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

AB-8118
File: 40-132797 Reg: 02053123

BERTHA ANGELI and MANUEL A. ANGELI dba Club Chapala
4818 East Compton Blvd., East Rancho Domingo, CA 90221,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: December 2, 2003
Los Angeles, CA

ISSUED JANUARY 21, 2004

Bertha Angeli and Manuel A. Angeli, doing business as Club Chapala (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for having knowingly permitted cocaine to be sold in the licensed premises, a violation of Health and Safety Code section 11352.

Appearances on appeal include appellants Bertha Angeli and Manuel A. Angeli, appearing through their counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer license was issued on January 13, 1983. On June 11, 2002, the Department instituted a 21-count accusation against appellants. Fifteen of the counts (1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 16, 17, 18, and 19) alleged various kinds of

[1]The decision of the Department, dated March 13, 2003, is set forth in the appendix.

drink solicitation activity. All of these charges were dismissed by the administrative law judge (ALJ) following an administrative hearing held on December 17, 2002. Six of the counts (6, 7, 14, 15, 20, 21) charged that an agent, employee or servant of appellants sold cocaine, a controlled substance, to Department investigators on January 11 and 18, and February 1, 2002. The ALJ found all six counts to have been proven, and ordered the license revoked.

Appellants thereafter filed a timely appeal in which they contend that the decision is not supported by substantial evidence.

DISCUSSION

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or 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]

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[2]The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of*

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., 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 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].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which 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. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The accusation charged, and the ALJ found, that Alfredo Tennyson, in six separate transactions on three different dates in January and February 2002, sold

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Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

cocaine to Department investigators Rene Guzman and Anthony Posada. Appellants do not dispute the fact that Tennyson offered to sell cocaine within the premises, and made sales of cocaine in the men's bathroom of the premises, but contend that Tennyson was neither an agent nor an employee, and that they had no actual or constructive knowledge of such sales.

The accusation alleged that Tennyson was an agent, employee, or servant of appellants. The ALJ concluded that although Tennyson projected an image of importance, akin to management, there was no competent evidence that he was an employee. Nonetheless, the ALJ concluded that, by permitting Tennyson to hold himself out ostensibly as management, appellants rendered themselves liable for his conduct as their agent.

Appellants challenge the ALJ's findings and conclusions, contending variously that there was no evidence any of appellants' employees had reason to know of Tennyson's drug sales or that drugs were secreted in his bar stool; that the Department investigators never saw Tennyson perform management or employee duties "other than a few times, in order to ingratiate himself with patrons, probably to further his drug enterprise;" that Tennyson paid for the beer he ordered, an act inconsistent with his being management; that he had no keys to the premises at the time of his arrest; that any drug conversations were concealed from appellants' employees; that no one other than the Department investigators and Tennyson's customers knew he was in the business of selling drugs; and that the evidence shows only an attempt by Tennyson to gain drug customers' confidence "by his publically perceived affiliation with the premises."

Thus, appellants contend, the evidence shows that Tennyson was an "artful

dodger" who secretly sold drugs by "affiliating himself with the premises" in order to facilitate sales. Even assuming Tennyson could be found to be an ostensible agent or an employee, appellants say, his acts cannot be imputed to them, because there is no evidence they knew of his activities, and his activities were not part of the licensees' usual and customary business. Finally, appellants contend, the Department held appellants to an unfair standard of knowledge, in that while Tennyson's behavior may have signaled drug sales to an experienced police officer or investigator, it would have not reasonably have put appellants' bartender or manager on notice of such conduct. The investigator testified that he became suspicious of Tennyson after seeing patrons enter the premises, accompany him to the bathroom, and then leave without having ordered anything to drink.

The evidence established that Tennyson engaged in a number of activities that would have led the ordinary person to believe he was "affiliated with the premises" in some way or another: he took investigators' orders for beers, brought the beers to them, and collected their money; took orders from other patrons, took their drinks to them, bussed tables, and talked to patrons; took the lead in furnishing an investigator information about the number of employees at the premises, or when a security guard or a DJ came on duty, and conducted the investigator on the investigator's inspection of the premises; carried keys which gave him access to locked areas of the premises; was able to inform the investigator of the contents of storage cabinets in the kitchen area.

