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

AB-8055
File: 21-220491 Reg: 02053192

MICHAEL EDWARD MCINERNY and MICHAEL EVETTE MCINERNY,
dba Emerald Spirits
1825-A West Vista Way, Vista, CA 92083,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: July 3, 2003
Los Angeles, CA

ISSUED SEPTEMBER 3, 2003

Michael Edward McInerny and Michael Evette McInerny, doing business as Emerald Spirits (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 20 days for their clerk selling an alcoholic beverage to a minor decoy, a violation of Business and Professions Code[2] section 25658, subdivision (a).

Appearances on appeal include appellants Michael Edward McInerny and Michael Evette McInerny, appearing through Michael Edward McInerny; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

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[1]The decision of the Department, dated November 7, 2002, is set forth in the appendix.

[2]Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 18, 1990.[3] Thereafter, the Department instituted an accusation against appellants charging that, on November 16, 2001, their clerk, Daniel McCoy, (the clerk), sold an alcoholic beverage to 18-year-old Eric Santos. Santos was working as a decoy for the San Diego County Sheriff's Department at the time.

At the administrative hearing held on August 21, 2002, documentary evidence was received, and testimony concerning the violation charged was presented by Santos and by Robert Eaton, a deputy with the San Diego County Sheriff's Department. Appellant Michael Edward McInerny also testified.

Following the hearing, the Department issued its decision which determined that the violation charged had been established.

Appellants filed a timely appeal in which they raise the following issues: (1) The Department did not proceed in the manner required by law; (2) relevant evidence was improperly excluded at the hearing; and (3) the administrative law judge (ALJ) applied the wrong legal standard.

DISCUSSION

I

Appellants contend the Department did not proceed in the manner required by law because it did not show that the violation charged was contrary to public welfare and morals, as required by the California Constitution, and because it did not use a consistent hearing process.

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[3]Exhibit 2 indicates that appellants have held an off-sale general license for this location since August 18, 1988.

Article XX, section 22, of the California Constitution provides that the Department may impose discipline on a license if it determines "for good cause that the . . . continuance of such license would be contrary to public welfare and morals, or that a person . . . holding a license has violated any law prohibiting conduct involving moral turpitude." Appellants appear to argue that this constitutional provision requires the Department to show that the violation charged was one involving moral turpitude before it can impose discipline and that the Department did not, and could not, show that the sale to this minor involved moral turpitude.

We agree with appellants that the sale of an alcoholic beverage to a minor "does not in every case evidence a bad moral character." However, a violation need not involve moral turpitude to be contrary to public welfare and morals. The Legislature prohibited sales of alcoholic beverages to minors, at least in part, to protect young people "from exposure to the 'harmful influences' associated with the consumption of such beverages." (*Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal.4th 561, 567 [28 Cal.Rptr.2d 638].) In other words, the statute was designed to promote public welfare and morals, and a violation of the statute is contrary to public welfare and morals. License suspension for such a violation is authorized under both the constitutional provision as well as Business and Professions Code section 24200, subdivision (a).

It appears that a hearing with regard to a prior accusation against appellants was conducted somewhat more informally than was this one. However, this Board can review only what happened in the present case. Appellants admit in their brief that "either procedure is acceptable," and we cannot find fault with the Department's insistence "upon strict compliance with administrative procedural requirements," even if

that was not done at the prior hearing. Appellants were entitled to fairness and basic procedural due process in both hearings, but that does not mean that the two hearings must have been conducted identically.

II

Appellants contend that relevant evidence was improperly excluded at the hearing. They argue that the ALJ erred in not allowing them to present evidence regarding the clerk's criminal charge of selling to a minor and not allowing them to present the clerk's testimony through an affidavit.

