 days to permit transfer of the license to other persons, for appellant not being the true and sole owner under the license; allowing Kenneth Torre who was excluded from any direct or indirect interest in the premises, to share in the proceeds of the operation of the premises; and for allowing the purchase of alcoholic beverages from another retailer, to be used in the premises for resale; being contrary to

[1]The decision of the department dated September 28, 1995, is set forth in the appendix.

the universal and generic public welfare and morals provisions of the California Constitution, Article XX, §22; and in violation of Business and Professions Code §§23300, 23355, 23402, and 23804.

Appearances on appeal included appellant Judy Torre, appearing through her counsel, Philip G. Dillon; and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on April 13, 1993. Thereafter, the department instituted an accusation against appellant's license on December 6, 1994, with appellant thereafter requesting a hearing.

An administrative hearing was held on July 31, 1995, at which time oral and documentary evidence was received. Subsequent to the hearing, the department issued its decision which revoked appellant's license with revocation stayed for 180 days to permit the transfer of the license to a person or persons acceptable to the department. The decision further provided that the license would be suspended until the transfer was accomplished. Appellant thereafter filed a timely notice of appeal.

In her appeal, appellant raised the following issues: (1) the crucial findings were not supported by substantial evidence, (2) relevant evidence was improperly excluded at the administrative hearing, and (3) there is new evidence which the department should consider which could not reasonably have been presented at the administrative hearing.

DISCUSSION

I

Appellant contended that the crucial findings were not supported by substantial evidence.

Finding I of the department's decision states that appellant was not the sole owner of the premises under the license. The record includes a document entitled "Certificate of Limited Partnership of Smugglers Bar and Grill A California Limited Partnership" that purports to create a limited partnership [exhibit 4]. The certificate, dated March 3, 1994, states that an agreement was made between appellant and Lee Williams effective January 2, 1993. The certificate recites that "The Partner in the Limited Partnership has contributed their [sic] interest in the property with an agreed value of $10,000.00." This apparently referred to Williams' alleged contribution of $10,000.00, a sum owed to Williams for wages not paid since approximately January 1993 [R.T. 21]. Section 8 of the certificate provides that profits of the limited partnership were to be divided between the partners, appellant and Williams, in proportion to their capital accounts. However, we find no evidence in the record of the amounts in the capital accounts for either partner.

Appellant testified at the administrative hearing that after she consulted with an attorney and an accountant, the limited partnership form was used in lieu of a promissory note to Williams for the salary she was owed by appellant [R.T. 20-21, 29].

The record is clear that appellant intended to back up her promise to pay Williams for the year Williams had worked without a salary by giving Williams an

interest in the premises. However, it also seems clear that there was no valid limited partnership created by the document that appellant prepared. There is a stamp on the front of the certificate that shows that it was filed with the department on March 7, 1994, but there is nothing to indicate, either on the document or in the testimony at the hearing, that the certificate was ever filed with the Secretary of State as required by Corporations Code §15621.

Filing the certificate with the Secretary of State is required in order for a limited partnership to legally exist in California. (American Alternative Energy Partners II v. Windridge, Inc. (1996) 42 Cal.App.4th 551, 560, __ Cal.Rptr.2d __.) Therefore, there is no substantial, or indeed any, evidence that a valid limited partnership, giving Lee Williams any interest in the license or the premises, was created. Despite the apparent assumption by appellant and the department that a limited partnership existed, we find that, in fact, none existed.

At most, a general partnership might have been created. (See American Alternative Energy Partners II v. Windridge, Inc., supra, at 561.) However, a partnership does not exist merely by virtue of the "fact that one party is to receive benefits in consideration of services rendered or for capital contribution ...." (Bank of California v. Connolly, (1973) 36 Cal.App.3d 350, 364, 111 Cal.Rptr. 468.) The "partnership agreement" was really no more than appellant's promise to Lee Williams that she would eventually be paid the wages she had earned.[2] There is simply no

[2]Appellant testified at the hearing:

"I had talked to an attorney, and I have talked to an accountant, rather

evidence of any kind in the record that establishes the legal existence of any ownership interest on the part of Lee Williams.

Finding II states that appellant's prior spouse, Ken Torre, had an interest in the premises in violation a condition of appellant's license. The record shows that on March 3, 1993, appellant signed a document called a petition for conditional license which imposed six conditions on the license. Condition 6 excluded the prior spouse of appellant, Ken Torre, from any management or interest in the premises.[3]

Ken Torre worked at the premises doing food preparation [R.T. 22]. In lieu of a regular $200.00 per week salary, he received some of the proceeds from the vending machine in the premises, and appellant paid some of Torre's personal bills from her business account [R.T. 16, 30-32].

The finding by the department that Ken Torre "had ... an interest in the operation of the business in that he receive[d] the proceeds from vending machines on the premises" [finding II] was presumably based on the assumption that the sharing of

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> than in lieu of doing a promisory [sic] note, we went ahead and did this document. Because it isn't filed with the state, other than her and I have agreed to the $10,000 figure, that she can have in part, in whole, at their request. She does not do the income taxes. I do the whole income tax.
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> * * *
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> "I went to the library and looked over forms, how to prepare. And obviously I did the wrong thing. She understands and I understand, it's an agreement between the two of us. That's strictly what it is. She does draw a salary." [R.T. 29.]

