ISSUED DECEMBER 31, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

CAMPERS CORNER BAR, INC. dba Campers Corner Bar 724 E. Seventh Street Los Angeles, CA 90021, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7065 File: 61-300092 Reg: 96038104 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: October 7, 1998 Los Angeles, CA

Campers Corner Bar, Inc., doing business as Campers Corner Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which conditionally revoked its on-sale beer public premises license, with revocation stayed during a probationary period of two years, with an actual 45-day suspension to be served, for appellant permitting, through its employees, the sale of a controlled substance, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and

[1]The decision of the Department issued pursuant to Business and Professions Code §11517, subdivision (c), dated February 20, 1998, and the proposed decision of the administrative law judge dated August 7, 1997, are set forth in the appendix.

Professions Code §24200, subdivisions (a) and (b), arising from a violation of Business and Professions Code §24200.5, subdivision (a), and Health and Safety Code §§11350 and 11352.

Appearances on appeal include appellant Campers Corner Bar, Inc., appearing through its counsel, Ronald L. Morris and James S. Morse; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer public premises license was issued on October 11, 1994.[2] Thereafter, the Department instituted an accusation against appellant charging the above referenced violations. The accusation lists five counts: count 1 alleged Manual Moreno, an employee, permitted the furnishing of drugs to others; count 2 alleged a permitting of the possession of drugs; counts 3 and 4 alleged a permitting of an underage person to enter the premises and consume an alcoholic beverage; and count 5 alleged that two employees permitted the furnishing of drugs to an undercover police officer.

An administrative hearing was held on July 21, 22, 23, and 24, 1997, at which time oral and documentary evidence was received. Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision which was rejected by the Department. The Department thereafter, issued its own decision which conditionally revoked appellant's license.

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[2]Finding I-A states that the premises had been licensed for approximately 20 years prior to its incorporation, and owned by members of the Moreno family.

The proposed decision of the ALJ and the decision of the Department are in the main, similar in actual effect on appellant. The proposed decision dismissed four of the five counts and one of the two parts of the one count retained, stayed revocation, and ordered a suspension of 30 days. The decision of the Department dismissed four of the five counts, except it found both employees had knowledge and permitted the illegal sale, stayed revocation, but ordered a suspension of 45 days. There was some rewriting of the proposed decision, especially in the area of the findings, making subtle but important adjustments: Findings IV-A, B, and D; V; VI-A and B; and VII-B, C, and D.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) there is no substantial evidence that employees of appellant permitted the drug transaction, and (2) the penalty is excessive.

DISCUSSION

The record shows that the area around the premises is a high crime area, described as "skid row, poor, industrial, [and] a lot of narcotic activity in the surrounding area." This area is within the downtown portion of the City of Los Angeles, where there are homeless, prostitutes, and public drinking [I RT 38-39]. While the area is apparently a drug saturated area, the record does not adequately show that appellant's premises had been a haven for narcotic activity, other than the opinions of the police officers, and the arrests on January 9, 1996. The arrests of November 9, 1995, do not appear to fall into this category (the premises as a drug haven) as the police only followed a known dealer into the premises.

Appellant's president, Sergio Moreno, testified that his father, Manual Moreno,

the head of the Moreno family and the original owner, but now an employee, had operated the premises for 25 years, and that the area has been a "skid row forever ... a lot of narcotics activity on the street ... a lot of crime." He also testified that it has been a "constant struggle chasing [drug] people away." At the risk of his own safety (and apparently that of other members of his family), he has cooperated with the police to control drug activity, and when a patron is suspected of illegal activities, that patron is asked to leave the premises. He also testified at length as to the deep community involvement of his family, working with the police and other community organizations to rid the area of its problems [II RT 72, 79, 80-95].

However, the police officers involved in both the November 9, 1995, and January 9, 1996, arrests testified somewhat to the contrary.

Alfonso Kotero, one of the police officers of the narcotic investigation group (and one of the officers accused by appellant in the theft of a large sum of money from the premises' check cashing office after the November 9 raid), testified that for the one year he had worked the area, there were thousands of drug arrests, but to his knowledge, none at the subject premises. Kotera considered that the owner[s] knew of drug activity within the premises, that the premises was a refuge location where many drug people go in and out of the premises, and that the Moreno family did not want to solve the internal drug problem -- the Morenos allowed the drug problems to happen [I RT 81, 83, 106, 109, 113-118].

Juan Martinez, a member of the narcotic investigation group and the main undercover officer in the January 9, 1996, drug sale and arrest, testified that the premises was well known in the area for drug dealings -- "the whole place is bad"

[referring to the premises], and while Martinez was in the premises, the officer heard some requests for narcotics [II RT 42, 46, 62].

