ISSUED DECEMBER 20, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MANUEL and MARIA GUTIERREZ dba Durango's Nightclub 8113 Eastern Avenue Bell Gardens, CA 90201, Appellants/Licensees,	)	AB-7188 File: 48-296480 Reg: 97040294
v.	)	Administrative Law Judge at the Dept. Hearing: John P. McCarthy
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	Date and Place of the Appeals Board Hearing: November 5, 1999 Los Angeles, CA

Manuel and Maria Gutierrez, doing business as Durango's Nightclub (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for having knowingly permitted narcotics transactions to take place in the premises on a recurring basis, and for their employees having engaged in a drink solicitation scheme,[2] being contrary to the universal and generic public welfare and morals provisions of the California

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[1]The decision of the Department, dated July 31, 1998, is set forth in the appendix.

[2] Violations were also found for having permitted loitering for the purpose of drink solicitation, in violation of Business and Professions Code §25657, subdivision (b), and Penal Code §303. All of the solicitation charges relate to instances in the same evening where each of two females solicited the same Department investigator to buy them drinks.

Constitution, article XX, §22, arising from violations of Business and Professions Code §§24200.5, subdivisions (a) and (b), and 25657, subdivision (b); Health and Safety Code §11352; and Penal Code §303.

Appearances on appeal include appellants Manuel and Maria Gutierrez, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on August 4, 1994. Thereafter, the Department instituted an accusation against appellants charging that appellants knowingly permitted narcotics transactions violative of the Health and Safety Code to take place in the premises, and solicitation of drinks, violative of various provisions of the Alcoholic Beverage Control Act, the Penal Code, and Department Rule 143.

An administrative hearing was held on September 22, 23, and 24, 1997, and January 26 and 27, 1998, at which time oral and documentary evidence was received. Seventeen witnesses testified, and a hearing transcript totaling 699 pages was generated.

Following the hearing, the Administrative Law Judge (ALJ) issued his proposed decision, sustaining the bulk of the charges of the accusation and conditionally revoking appellants' license, conditioned upon an actual 120-day suspension and three years of discipline-free operation.

The Department did not adopt the proposed decision, instead issuing its own decision pursuant to Government Code §11517, subdivision (c). The Department's decision adopted all material aspects of the proposed decision except those pertaining to the penalty. In that respect, the Department rejected that part of the proposed decision entitled "Penalty Recommendation," rejected the penalty proposed by the ALJ, and ordered appellants' license revoked.

Appellants have filed a timely notice of appeal, and raise the following issues: (1) The Department failed to issue its decision within the 100-day period prescribed in Government Code §11517, subdivision (d); as a result, the proposed decision was adopted by operation of law; (2) The Department erred in its application of the statutory presumption that respondents knowingly permitted the narcotics transactions to occur; (3) the evidence is insufficient to support the findings of drink solicitation; and (4) the penalty constitutes an abuse of discretion.

DISCUSSION

I

Business and Professions Code §11517, subdivision (d), provides:

> "The proposed decision shall be deemed adopted by the agency 100 days after delivery to the agency by the Office of Administrative Hearings, unless within that time the agency commences proceedings to decide the case upon the record, including the transcript, or without the transcript where the parties have so stipulated, or the agency refers the case to the administrative law judge to take additional evidence. In a case where the agency itself hears the case, the agency shall issue its decision within 100 days of submission of the case. **In a case where the agency has ordered a transcript of the proceedings, the 100-day period shall begin upon delivery of the transcript.** If the agency finds that a further delay is required by special circumstances, it shall issue an order delaying the decision for no more than 30 days, and specifying the reasons therefor. The order shall be subject to judicial review pursuant to Section

11523." [Emphasis added.]

Appellants contend that the Department failed to demonstrate compliance with the 100-day time limit in Government Code §11517, subdivision (d). They contend that shipping records obtained from the court reporting service which prepared the transcripts demonstrate that the transcripts were delivered to the Department more than 100 days prior to the Department's issuance of its decision pursuant to Government Code §11517, subdivision (c). Consequently, appellants assert, the proposed decision (which differs materially from that of the Department only in that its order of revocation was stayed and a suspension imposed as contrasted with the Department's order of outright revocation) became the decision of the Department by operation of law.

Appellants assume that the Department has an obligation to make an affirmative showing, apparently as part of its decision, that the deadline has been met. The statute is silent as to whether the Department must make such a showing. Appellants argue, however, that the Department has this obligation because it is the only party with the information that would show whether its decision was timely.

