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

AB-7804
File: 48-306102 Reg: 00049930

GERALD INMAN dba Jerry's Stables
14127 Foothill Blvd., Fontana, CA 92335,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 6, 2001
Los Angeles, CA

ISSUED FEBRUARY 22, 2002

Gerald Inman, doing business as Jerry's Stables (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for permitting acts by his performers in violation of the rules of the Department, and permitting sales of controlled substances by way of performers and patrons, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivision (a), arising from violations of Business and Professions Code §24200.5, subdivision (a); Health and Safety Code §11379; and California Code of Regulations, chapter 1, title 4, §§143.3 (a), (b), and (c), and 143.3(2).

Appearances on appeal include appellant Gerald Inman, appearing through his counsel, Larry P. Adamsky, and the Department of Alcoholic Beverage Control,

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[1]The decision of the Department, dated May 10, 2001, is set forth in the appendix.

appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on June 23, 1998. Thereafter, the Department instituted an accusation against appellant charging the violations shown above. The accusation charged 33 counts, 20 counts concerning sales of controlled substances, and 13 counts of violating the rules of the Department (Rule 143) concerning his performers' conduct.

Additionally, the accusation charges that in 1998 and 1999, appellant had a decision in each year against him concerning the same Rule 143 charges as are present in the present matter. While the Department did not prove the prior violations by way of certified copies of those decisions, appellant in his testimony admitted that those violations alleged in the accusation had in fact occurred [RT 19, 31].

An administrative hearing was held on March 21, 2001, at which time oral and documentary evidence was received. At that hearing, appellant admitted by stipulation that the reports of the investigators concerning the acts surrounding the violations charged were true [RT 6-8]. Thereafter, testimony by appellant and his witnesses was presented concerning the charges. Subsequent to the hearing, the Department issued its decision which determined that two of the controlled substances charges and one of the performer's conduct charges, were found not proven. The Department ordered the license revoked.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) appellant did not permit the violations, (2) it was an abuse of discretion to find Business and Professions Code §24200.5, subdivision (a), applicable, and (3) the penalty is excessive.

DISCUSSION

The Department 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.[2]

"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 there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is

[2]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].

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].)

I

Appellant contends the violations were not permitted by him. Appellant alleges that the dancers were independent contractors thus their knowledge of the violations could not be imputed to appellant.

A licensee is vicariously responsible for the unlawful on-premises acts of his employees. Such vicarious responsibility is well settled by case law. (Morel 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].)

Appellant cites the case of McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8], for the proposition that the knowledge of the entertainers cannot be attributed to him. The McFaddin case concerned several transactions which occurred on the premises involving patrons selling or proposing to sell controlled substances to undercover agents. While the licensee and its employees did not know of the specific occurrences, they knew generally of contraband problems and had taken numerous preventive steps to control such problems. The McFaddin court held that since (1) the licensee had done everything it reasonably could to control contraband problems, and (2) the licensee did not know of the specific transactions charged in the accusation, the licensee could not be held accountable for the incidents charged.

The McFaddin matter concerned patron misconduct. In the present matter, we have two entertainers who participated in the Rule 143 violations (12 instances or counts), and the negotiations and sales of controlled substances (13 instances or counts). McFaddin, therefore, has little weight in the present matter.

The record shows the violations of Rule 143 in all its variations of conduct: exposure of breasts, touching and exposure of the vulva, and simulated intercourse. The record is certainly not equivocal. The prior record, the hearing, and appellant's brief, tend to show a lack of appreciation for the law as it applies to such conduct [RT 20-26].

The record also shows that on July 12, 14, 20, 27, and August 18, and 25, 2000, sales of controlled substances took place. One of the dancers upon being asked if a purchase could be made, introduced the investigator to another entertainer. Premises' phones were used in the transactions, and the investigators were told to call the premises if they needed more of the controlled substances.

The case of Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], also cited by appellant, was actually two cases--Laube and Delena, both of which involved restaurants/bars--consolidated for decision by the Court of Appeal.

The Laube portion dealt with surreptitious contraband transactions between patrons and an undercover agent--a type of patron activity concerning which the licensee had no indication and therefore no actual or constructive knowledge–and the court ruled the licensee should not have been required to take preventive steps to suppress that type of unknown patron activity.

The DeLena portion of the Laube case concerned employee misconduct, wherein an off-duty employee on four occasions sold contraband on the licensed

premises. The court held that the absence of preventative steps was not dispositive, but the licensee's penalty should be based solely on the imputation to the employer of the off-duty employee's illegal acts.

The imputation to the licensee/employer of an employee's on-premises knowledge and misconduct is well settled in Alcoholic Beverage Control Act case law. (See Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; Morel v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633]; and Endo v. State Board of Equalization (1956) 143 Cal.App.2d 395 [300 P.2d 366, 370-371].)

However, appellant contends the entertainers were independent contractors, and as such, appellant is not responsible for their improper conduct, both as to personal dancing, and involvement in the sales of controlled substances.