The evidence established that appellants' manager, Carmelo Sarabia, was in charge of the bar during January and February, 2002, but was not present on any of the days when Tennyson conducted cocaine transactions with the investigators. The manager's full-time job was as the owner of a motor vehicle body shop, and he was

without training in the laws governing the operation of a bar. The combination of his absences from the premises and his lack of training are what convinced the ALJ that appellants had neglected the duty imposed upon them to run a lawful establishment (Findings of Fact 4-O, -P, and -Q):

> Neither of the licensees were present at the hearing to address the serious issues which were raised by the evidence and what steps they would take to infuse with meaning their responsibilities as licensees. Based on Sarabie's [sic] recitation of his qualifications, it is found that he did not have the experience or judgment to effectively manage the bar and the bar was bereft of management.
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> A licensee has a general, affirmative duty to run 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. (Laube v. Stroh (1992) 2 Cal.App.4th 364, 379.) Under the facts of this case, the licensees were absent from the premises for substantial periods of time; did not fulfill their management function and had no effective management in place to run the establishment.
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> Sarabie[3] was absent from the location during all of the three relevant dates the Department investigators visited the premises. With respect to Juana Martinez, the bartender and the person next in line of management personnel to run the establishment in Sarabie's absence, there is nothing in the record that [she] performed any function other than that of a bartender. The premises were left without management for all intents and purposes.
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> There was reasonable cause to suspect that Tennyson was engaged in unlawful activity at the premises based on the unusual, suspicious and ongoing pattern of conduct on the part of Tennyson. Tennyson had literally set up a base of operations at the premises from which he was dealing cocaine, right under the noses of Sarabie and Martinez.
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> Tennyson used a specific bar stool to store baggies of cocaine which he would offer to sale [sic] to patrons at the bar. He would direct interested patrons to follow him to the restroom; make the sale as he did with Investigator Posada, and then return to his barstool. Posada testified that based on his police experience with narcotics dealers, this was a common mode of operation.
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> It is incomprehensible that the conduct on the part of Tennyson raised no alarm bells in the minds of Sarabie or Martinez. It is not inconceivable that these cocaine sales were carried on with the tacit approval of the licensees who were

[3] The correct spelling of the manager's name is "Sarabia." (See RT 254.)

> friends with Tennyson and permitted him free reign of the premises without any supervision. This allowed him to conduct his narcotics activities without the slightest interference.
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> Tennyson had a set of keys to the establishment, which permitted him access to non-public areas therein with which he had some familiarity. Presumably he obtained the keys from the licensees. Although there is evidence that he projected an image of importance, akin to management, there is no competent evidence that he was an employee of the premises.
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> At the very least, for the licensees through their management people to close their eyes to Tennyson's drug dealing, borders on recklessness and constitutes "having permitted" the violations to occur. Further by permitting Tennyson to hold himself out ostensibly as part of management, renders the licensees liable for his conduct as their agent.

Appellants virtually concede that Tennyson acted as an ostensible agent on their behalf, citing Tennyson's "publicly perceived affiliation with the premises", and the fact that "everything he did describes an opportunistic flim-flam individual who ingratiated himself with other patrons in order to facilitate his drug sales." (App.Br. , page 7). It is understandable that the ALJ questioned the failure of Sarabia and Martinez to question what Tennyson's motives were when carrying on such activities. The only reason they might not have had actual knowledge of what he was doing was because they did not care and chose not to know. Under such circumstances, it does not seem unreasonable to hold appellants responsible for Tennyson's conduct. By an extreme lack of diligence, equivalent to intentional neglect, they can be said to have knowingly permitted his unlawful activity.

There were six sales to investigators over a span of three weeks, all by the same individual. And, based upon the testimony of the investigators, the interaction between Tennyson and other patrons that the investigators observed - the approach of a patron, a joint visit to the restroom, and the departure of the patron without ordering a drink - suggests the likelihood of more such sales. Indeed, Department investigator Rene

Guzman testified that Tennyson three times retrieved items from the bar stool on which Guzman himself was seated and engaged in hand-to-hand transactions with patrons. Given that this was done in plain view, we can only wonder why the bartender never questioned Tennyson's behavior.

ORDER

The decision of the Department is affirmed.[4]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, 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.