In any event, the certified transcripts are stamped as having been received by the Department on April 22, 1998 (Vols. I, II, IV and V) and April 23, 1998 (Vol. III). In addition, the Board has been furnished certified copies of the invoices which accompanied the transcripts, which reflect the same dates. In the absence of any evidence that these dates are incorrect, it would appear that the issuance of the Department's decision 99 days later met the statutory deadline.

We cannot accept appellants' contention that the 100 days are deemed to

commence running on the day the court reporter delivers the transcripts to UPS.[3] If, as appellant's argument assumes, the 100-day limit is jurisdictional,[4] it seems to us unwise to have the beginning date dependent upon the date the court reporter delivers the transcript to a common carrier. We do not think such a critical date should turn on an act by a non-party. Thus, we think appellants' citations to Code of Civil Procedure §1013 and other similar statutes of little relevance and less significance in the context of this case.

Code of Civil Procedure §1013 provides that when service is effected by mail, it is complete at the time of deposit. However, it further provides that, if within a given number of days a party has a right which may be exercised or an act which must be done, the time to do so is extended by five days if the address of mailing is within the State of California. Thus, the effect of this code provision is to provide a party with the equivalent of the maximum time during which it may or must perform an act, i.e., either serve a document or respond to something served upon them.

Nor are we persuaded by appellants' reference to the rule which applies in the law of sales, that when a contract does not specify otherwise, title passes when the delivery is made to the common carrier. That rule, which serves the purpose of allocating the risk of possible loss in transit, has no relevance where the party who must

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[3] Documents obtained from the court reporting service by appellants indicate that the transcripts were delivered to UPS on April 20, 1998.

[4] Deadlines imposed upon administrative agencies are either mandatory, that is, jurisdictional, or directory, in which case the failure of the agency to meet the deadline is of no consequence. (See Outdoor Resorts/Palm Springs Owners' Ass'n v. Alcoholic Beverage Control Appeals Board 1990) 224 Cal.App.3d 696 [273 Cal.Rptr. 748].)

act cannot act until after receipt of the material in question. Until its receipt of the transcript, the agency is not in a position to formulate its own decision, which, by statute, it is given 100 days to do.

In Poliak v. Board of Psychology (1997) 55 Cal.App.4th 342, 351 [63 Cal.Rptr.2d 866], a case cited by appellants, the court summarized the import of §11517, subdivision (d), the code provision here involved:

> "The statute ensures timely action in two ways. First, the agency must issue a notice of non-adoption and elect to decide the case itself or to remand it, thereby commencing proceedings, within 100 days of receipt of the ALJ's proposed decision. Second, the agency must issue its decision within 100 days of **receiving** the transcripts." (Emphasis supplied.)

The court's focus on the agency's receipt of the transcripts, although not critical to its decision, is certainly instructive, and consistent with our reading of the statute.

We believe that appellants' contention must be rejected for the reasons stated herein, and that it is unnecessary for us to reach the question whether the 100-day limit is mandatory or merely directory.

II

Appellants contend that the Department erred in its application of a presumption that they knowingly permitted the narcotics transactions to occur; they claim the Department failed to conduct the requisite analysis to determine whether the presumption "should have stood following five volumes of transcript hearings." (App.Br., page 20.)

We read this as an argument that the presumption of knowing permission was overcome by other evidence.

Appellants do not dispute the findings that the seven drug transactions

occurred. The incidents involved four different sellers, none of whom were employees of the premises. Appellants argue that, because of the surreptitious nature of the transactions, and the location where they took place - near or inside the men's restroom - the bartender and other employees were not in a position to witness them. Consequently, they claim, it is unfair to charge them with having knowingly permitted the transactions to take place.

The findings offer only mixed support for appellants' contentions. Finding X, which addressed the issue of knowledge, found as follows:

> " It was not established that either respondent [sic] or any of their employees had actual knowledge of any of the specific drug transactions referred to in Findings of Fact III through IX, above. Neither respondent was present at the premises during any of the transactions. On the other hand, it is difficult to believe that suspicious activity so obvious to investigator Pacheco was either not seen or was overlooked by the respective on-duty employees at the club.
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> "It is not possible to see the entrance to the men's restroom from a bartender's position behind the fixed bar counter. It is similarly not possible to see activity in the hallway where the July 12 transaction with Alvarez took place. There was a bartender on duty during each of Pacheco's visits and at no time while Pacheco was inside the club did the bartender leave her fixed post behind the fixed bar counter.
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> "On the other hand, one or more waitresses was also on duty while investigator Pacheco was inside on April 5, May 31, and July 12, 1996, although they may not have started work until about 9:00 p.m. It was customary to have two waitresses on duty on Friday evenings during the April to July period in 1996. In addition, a security guard was on duty while Pacheco was at the premises on July 12, 1996, and nearby when Pacheco spoke outside with Guerrero.
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> "Each of investigator Pacheco's visits to the club occurred on a Friday. According to respondent Manuel Gutierrez, before 8:30 or 9:00 p.m., even on Fridays, as a rule there were hardly any patrons at the location. While it may be difficult for a bartender, short in stature, to see everything which occurred in the premises from behind the bar counter, it was not established that even a short bartender can see nothing past the patrons who are sitting at the bar.