The two "raids" on the premises of November 9, 1995, and January 9, 1996, are a backdrop to the central issue in the present appeal: (1) whether two employees knew of a particular drug transaction going on within the premises on January 9, and (2) the import of the Morenos' prior knowledge that there had been drug transactions within the premises, a relatively minor issue.

Apparently, the present appeal's history commenced on November 9, 1995, when a police surveillance of the premises was organized and put into effect. A group of persons were observed outside the premises, with one male, later identified as Diego Guttierrez, selling and delivering what appeared to be drugs. During this time, Manual Moreno, an employee of appellant, came out of the premises on several occasions, possibly as many as five times, and was in the area while the drugs were being passed. Moreno at some time was observed by the officer shaking hands with Guttierrez, indicating to him, the officer, that they were friends. Guttierrez later went into the premises where he was subsequently arrested with drugs on his person. Another person was also arrested after being observed attempting to dispose of drugs in the bathroom area [I RT 7-16, 62-67, 126-128].

Apparently, all the persons in the premises were lined against a wall and searched. During the investigation process, two officers, identified as Alfonso Kotero and Gerard Kennelly, were alleged to have gone into the check cashing office with an unidentified uniformed officer [where the alleged theft of $10,000 occurred] [II RT 98, 140, and III RT 7-8, 40-42].

Sergio Moreno, president of appellant, alleged that after the police left, $10,000 from the check cashing office was discovered missing. A report of the alleged theft was made to the police department on November 14, 1995. The matter of the theft was investigated by the police narcotics group's own investigators for over a month following the report of the theft. The theft allegations against the officers through the police internal affairs unit was not commenced until January 29, 1996, a period of almost two months following the alleged theft, and one month after the second raid on the premises [IV RT 36-40].

During the interval between when the narcotics group began investigating the theft allegations and the time internal affairs began the investigation of the theft, narcotics officers, including the two officers who were the focus of the theft investigation, performed another investigation or raid on the premises, on January 9, 1996. It is this raid that gives rise to the present appeal.

Appellant presents serious allegations in its brief concerning substantial police misconduct. Most of these allegations were presented and considered during the administrative hearing.

In this review, many of the allegations raised by appellant cannot be considered, as the rules of appellate review limit the scope of the Appeals Board's considerations.

The Appeals Board's review of the voluminous record of the proceedings in the administrative hearing leaves the Board with more questions unanswered than answered. The police conduct, or the decisions made as to the conduct of the raids on the premises and the internal affairs investigation, are highly unusual considering the police and premises' employees' testimony that the area

surrounding the premises and, according to the police officers, the premises itself, were a haven of drug activity for decades. Unfortunately, the underlying question as to why there was such limited police activity at the premises, over time, considering the testimony of the police officers, substantiated in a limited manner by the Morenos, of such constant drug activity both within and outside the premises, is unascertainable from the record. The Board is duty bound to review the record and makes its determinations based upon that record, and not be influenced by the innuendos replete within the record and arguments of the parties.

It is the Department which is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without

jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[3]

With the highly charged emotions apparent in the present review, appellant's allegations generally attack the credibility of the principal investigating officers, Martinez, Kotero, and Kennelly, as well as conflicts in the testimony. Appellant describes the officers' testimony as "reconstructed memory," "opinionated statements," and "canned testimony."

However, the question of credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact -- not the Appeals Board. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) Where evidence is in conflict, the Appeals Board is bound to resolve the conflicts in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (a case where 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]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].) With such fundamentals stated, we will consider the issues raised by

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[3]The California Constitution, article XX, §22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

appellant.

I

Appellant contends there is no substantial evidence that employees of appellant permitted the drug transaction of January 9, 1996.

It is fundamental that a licensee is vicariously responsible for the unlawful on-premises acts, or knowledge, of its employees. Such vicarious responsibility is well settled by case law. (Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; and Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].)

Therefore, the crucial question, to impute responsibility to appellant, is whether the two employees, or either of them, had knowledge of the drug transaction about which officer Juan Martinez testified.

A. Mary, the Bartender.

Officer Martinez testified he called the premises, and talked to Mary. He asked for a specific person and was informed that person was not at the premises. The officer indicated he was looking for "black," a street name for heroin. Mary indicated she knew a person, then at the premises, who could provide the heroin [II RT 12-14, 57].[4] The officer under cross-examination testified that the word "narcotics" was never

[4]There appears to be no valid way this appellate tribunal can accurately determine what specifically, the officer told Mary or Mary told the officer, concerning the use of the word narcotics, or some synonym thereof.

used, and the word "heroin" was not used on the phone to Mary. The possible words that would have been used would be "merchandise," "stuff," or "black" [II RT 37-40].

The officer stated that Mary put someone on the phone who could help the officer. Subsequently, the person the officer talked to, left the premises, delivered heroin to the officer, and was thereafter arrested [II RT 15-17].