Appellants argue that the criminal charge is relevant in this case because the reason for the criminal charge – the sale of an alcoholic beverage to a minor – is also the basis for the disciplinary action on the license. The Appeals Board addressed the same argument in *Janal's Entertainment, Inc.* (2000) AB-7385. The Board noted that, "because the standard of proof in a criminal matter – beyond a reasonable doubt – is higher than the preponderance-of-the-evidence standard that is applicable in a license disciplinary matter," a dismissal or acquittal in a related criminal case is not "relevant evidence" and is properly excluded from the record. The Board also relied on *Gikas v. Zolin* (1993) 6 Cal.4th 841 [25 Cal.Rptr.2d 500] and *Cornell v. Reilly* (1954) 127 Cal.App.2d 178 [273 P.2d 572], both of which held that an acquittal in a criminal case is not dispositive in an administrative disciplinary proceeding based on the same underlying conduct. We have no reason to decide this issue differently in the present matter.

Appellants offered the written declaration of the clerk, who left shortly after signing it, to rebut the officer's testimony that the clerk had changed his story several times when confronted about the sale. The Department objected to the declaration on

several grounds, principally hearsay and "improper notice to the Department" [RT 79], and the ALJ sustained the Department's objection.

Appellants argue on appeal, as they did at the hearing, that the declaration was admissible as a declaration against penal interest (Evid. Code, § 1230) or as administrative hearsay explaining or supplementing other evidence.

The clerk's declaration fails to qualify as a declaration against penal interest because the clerk does not admit to selling to a minor, nor to taking any action that could reasonably subject him to any criminal charge. The declaration is simply the clerk's version of what happened, and it is clearly designed to exculpate him.

Appellants do not state what evidence they believe the declaration supplements or explains, which would allow its admission as administrative hearsay, and we have found none in our review of the record. Rather than supplementing or explaining evidence, the declaration contradicts the evidence presented at the hearing.

The hearsay rule protects the right of each party to cross-examine witnesses and helps assure the trustworthiness of the evidence presented in a proceeding. The declaration offered by appellants was rejected by the ALJ because he could not judge the trustworthiness of the statement without the clerk's presence, and the Department did not have the opportunity to cross-examine the clerk. We cannot say that he abused his discretion in doing so.[4]

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[4]The Administrative Procedure Act (Gov. Code, § 11340 et seq.) provides methods by which a party may introduce testimony in a writing, such as the declaration offered here. Government Code section 11511 provides for depositions in cases where a witness will be unavailable to testify, and section 11514 specifies the procedure for affidavits to be introduced in evidence. Both statutes provide that the opposing party must receive notice and the opportunity to cross-examine the person whose testimony will be recorded. Appellants did not comply with the requirements of either of these statutes.

III

Appellants contend the ALJ used a legal standard of strict liability in that he limited their defenses to those available under Department rule 141.[5, 6] They argue that their absence from the premises at the time of the sale and their extensive precautions to prevent sales to minors provide them with an alternative defense which the ALJ should have allowed them to present.

Appellants cite language from *Laube v. Stroh* (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779] and *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1999) 76 Cal. App.4th 570 [90 Cal.Rptr. 2d 523] (*Santa Ana*) in support of their position that they should not be held liable because they had no knowledge of the violation and they had taken steps to prevent such sales.

Appellants refer to the court's statement in *Laube v. Stroh, supra*, that,

> a licensee must have knowledge, either actual or constructive, before he or she can be found to have "permitted" [a violation]. It defies logic to charge someone with permitting conduct of which they are not aware. It also leads to impermissible strict liability of liquor licensees when they enjoy a constitutional standard of good cause before their license – and quite likely their livelihood – may be infringed by the state.

(*Laube v. Stroh, supra*, 2 Cal.App.4th at p. 377.)

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[5]References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

[6]Appellants assert that the ALJ erroneously considered only the physical appearance of the decoy when determining that he displayed the appearance generally expected of a person under the age of 21, as required by rule 141(b)(2), because the only details he included in his finding involved physical appearance. However, the ALJ stated that he considered the decoy's "overall appearance . . . including his demeanor, his poise, his mannerisms, [and] his maturity, . . . the way he conducted himself at the hearing and all the evidence presented regarding his appearance." (Findings of Fact IV.C.& D.) We have no reason to doubt the ALJ's statement.