> An on-duty bartender should at a minimum have been alerted to the hiding place at the bar counter used by Alvarez for his cache of drugs. The lack of patronage, the suspicious movement of patrons in use of the restroom and the many contacts with Guerrero, and the fact that both Guerrero and Alvarez had their supply of drugs inside the premises, should have alerted respondents' employees that illicit activities were occurring."

It is apparent from this finding that the ALJ did not find appellants' disclaimer of knowledge entirely persuasive. Given the existence of what could be characterized as a "narcotics convenience store" inside the premises, and the probability that the transactions with the Department investigator were only a sampling of what the activity probably was, it is not unreasonable to believe that the employees who were on duty at those times must have turned a blind eye to what went on with respect to the activities of Alvarez and Guerrero, the sellers, and did so with respect to the transactions with investigator Pacheco.

Appellants place heavy reliance upon the decision in Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], and argue that the fact that no employees were involved, that the transactions were surreptitious, and that no traditional narcotics transaction language occurred within earshot of employees, coupled with appellants' efforts to assure that such transactions did not take place within the premises, all preclude the application of the presumption that appellants "knowingly permitted" the illegal sales.

In Laube v. Stroh, supra, the court criticized the Department and the Appeals Board for what it described as their interpretation of an earlier case (McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8]) that "a liquor licensee permits drug activity when he or she fails to take reasonable steps to

prevent it, even when the licensee has no reason to believe such activity is occurring." The court (at 2 Cal.App.4th at 373) rejected the "notion that the passive conduct of permitting something by failing to take measures to prevent it does not require knowledge of the thing permitted," concluding instead (2 Cal.App.4th at 379) that:

> "A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly. Once a licensee knows of a particular violation of law, that duty becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from recurring, once the licensee knows of it, is to 'permit' by a failure to take preventative action."

Thus, although rejecting the concept of strict liability, the court, nevertheless, appears to be saying that, despite however extensive the measures a licensee may have taken after learning there had been drug transactions between patrons in the premises, that licensee will be deemed to have "permitted" any such transaction which occurred thereafter.

However, the court in Laube v. Stroh did not address the statutory presumption that is contained in Business and Professions Code §24200.5, subdivision (a). Appellants, although asserting the presumption is rebuttable, have cited no case that so holds. Endo v. State Board of Equalization (1956) 143 Cal.App.2d 395 [300 P.2d 366] suggests it may not be rebuttable.

We do not need to reach that question, because we are not of the belief that appellants' evidence is sufficient to overcome the presumption of knowing permission. The facts recited in Finding X are sufficient, we think, to make a case

of knowing permission, and certainly to refute the argument that the statutory presumption had been overcome.

III

The accusation contained nine counts (counts 2 through 11) premised on drink solicitation. Counts 2 and 7 charged violations of Business and Professions Code §24200.5, subdivision (b) (employment for or permission to procure purchase of alcoholic beverages pursuant to commission scheme). Counts 3 and 8 were premised on violations of Business and Professions Code §25657, subdivision (a) (employment or payment of commission for procuring purchase of alcoholic beverages). Counts 4 and 9 charged that the two females were permitted to loiter for the purpose of soliciting alcoholic beverages for their consumption, in violation of subdivision (b) of §25657. Counts 5 and 10 charged violations of Rule 143 based upon the alleged solicitation conduct (solicitation or acceptance of drink by employee), and counts 6 and 11 charged violations of Penal Code §303 (employment for purpose of, or payment of commission for, procuring purchase of alcoholic beverages).

The Department concluded that counts 3, 5, 8 and 10 of the accusation had not been established, citing Findings of Fact XII through XV and XVII, and noting that Business and Professions Code §25657, subdivision (a), and Rule 143 both require that the person soliciting the beverage be an employee. Finding XVII concluded that neither of the two females was an employee on the day in question.

