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

AB-8479
File: 48-331278 Reg: 03055578

VIRGINIA SILVA, dba Pepe's Club
2263 East Main Street, Stockton, CA 95205,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: April 6, 2006
San Francisco, CA

ISSUED AUGUST 11, 2006

Virginia Silva, doing business as Pepe's Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license for having knowingly permitted the sale of cocaine and negotiations for the sale of cocaine on the licensed premises, in violation of Business and Professions Code section 24200.5, subdivision (a), in conjunction with Health and Safety Code sections 11055, 11350, 11351, and 11352.

Appearances on appeal include appellant Virginia Silva, appearing through her counsel, Grayling M. Williams, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

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[1]The decision of the Department, made pursuant to Government Code section 11517, subdivision (c)(2)(E), dated August 23, 2005, is set forth in the appendix, together with the proposed decision of the administrative law judge.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on July 14, 1997. Thereafter, the Department instituted an accusation against appellant charging that she knowingly permitted the sale, and negotiations for the sale, of cocaine in her licensed premises on three occasions in December 2000, January 2001, and November 2001, in violation of Business and Professions Code section 24200.5, subdivision (a) (section 24200.5(a)), and Health and Safety Code provisions. In a second count, appellant was charged with permitting the possession of controlled substances by an employee and a patron on January 25, 2002, in violation of Business and Professions Code section 24200, subdivision (a), and Health and Safety Code sections 11350 and 11351.

At the administrative hearing held on February 25, 2005, oral and documentary evidence was received. Testimony established that a patron (Arellano) negotiated for and made sales of cocaine to an undercover informant (Ontiveros) while in the premises or on the sidewalk just outside on three occasions, that appellant's bartender (Cisneros) knew of such sales, and that her security guard possessed cocaine on January 25, 2001. Appellant does not deny that the drug transactions occurred.

The parties agreed that, following the hearing, appellant should file the declaration of the premises manager, Alberto Ortiz. Ortiz was not able to testify at the hearing because of his father's death in Mexico two days before the hearing. The declaration explained measures taken to prevent further drug sales in the premises, including installation of surveillance cameras, hiring a professional security company, posting warning signs, and instituting searches of patrons as they enter the premises.

The proposed decision of the administrative law judge (ALJ) determined that the charges of the accusation were established. His proposed order was to revoke

appellant's license, but to stay the revocation for 180 days to permit appellant to attempt to sell the license and to suspend the license during that time. The Department rejected the ALJ's proposed decision and decided the case itself, pursuant to Government Code section 11517, subdivision (c)(2)(E). The decision issued by the Department adopted the ALJ's proposed findings and conclusions of law in their entirety, but ordered the license revoked outright.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant raises the following issues: (1) The penalty is arbitrary and excessive; (2) the decision is not supported by the findings or the law; and (3) appellant possesses relevant evidence which could not be produced on the date of the hearing. The first two contentions both concern the penalty imposed, and will be addressed together.

DISCUSSION

I

Appellant contends the Department exceeded its authority in revoking the license outright. Appellant notes that this was the first disciplinary action filed against her in 26 years as a licensee. Also, she asserts, since no action was taken by the police or the Department following either the first or the second illegal sale, neither she nor her manager had any notice of the drug sales until arrests were made on January 25, 2002.

Appellant also argues that the Department's decision, which adopted the entire proposed decision of the ALJ except for the order, is inadequate because it provides no explanation for the decision. Appellant charges that the difference between the order of the proposed decision and that of the Department's decision must have been the result of an impermissible ex parte communication received after the hearing, thus depriving

her of her rights to notice of all the evidence against her and to confront and cross-examine the witnesses against her.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

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 Department's exercise of discretion "is not absolute but must be exercised in accordance with the law, and the provision that it may revoke a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare and morals." (*Martin v. Alcoholic Beverage Control Appeals Board* (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513] quoting from *Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772, 775.)

Rule 144, which comprises the Department's penalty guidelines, begins with the Department's "Policy Statement":

> It is the policy of the Department to impose administrative, non-punitive penalties in a consistent and uniform manner with the goal of encouraging and reinforcing voluntary compliance with the law.

At the beginning of the schedule of penalties is a note: "For purposes of this schedule of penalties, 'revocation' includes any period of stayed revocation as well as outright revocation of the license."