Laube v. Stroh, supra, is not helpful to appellants.[7] The language quoted states that knowledge may be either actual or constructive. It is settled law that a licensee has constructive knowledge of the on-premises conduct of an employee, because the employee's knowledge is imputed to the employer. (See *Harris* v. *Alcoholic Beverage Control Appeals Bd.* (1962) 197 Cal.App.2d 172 (17 Cal.Rptr. 315); *Mack* v. *Department of Alcoholic Bev. Control* (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629].) In appellants' case, while they did not actually know of this particular violation, they clearly had constructive knowledge, since it was their own employee who made the unlawful sale, and his knowledge is properly imputed to appellants.

Appellants also refer to *Santa Ana*, *supra*, where the court found the Department's imposition of discipline to be an abuse of discretion. There an employee surreptitiously used her own funds to illegally purchase food stamps at half their face value although the licensee had taken strong steps to prevent such crime. The court, as noted by appellants, explained that exceptions from the general rule of imputed knowledge may be justified in a particular case; that departmental discipline is imposed to protect public welfare and morals; and that imposing discipline must be viewed in the context of selling alcoholic beverages.

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[7]In that case, the court annulled the Department's decision imposing discipline on a licensee for surreptitious drug transactions of which neither the licensee nor the licensee's employees knew or had reason to suspect were occurring among patrons of the "upscale hotel, bar and restaurant." The court criticized the Department's use of a strict liability standard in "permitting" cases and extensively analyzed the line of cases on which the Department relied, concluding that, in fact, "the licensee's knowledge is essential." (*Laube v. Stroh, supra*, 2 Cal.App.4th at p. 376.) However, the licensee need not have actual knowledge; constructive knowledge, such as that imputed to the licensee through knowledge of a licensee's employee, is sufficient. (*Id.*, at pp. 376, 377.)

Santa Ana, *supra*, is also not helpful to appellants, because the circumstances were not similar. The court in *Santa Ana* found that the violation charged did not have the required "minimal nexus" to the sale of alcoholic beverages which was necessary for the rational imposition of discipline. The violation charged in the present case directly involved a sale of alcoholic beverages, making the court's analysis in *Santa Ana* inapplicable.

Appellants contend that the considerable measures they took to prevent sales to minors should provide a defense. However, the court in *Reilly v. Stroh* (1984) 161 Cal.App.3d 47, 54 [207 Cal.Rptr. 250], responding to a similar argument, quoted *Marcucci v. Board of Equalization* (1956) 138 Cal.App.2d 605, 610 [292 P.2d 264], and said:

> "if the licentiate, through an employee, has knowledge that such [violation] is taking place, there arises immediately an active duty to prevent its continuance. A failure to prevent it is within the meaning of the statute a permitting of that [violation]." Thus, when *Harris*[8] says [that "to permit" means] "abstaining from preventative action," it means abstaining from the action that *in fact prevents*, not abstaining from any action to try to prevent. A licensee with knowledge of the [violation] violates section 24200, subdivision (b) if he does not *in fact* prevent [the violation] (subject, of course to the defense that the licensee may rely upon an apparently valid identification – Bus. & Prof. Code, § 25660).

The licensee in *Reilly v. Stroh* also argued that language in *Kershaw v. Department of Alcoholic Beverage Control* (1957) 155 Cal.App.2d 544, 548 [318 P.2d 494], established that if a licensee took *some* measures to prevent violations, "particularly if his measure exceeded the standards of licensees in the community, he should not be penalized for imperfect results." The court rejected this argument, stating:

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[8]*Harris v. Alcoholic Bev. Control Appeals Bd.* (1963) 212 Cal.App.2d 106, 123-124 [28 Cal.Rptr. 74].

> The comment of the *Kershaw* court regarding failure of its licensees to take preventative measures does not establish the converse principle that all a licensee must do is seek to prevent the violations. The language of *Kershaw* must give way to the standard set by *Harris* and *Marcucci*, *supra*.

(*Reilly v. Stroh*, *supra*, at p. 55.)

Licensees are not subject to strict liability in sale-to-minor cases because affirmative defenses are available to them pursuant to rule 141 and section 25660. The Department's decision considered both defenses and found them not established. We cannot say that the Department abused its discretion in doing so.

ORDER

The decision of the Department is affirmed.[9]

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

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