Of the counts which were sustained (counts 2, 4, 6, 7, 9 and 11) appellants

challenge counts 4 and 9 on the ground there was no evidence or finding that either of the two females was loitering, and counts 6 and 11 on the ground the Penal Code provision requires proof of employment. Significantly, appellants have not challenged counts 2 and 7, which charged violations of Business and Professions Code §24200.5, subdivision (b).

The evidence of loitering is weak or non-existent. All that the record shows is that shortly before investigator Pacheco left the bar to call for backup, he was approached by Elba Lopez, who asked him to buy her a drink, and shortly after he returned to the bar, was approached by Anna Orellana, who asked him to buy her a beer. There is no evidence which shows what the females were doing before that, or how long they had been in the bar before approaching the investigator. While Lopez sat with Pacheco long enough to have several drinks, we think that activity is more akin to solicitation than loitering. Counts 4 and 9 should have been dismissed.

Penal Code §303 is written in the alternative, and does not necessarily require proof of employment. However, the Department now states that these counts should be dismissed since the accusation was based upon employment and not upon payment of commission.

Thus, appellant has been successful, at best, in narrowing the solicitation counts to two. The surviving counts are premised upon the bartender's payment of undetermined sums of money to the two females when they solicited the drinks, the money coming from Pacheco's $20 bills. Unfortunately for appellants, these two counts were based upon Business and Professions Code §24200.5,

subdivision (b), which by its terms mandates revocation.

IV

Appellants challenge the Department's order of revocation as an abuse of discretion. Appellants seem to say that, even if knowledge may be presumed from successive sales, it is improper to base revocation on such presumed knowledge. In other words, although knowledge may be presumed in order to support a finding that the statute was violated, more is required for the next step, the order of revocation. Appellants dismiss the solicitation charges as an isolated instance, noting that there was no evidence of solicitation in any of Pacheco's earlier visits to the premises. Finally, appellants point to the extensive remedial efforts they exerted to prevent future drug activity, including the installation of closed circuit video; removal of booths which could possibly conceal such transactions; the position of prominent signs, in English and Spanish, warning against drug transactions; and the hiring of a person to limit access to the restrooms to one person at a time. Thus, they contend, the Department abused its discretion when it rejected the more lenient penalty proposed by the ALJ.

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].)

The ALJ was obviously impressed by appellants' arguments that their lack of personal involvement in the surreptitiously-conducted drug transactions, the remedial action taken by them to prevent future such occurrences, and the isolated nature of the drink solicitations, all militated against the outright order of revocation Department counsel had requested.

The Department, on the other hand, was less impressed, rejecting the stayed revocation, lengthy suspension and probationary period ordered by the ALJ and instead ordering outright revocation.

The Department's reasoning was expressed as follows:

> "Considering penalty, the violation of Section 24200.5(a), by itself, warrants revocation of the license. Seven drug transactions within two months results in the conclusion that respondents are deemed to have knowingly permitted the illicit sales. (See Endo v. Board of Equalization (1956) 143 Cal.App.2d 395, 300 P.2d 366.) The violation of 24200.5(b), by itself, also warrants revocation of the license. Two of the respondents' employees, including the person respondents leave in charge when they are not present, Elsa Bonilla (Perez), were directly involved in paying money to females they knew. The conduct of both Bonilla and Contreras are imputed to respondents. (Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149, 2 Cal.Rptr. 629.) Significantly, the employees apparently convinced respondents they did nothing wrong, for both are still employed at the premises. Further, none of the remedial steps taken after July 12, 1996, involved illegal drink solicitation.
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> "Violations of Section 25657(b) and California Penal Code Section 303 have also been established.
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> "The interest of the Department is in protecting the general public from unlawfully run premises. The violations found are the most serious sort, and which require the strictest sanctions to protect the health, welfare and morals of the public"

The combined presence of drug transactions and B-girl activity clearly influenced the Department's thinking. The reversal of the counts based on Business

and Professions Code §25765, subdivision (b), and of the counts based on Penal Code §303, in accordance with the Department's concession in its brief, does little for appellants' situation, since the most serious of the solicitation charges were not challenged, except for the claim they were an isolated instance.

There is no doubt that the discipline ordered by the Department is severe. Appellants may well face financial hardship as a consequence of losing their license. Nevertheless, the Department has the statutory power to enter the order as it did. It has expressed cogent reasons for its order. Regardless of whether the Board might sympathize with appellants' plight, it cannot say the Department abused the wide discretion it possesses. Therefore, the penalty order must stand.

ORDER

Determination of Issues III and IV (Counts 4, 6, 9 and 11) are reversed. The decision of the Department is affirmed in all other respects.[4]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4] 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.