In the vast majority of these types of violations there is little, if any, cause to question the penalty of revocation. In the usual case, there are findings of either actual knowledge by the licensee, drug transactions so open and frequent that the licensee's knowledge could reasonably be inferred, or drug sales made by an employee to whom the licensee had delegated significant authority over the operation of the premises. (See, e.g., *Ewdish* (2005) AB-8312 (sales by licensee's brother; over 100 baggies of cocaine and methamphetamine found); *Inman* (2002) AB-7804 ("continuous ease of obtaining" drugs); *Gutierrez* (2000) AB-7188 (employees turned "blind eye" to "narcotics convenience store" in premises).) Even in such egregious situations, however, the Department has sometimes imposed stayed revocations. (*Bertolucci and Holmes* (2002) AB-7840 ("blatant" sales made with "tacit knowledge and consent of the bartenders" [revocation stayed for 3-year probationary period; license suspended 60 days]); *Cianciola* (2002) AB-7382 (drugs sold by bartender left in charge and by patrons [revocation stayed to allow sale of license]).)

In the present case, the decision makes no finding that either the licensee or her manager, Ortiz, had actual knowledge of the drug sales. There is no finding or evidence that sales were open and notorious. Nor is there a finding that any employee

sold drugs, although it does find that the bartender and the security guard knew that Arellano was selling drugs.

Appellant was charged under section 24200.5(a)[2] with "knowingly permitting" the illegal drug sales. The three sales charged in the accusation were spread out over almost a year, with 10 months between the second and third sales. This can hardly be considered "successive sales" made over a "continuous period of time," so the presumption created by section 24200.5(a) does not arise. The finding that appellant "knowingly permitted" the drug sales is based solely on imputing to her the knowledge the bartender and the security guard had of the drug sales. (Concl. of Law 7, ¶3.)

The proposed decision, adopted by the Department in its entirety except for the order, was grounded on the lack of day-to-day oversight by appellant and an apparent distrust of the manager's "continued stewardship." The Department's argument on appeal relies on the same proposition. It castigates appellant, a 70-year-old widow, for not working in the bar, and concludes that since she chose to remove herself from the operation of the bar and to delegate the day-to-day operation to her manager, she should not be "rewarded" with a mitigated penalty.

The Department, by adopting the ALJ's findings of fact and conclusions of law, adopted the premise that the problem with the license was appellant's lack of appropriate management. Both the ALJ's proposed penalty and the penalty imposed

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[2]This section provides that:

> Notwithstanding the provisions of Section 24200, the department shall revoke a license . . . [i]f a retail licensee has knowingly permitted the illegal sale, or negotiations for such sales, of narcotics or dangerous drugs upon his licensed premises. Successive sales, or negotiations for such sales, over any continuous period of time shall be deemed evidence of such permission. . . .

by the Department would succeed in removing appellant and her lax management from the premises. In ordering outright revocation, however, the Department not only removed appellant, but removed the license itself, precluding appellant from recovering anything after her 26-year investment in the business.

While it is clear to any reasonable person that appellant ought not to be allowed to continue as a licensee, it is unclear why the Department felt it necessary to eliminate the license entirely and to preclude appellant from an attempt to sell the license. The Department did not add to or change the proposed decision of the ALJ, providing no explanation for its insistence on outright revocation. Although the Department is not required to justify its penalty orders, where the findings and conclusions clearly support the mitigated penalty, the failure to provide any explanation for imposing the most severe penalty leaves the impression of arbitrary action by the Department.

The purpose of the Department's imposition of outright revocation in this case appears to be the Department's belief that the ability to sell the license would reward an undeserving licensee; in other words, it is intended to punish appellant. Punitive and arbitrary penalties are beyond the scope of the Department's authority. If there is a legitimate reason for revoking this license outright instead of simply solving the problem as it was presented in this case, we think that appellate reviewers, and the affected licensee, are entitled to enough of an indication to assure that the Department has not acted improperly.

While we acknowledge that the Department has a great deal of discretion when it comes to determining what is an appropriate penalty, outright license revocation under the circumstances presented in this case is not necessary to protect the welfare and morals of the citizens of California. Imposing outright revocation in this case

appears to be arbitrary, punitive, and unreasonable, and to violate the Department's own policy statement in rule 144. For these reasons, we believe the penalty of outright revocation was an abuse of discretion.

II

Appellant contends that she has relevant evidence that could not be produced on the date of the hearing: the testimony of her premises manager, Ortiz. Ortiz was not able to testify at the hearing because of his father's death and funeral in Mexico. This was explained to the ALJ in a discussion off the record, and the parties apparently stipulated to the submission of a declaration from Ortiz in lieu of his oral testimony.

The ALJ found there was insufficient information on some subjects, such as whether the Department had qualified Ortiz as a bar manager, whether the bartender involved was a temporary worker, and whether the security guard was fired following his arrest. Appellant argues that Ortiz could satisfy the Department on these matters in a further hearing "such that the Dept. might ultimately agree that Ms. Silva be allowed to sell her license or even keep it outright." (App. Br. at p. 12.)