After the arrest had been made, the officer again called the premises and talked to Mary. The officer asked to speak to the arrested man, stating to Mary that he had made arrangements for the purchase of "heroin" but the man failed to show up. Mary told the officer that the man was not there, and the officer asked if there was someone in the premises who could help the officer buy "heroin." Mary referred the officer to the arrested man's "partner" [II RT 17-19].

The officer then came to the premises, met Mary, and Mary introduced the officer to a person who could provide the "heroin" [II RT 21-22].

We must determine that Mary "permitted" the subsequent sale, by way of her knowing that drug deals, and negotiations of such, were being negotiated in her presence. Thus, the knowledge by Mary that there was a person or persons, within the premises who were dealers, and her recommendation of one of them to officer Martinez, is sufficient to show "permitting."[5] We base our view on two factors: (1) there is sufficient substantial evidence by way of the officer's testimony that Mary knew or

[5]Mary had recommended the officer talk to a man who could help with the officer's purported desires [RT 14]. That individual thereafter was arrested for a sale of narcotics to the officer. Later, Mary provided telephone access to the arrested man's partner [RT 18-21].

had reason to believe that all of the "in and out" of patrons, negotiations by patrons, and phone calls to and from patrons, were more than "local business men" doing a legal business, in this skid row, narcotic infested area, and (2) the record shows that drug deals were being made on the premises' phones by persons who one would suppose, in a beer bar, to be passive patrons; the comments by the officer to Mary as to his intent to do narcotic business with other patrons [II RT 28, 35]; and the deal attested to by the officer of a drug deal being made in the restroom [II RT 32].

The drug dealing at one of the two pay phones in the premises, by a drug dealer, was open and blatant [RT 22-30], and the corresponding call to a supplier, who later made a transfer to the dealer working with the officer, and the subsequent sale of additional narcotics in the premises, also goes to the question of the openness of the drug dealing denied by appellant's employees [RT 30-31].

B. Rosa the Bartender.

At the time the officer and a dealer were negotiating a drug deal, Rosa came by their table and stated that there were two undercover police officers in the premises. She accurately pointed out the back-up police officers [II RT 25].

Rosa's comments concerning the undercover officers to the two "patrons," the officer and the drug dealer, do not properly show she had a clear recognition that the conversations between the officer and the dealer, were drug related. Appellant's employees had been told by Mr. Moreno, the president of appellant, that there were two undercover police officers in the premises [II RT 121]. With the normal fear of reprisals by the police after the first raid of November 9 on the premises, and the questionable handling by the police department of the accusation of the theft, her response could be

reasonably related to a fear of police retaliation. Therefore, Rosa's knowledge of the pending narcotic transaction was not proven by her comments concerning the undercover officers.[6]

However, Rosa's statement to the officer and the dealer that there was a one-way mirror in the check cashing office where the interior of the premises could be observed by anyone in that office, tends to show that her comment was not motivated by fear of police retaliation, but that management would see something Rosa did not want management to see, a reasonable inference to a drug deal, considering the record. Again, with what appears as a fairly open scene of drug negotiations and dealings, Rosa's last comment of the office's one-way mirror negates her claim as being "innocent," and constitutes substantial evidence of her knowing that a drug transaction or some illegal activity was proceeding.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant matter, the findings are attacked on the ground that

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[6]The police internal affairs investigation was closed without conclusion because the witnesses against the police were "uncooperative." [II RT 46, 59-53]. An internal affairs officer testified that there were things that could be done to protect complainants from retaliation by the police officers, who were accused of the theft. However, the internal affairs officer's only constructive suggestion was that the accused officers would not know who the witnesses were who would testify against them -- a highly theoretical protection since the officers already knew who was involved in the November 9 raid [IV RT 47-50].

there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

We conclude that there was substantial evidence, bolstered by the clear testimony of the police and Manual and Sergio Moreno, that narcotic activity was a major problem around, and to a degree, in the premises.

II

Appellant contends the penalty is excessive. The Appeals Board will 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 will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Manual Moreno (who apparently knew Guttierrez, the drug dealer) now an employee of his son or sons, testified that he tried to move drug dealers away from the premises, when he saw the illegal business dealings. He testified that he would tell patrons to leave the premises when he saw their illegal actions -- a reasonable inference that there was drug trafficking in the premises and within his knowledge [III RT 46]. Yet his testimony appears suspect in view of the testimony that he met and talked with an observed drug dealer, in the company of others outside the premises [I

RT 7-16, 62-67, 126-128].

The state of the record marginally, but substantially as defined by case law, shows the knowledge of the two employees to that which was transpiring on January 9, 1996.

ORDER

The decision of the Department is affirmed.[7]

RAY T. BLAIR, JR., CHAIRMAN
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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