[3]Condition 6 stated: "That Kenneth E. Torre shall have no interest directly or indirectly in the ownership nor act as a manager or consultant in the operation or control of the licensed premises or business activities conducted in said premises."

profits created some kind of de facto joint venture or partnership between Ken Torre and appellant. While he did receive proceeds from the vending machines, it is clear that he received those proceeds as or in lieu of wages, and it is equally clear that no inference of the existence of a partnership or joint venture can be drawn if profits were received in payment as wages of an employee. (Roberts v. Wachter (1951) 231 P.2d 540, 545, 104 Cal.App.2d 281; see also Witkin, Summary of California Law, Ninth Edition, vol. 9, pp.422-423.) Therefore, there does not appear to be any legal basis for finding that Ken Torre had any kind of interest in the business that violates the condition on the license.

Finding III states that appellant bought some wine and distilled spirits from Costco and Food for Less stores [exhibit 7]. Such a purchase from a retailer for resale violates Business and Professions Code §23402.[4] Appellant testified at the administrative hearing that "the wine was used in cooking preparation. It was just the vodka, brandy, and Vermouth, we did not know was an alcoholic--because that's used in cooking also" [R.T. 31]. It is not clear how many bottles were purchased, but there are copies of eight receipts in the record [exhibit 7]. Some of the bottles were seized by the department [R.T. 13-14]. The record does not indicate whether the bottles that were seized were open, had spouts on them, or were in the kitchen or in the bar proper.

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[4]Business and Professions Code §23402 states in pertinent part: "No retail on- or off-sale licensee...shall purchase alcoholic beverages for resale from any person except a person holding a beer manufacturer's, wine grower's, rectifiers's, brandy manufacturer's, or wholesaler's license."

Appellant appears to concede that she bought alcoholic beverages from a retailer with her business funds, although she does imply at least that the beverages purchased were to be used in food preparation. However, there was no evidence of what type of food was prepared that would use the beverages purchased. Where the record shows purchases from another retailer, it is reasonable to conclude that the bottles purchased and thereafter stored at the premises were for the resale operation of the premises. Appellant also testified that the initial delivery of beverages from the wholesaler did not include all that was needed-- implying that at least some of the retail purchases were made for resale [R.T. 31].

II

Appellant contended that relevant evidence was improperly excluded at the administrative hearing. Appellant apparently attempted to have the administrative law judge (ALJ) consider the order of dismissal of Ken Torre's felony conviction.[5] It was apparently that felony conviction that led to the condition on the license that prohibited Ken Torre from having an interest in the premises.

The condition on the license which excluded Ken Torre from an interest in the business was affixed to the license on March 3, 1993. The charges concerning Ken Torre with regard to appellant's license concerned dates from April 13, 1993, to December 6, 1994. The order of dismissal of the felony charge was entered December 23, 1994. Thus, the charges involved events that occurred prior to the effective date

[5]The petition for dismissal to the Superior Court was made in accordance with Penal Code §1203.4.

of the discharge of the felony conviction.

Additionally, the prescribed manner of removing a condition is through the process outlined in Business and Professions Code §23803, with which appellant did not comply. Whether or not the department would consider the dismissal of the felony conviction as a factor in a review of a petition to remove the condition, the fact is that without a proper petition and assent by the department for removal of the condition, the condition is in full force and effect notwithstanding the dismissal of the felony conviction.

III

Appellant contended that there is new evidence which the department should consider and which could not reasonably have been presented at the hearing.

The appeals board may remand to the department for its consideration any newly discovered evidence which may tend to alter the decision of the department (California Code of Regulations, Title IV, §198). Appellant has not conformed to the specific requirements of the board's rule 198. However, the appeals board takes a reasonable and pragmatic view as to strict conformity to the rule, and does so in this present matter.

The request essentially is a motion to remand the matter back to the department for its consideration of a rescission agreement dated October 15, 1995, rescinding the limited partnership agreement dated January 2, 1993. Appellant argues that this effectively eliminates the problem of Lee Williams being considered a limited partner in the business. However, if a limited partnership existed at the time of the charge made

by the department, we fail to see how a later rescission would alter that.

IV

While appellant here is not without fault, with one exception her faults are not those charged by the department. The two major violations charged, those regarding the purported interests in the premises of Lee Williams and Ken Torre, are not supported by substantial evidence. The remaining violation, purchase from a retailer, is ordinarily subject to only a five-day suspension, according to the department's own guidelines. Therefore, the penalty imposed clearly requires reconsideration by the department.

CONCLUSION

The decision of the department with regard to its determination III and such part of determination V as concerns its finding III, is affirmed; the decision of the department with regard to determinations I, II, and IV, and such part of determination V as concerns findings I, II, IV, and V, is reversed, and the penalty order is reversed and remanded to the department for reconsideration of the penalty.[6]

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[6]This final order is filed as provided by Business and Professions Code §23088 and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.

DISSENT FOLLOWS

DISSENT OF BEN DAVIDIAN

I respectfully dissent from the decision of the majority of the board. I would support the department's decision in this matter.

BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
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