Civil Code §2298 states: "An agency is either actual or ostensible." Civil Code §2300 defines "ostensible agency" as: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (See also 2 Summary of California Law, Witkin, pages 52-53 for a full discussion of ostensible agency).

In the matter of Shin (1994) AB-6320, the Appeals Board found an ostensible agency where a licensee's daughter, while visiting the premises, was told by the father/licensee not to sell anything, but to watch out for thieves while the father was busy with another patron. While at the counter near her father, the daughter sold an alcoholic beverage to a minor and accepted payment for the

beverage, having access to the cash register.

The record shows that the two entertainers also waited on patrons of the premises, obtained drink orders, and served the drinks to those who ordered [Exhibit 2]. These duties are consistent with employment, no matter how the classification of the entertainers is found in the premises' books. This is not patron misconduct as set forth in McFaddin and the first part of Laube, but employee misconduct. Permission is therefore presumed.

II

Appellant contends it was an abuse of discretion to find Business and Professions Code §24200.5, subdivision (a), applicable.

Appellant questions the presumption raised by §24200.5, subdivision (a), that successive negotiations or sales over a period of time should be deemed evidence of "permission" or "knowledge" by appellant. The §24200.5, subdivision (a), presumption is that a licensee knowingly permits sales or negotiations for sales of contraband where there are successive transactions over a continuous period of time. Two appellate court cases discussing the "knowingly-permitted" phrase in §24200.5(a) held that the statute gives rise to a rebuttable presumption, and treated the presumption as evidence.[3] These cases were decided prior to the enactment of Evidence Code §600, which precluded a presumption from being

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[3]In Endo v. State Board of Equalization (1956) 143 Cal.App.2d 395, 300 P.2d 366, the Court of Appeal regarded the presumption as evidence when it stated: "The evidence (including the statutory presumption) which supports the finding is substantial ..." (300 P.2d at 369). In Kirchhubel v. Munro (1957) 149 Cal.App.2d 243, 308 P.2d 432, the same panel of the Court of Appeal again regarded the presumption as evidence when it stated: "The presumption is not made conclusive but merely evidence of permission which may be overcome by a contrary showing." (308 P.2d at 436.)

evidence.

Various legal sources do not find the existence of presumptions and their no longer being regarded as evidence as irreconcilable (see Witkin: California Evidence, 3rd ed., Vol. I, Ch. III, Burden of Proof and Presumptions; Comments of the Law Revision Commission and the Assembly Committee on Judiciary in West's Annotated California Codes; and Evidence Code §600 et seq.). Instead, presumptions should be classified as either presumptions affecting the burden of proof (public policy presumptions other than those facilitating proof) or presumptions affecting the burden of producing evidence (proof-facilitating presumptions). The Kirchhubel case declared that the presumption in §24200.5(a) was a rebuttable one (308 P.2d at 436). Evidence Code §602 provides that "A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption." Accordingly, the presumption involved in §24200.5(a) is one affecting the burden of proof.

In People v. Hampton (1965) 236 Cal.App.2d 795 [46 Cal.Rptr. 338], it was held that Labor Code §212(a), which creates a presumption of knowledge that there are insufficient funds when employer/defendants issue checks that are later dishonored, imposed the burden of proving the nonexistence of knowledge on defendants, and held that their testimony of no knowledge was insufficient to meet the presumption. To prove no knowledge, defendants had to prove that reasonable steps had been taken to inform themselves on whether funds would be available.

Appellant contends that he and two witnesses gave “strong” evidence that they did not know of controlled substance sales. Apparently from the decision the Administrative Law Judge did not find the testimony credible.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (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].)

We conclude that, based upon our analysis and the continuous ease of obtaining controlled substances within the premises from patrons and the entertainers, appellant was properly charged and found in violation of law.

III

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].)

The Department had the following factors to consider: (1) appellant's entertainers had a history of Rule 143 improper conduct apparently as extensive as the conduct in the present case; (2) the Rule 143 conduct of the entertainers was open to public view so it could be seen by the bartender on duty, even though in this present case, it was done behind the jukebox, but observable by the bartender behind the bar [RT 51, 55]; (3) the prior conduct of the entertainers should have put appellant on notice of the potential for misconduct considering the appeal of that conduct on the patrons, and the potential for improper showing of body parts in the hopes of obtaining tips -- a common practice and obvious concern, hence the

mere setting forth rules with an absence of a reasonably workable system to closely monitor against improper conduct, is no safeguard for such conduct where the environment of the premises, and the titillating conduct, would induce demands for more to see; and (4) the entertainers successive sales to the investigators of controlled substances -- sufficient knowledge was had by the entertainers to obtain the sought after controlled substances with little time delay.

Considering such factors, the appropriateness of the penalty must be left to the discretion of the Department. The Department having exercised its discretion in a reasonable manner, the Appeals Board will not disturb the penalty.

ORDER

The decision of the Department is affirmed.[4]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]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.