The Board may remand a matter to the Department to consider new evidence where there exists relevant evidence that either could not have been produced in the exercise of reasonable diligence, or that was improperly excluded at the hearing. (Bus. & Prof. Code, § 23085; cf. *State of California v. Superior Court* (1974) 12 Cal.3d 237, 257-258 [115 Cal.Rptr. 497, 524 P.2d 1281] [applying Code Civ. Proc., § 1094.5].)

The decision discussed the Ortiz declaration in Findings of Fact 13 and 14 (footnote omitted):

> 13. Ortiz acknowledges, via Declaration, being Respondent's manager at the present time and claims to have worked in that capacity since 1995. (Exhibit A.) He testified that he has worked at the Licensed

Premises for 17 years, first as a doorman and stock clerk, then as a bartender. (*Id*.) In March 2004, Ortiz attended and completed Department L.E.A.D. training. (*Id*.) He claims to have become familiar with rules and other considerations involved in running a lawful on-sale business. Almost immediately after the drug arrests involved in the within Accusation, Ortiz caused to be installed video surveillance, both outside and inside the Licensed Premises, although there is apparently no surveillance yet in or around the restrooms. (*Id*.) He confirms what Respondent said about outsourcing security services, having made the change in 2003, and has installed signs throughout the club warning customers, if not employees, of the video surveillance and that anyone caught using or dealing drugs is subject to search and will be reported to law enforcement authorities. (*Id*.)

14. Ortiz has warned all employees that drug use and dealing will not be tolerated and that consumption of alcoholic beverages while on duty is forbidden. (*Id*.) In paragraph 8 of his Declaration, Ortiz says that since he's been the manager, he no longer tends bar. It sounds as if that is a recent event, even though earlier he said that he has been manager since 1995, prior to the drug events involved in the within matter. (*Id*.) According to Ortiz, he has not witnessed any recurrence of the drug events involved herein, although he says he was manager during the time of the within events and did not indicate he witnessed those events either. (*Id*.)

Ortiz and the information in the declaration are addressed again in the second paragraph of Conclusion of Law 9:

Respondent operates her licensed business on an absentee basis. She puts the entire operation, as far as was shown here, in the hands of a single manager. That manager has not been shown to have the qualifications required of such a manager, although he may have them. The evidence did establish that manager Ortiz, if he is to be believed, has been managing the premises since 1995, well before the investigation that resulted in the within Accusation. He either was unaware of what was going on in the bar he managed or he was aware of it. In either event, his continued stewardship of the licensed business is suspect. The acts [sic] he claims to have taken to protect against recurrence of unlawful drug activity, the surveillance cameras, the inspections upon entry into the business, the outsourced security service, the signs and employee warnings, even if all are in place, appear to have been taken at a leisurely pace after January 25, 2002. There is substantial question as to the sincerity of the effort.

This Board has been concerned, from the time we first received the record in this matter, with the ALJ's interpretation of the declaration from Ortiz, particularly his willingness to draw negative inferences based on the failure of the declaration to provide answers to questions that Ortiz was not asked. We don't know the circumstances of the agreement to submit the declaration, since any discussion about this was off the record. However, our reading of the transcript leads us to believe that appellant desired to have Ortiz testify and had requested a further hearing date to present his testimony. It appears that the ALJ, who earlier in the hearing had told the Department's attorney that he would not continue the matter,[3] proposed the declaration as a substitute for a further hearing.

We do not know if there was a representation, or requirement, about what issues the declaration would address, but the questions raised and comments made by the ALJ in his proposed decision are not necessarily ones that could have been anticipated in preparing the declaration. On the other hand, the questions and comments could have been addressed if Ortiz had testified in person. Most importantly, the ALJ would have had the opportunity to evaluate Ortiz' credibility, something virtually impossible to do by reading a declaration. Perhaps the ALJ would still have had doubts about Ortiz' sincerity and believability, as he clearly did after reading the declaration, but perhaps he would have found Ortiz to be candid and truthful, allowing him to resolve his doubts differently than he did in the proposed decision.

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[3]In response to the Department's request for a continuance, the ALJ said:

> This case has so many whiskers on it, it's unconscionable as it is. I'm not going to continue it another couple of months. Okay. So put on what you've got and let's be done with it.

[RT 41.]

We believe that fairness to both parties is best served by allowing appellant the opportunity to present the live testimony of Ortiz. Whether or not the result is the same, both sides, and the ALJ, will then have had the opportunity to have their questions answered. The decision can then be based on facts and reasonable inferences instead of on suppositions. This case may have a long grey beard by the time it is done, but expeditious resolution is only one of the considerations in disciplinary licensing proceedings.

ORDER

The decision of the Department is reversed and the matter is remanded to the Department for further proceedings in accordance with the foregoing decision.[4]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]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.