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

AB-8551
File: 47-406770 Reg: 05060450

OVATIONS FANFARE, LIMITED PARTNERSHIP,
dba Alameda County Fairgrounds Satellite Club
4501 Pleasanton Avenue, Pleasanton, CA 94566,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Robert R. Coffman

Appeals Board Hearing: April 5, 2007
San Francisco, CA

ISSUED DECEMBER 11, 2007

Ovations Fanfare, Limited Partnership, doing business as Alameda County Fairgrounds Satellite Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant knowingly permitting a person under the age of 21 to consume an alcoholic beverage in the on-sale premises in violation of Business and Professions Code[2] section 25658, subdivision (d).

Appearances on appeal include appellant Ovations Fanfare, Limited Partnership, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its

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[1]The decision of the Department, dated March 30, 2006, is set forth in the appendix.

[2]Unless otherwise indicated, all subsequent statutory references are to the Business and Professions Code.

counsel, Matthew D. Botting.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on March 10, 2004. On August 16, 2005, the Department filed an accusation against appellant charging that, on July 2, 2005, appellant violated section 25658, subdivision (d), by knowingly permitting 18-year-old Christine Datlen and another person under the age of 21 to consume beer, an alcoholic beverage, on the licensed premises. An amended accusation later added two more counts, alleging violations of section 25658, subdivision (a), selling or furnishing an alcoholic beverage to a minor.

At the administrative hearing held on January 27, 2006, documentary evidence was received and testimony concerning the charges involving Datlen was presented. The Department moved to dismiss the counts regarding the other underage person.

On July 2, 2005, a Department investigator observed a group of young people at the Alameda County Fair. Two of the females in the group were passing a plastic cup back and forth between them, taking turns drinking from the cup. The cup bore the words "Alameda County Fair" and appeared to contain beer.

The investigator approached the young women, identified himself, and asked one of them how old she was. The young woman, later identified as Christine Datlen, initially insisted she was 23 years old. However, the investigator could not verify that with the California Highway Patrol, and Datlen eventually admitted she was only 18 years old. According to the investigator, Datlen told him she had purchased the beer at one of the fair booths, but refused to show him who sold the beer to her or where she bought it.

Datlen testified she did not remember what she told the investigator about how she got the beer, but that a friend had purchased the beer. She also said she was not

concealing the beer while she was drinking, but was drinking it openly and sharing it with her friend while in an open area of the fairgrounds.

Charles Neary, a principal of the partnership licensee, testified that when appellant became a concessionaire at the Alameda County Fair, it expanded the licensed area at the fairgrounds, after consulting with the Department, so that appellant would not have to apply for numerous daily licenses to cover the various events during the course of the fair. The diagrams of the licensed area (Ex. 4), show that appellant's license encompasses almost all of the Alameda County Fairgrounds, except for the adjacent golf course and some of the parking lots. Neary testified that, "The practicality is such that in a venue the size of the Alameda County Fair, we only have control over specific areas on those properties." [RT 70.] Appellant's employees who sell and serve alcoholic beverages at the various stands are directed to "monitor the immediate location" for underage possession or drinking. (Ex. 5.) Neary defined "immediate location" as "anywhere within eye contact of that server" from the server's vantage point in the concession booth. [RT 76.]

Appellant had no employees or independent contractors patrolling the areas outside the booths to monitor compliance with the alcoholic beverage laws. The Alameda County Fair contracted with the Alameda County Sheriff to provide deputies to patrol the ground and serve as the fair's law enforcement, including enforcing the alcoholic beverage laws.

Subsequent to the hearing, the Department issued its decision which determined that appellant had knowingly permitted Datlen's consumption of the beer in violation of Business and Professions Code section 25658, subdivision (d). The other counts were dismissed. Appellant then filed an appeal contending the Department did not prove that appellant had knowledge of the minor's consumption of beer.

DISCUSSION

Either of two statutes may be used by the Department to charge a licensee when a minor is found drinking in a licensed premises. The licensee may be charged with violating section 24200, subdivision (b) (hereafter 24200(b)),[3] by *permitting* the minor to violate section 25658, subdivision (b) (hereafter 25658(b)).[4] Alternatively, the Department may charge the licensee with violation of section 25658, subdivision (d) (hereafter 25658(d)) for *knowingly permitting* a minor to consume an alcoholic beverage in a licensed premises.[5] The accusation in this case charged appellant licensee with violating section 25658(d).

Appellant contends the Department's decision must be reversed because the Department did not prove appellant had either actual or constructive knowledge that the minor was consuming an alcoholic beverage, and thus could not *knowingly* permit the violation. According to appellant, it cannot be held to have "knowingly permitted" the consumption of an alcoholic beverage by a minor unless one of appellant's employees[6] "***directly observed***" the consumption. (App. Br., at p. 6, emphasis in original.)

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[3]Section 24200, subdivision (b), provides that a licensee may be disciplined for, among other things, permitting a violation of the Alcoholic Beverage Control Act.

[4]Section 25658, subdivision (b), provides:

> Any person under the age of 21 years who purchases any alcoholic beverage, or any person under the age of 21 years who consumes any alcoholic beverage in any on-sale premises, is guilty of a misdemeanor.

[5]Section 25658, subdivision (d), provides:

> Any on-sale licensee who knowingly permits a person under the age of 21 years to consume any alcoholic beverage in the on-sale premises, whether or not the licensee has knowledge that the person is under the age of 21 years, is guilty of a misdemeanor.

[6]Appellant, of course, could not have observed anything directly, since it is a business entity, not an individual.

The Department, on the other hand, contends that appellant "knowingly permitted" the violation because it failed to take reasonable steps to prevent minors at the Alameda County Fair from obtaining and consuming alcoholic beverages. It asserts that to "knowingly permit" a minor to consume an alcoholic beverage, "does not require that knowledge to be actual – rather constructive knowledge equally gives rise to the offense." (Dept. Br. at p. 3.) Constructive knowledge, the Department argues, may exist when the licensee should have been aware of the violation but, for whatever reason, did not actually see the violation occur.

Because the violation was charged under section 25658(d), the Department was required to prove that appellant *knowingly* permitted the violation, not simply that appellant permitted the violation. We conclude that the Department failed to prove that appellant knowingly permitted the violation, and we reverse the Department's decision.

In Finding of Fact 11, the administrative law judge (ALJ) summarized the facts and explained his recommended decision:

> 11. The respondent's policy and procedure for the Alameda County Fairgrounds (Exhibit 5 in evidence) states that alcoholic beverage servers shall monitor the immediate location for any apparent minors consuming alcoholic beverages. In other words, the area around the sales booths. It has assumed no responsibility for the remainder of the premises. The responsibility for preventing minors from consuming alcoholic beverages at the premises remains with the respondent, irrespective of the efficacy of the arrangement between the County Fairgrounds authority and the Sheriff's Department. The respondent did not contract with the Sheriff's Office, the County Fairgrounds did. The respondent has no control over the amount or type of police presence at the fairgrounds. Respondent has no authority to assign deputies to specific duties or to specific areas within the fairgrounds. Neither the Alameda County officials who operate the fairgrounds nor the Sheriff's Department has assumed respondent's responsibility to enforce the Alcoholic Beverage Control Act laws.
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> Respondent has taken no reasonable or credible steps to prevent minors from consuming alcoholic beverages at the licensed premises. Respondent was not diligent in anticipation of this reasonably possible

> unlawful activity. In fact, judging by its "Alcohol Policy and Procedure for the Alameda County Fairgrounds," and the testimony of its vice-president, it seems to have intentionally abrogated its responsibility to prevent such unlawful activity.
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> It is the respondent that elected to include the entire fairgrounds as the licensed premises. Therefore, its responsibilities encompass the entire fairgrounds. Despite this, the respondent has elected to limit its responsibilities to the immediate area surrounding its sales booths. Unfortunately, it is not permitted to hide behind the admittedly practical difficulties that may exist in preventing minors from consuming alcoholic beverages at the licensed premises.
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> Under the circumstances the respondent knowingly permitted Datlen to consume beer at the licensed premises.

The Department's decision includes a discussion of one appellate court case and three Appeals Board decisions: *Laube v. Stroh* (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779] (*Laube*); *AMF Bowling Center, Inc.* (2000) AB-7232 (*AMF*); *Song* (2000) AB-7384; and *Acapulco Restaurants, Inc.* (2002) AB-7694 (*Acapulco*). The ALJ, the Department, and both parties all relied, to some extent or another, on language in these cases.

Laube is the seminal case regarding the meaning of "permitted." In that case, the court annulled the Department's decision imposing discipline on a licensee for permitting 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 licensee's "upscale hotel, bar and restaurant."

The court rejected the idea that a licensee could permit something of which the licensee was unaware and concluded that "the licensee's knowledge is essential." (*Laube*, *supra*, at p. 376.) The court said, in frequently quoted language:

> We . . . hold that a licensee must have knowledge, either actual or constructive, before he or she can be found to have "permitted" unacceptable conduct on a licensed premises. 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.

(*Id*., at p. 377.)

The Appeals Board opinions cited in the Department's decision use the *Laube* requirement of "knowledge, either actual or constructive," as a jumping-off place.

In *AMF*, *supra*, the Board concluded that the licensee permitted a violation of section 25658(b) because its large facility was licensed to allow minors and adults to mingle while alcoholic beverages were being served and consumed. The licensee was well aware of the heightened risk of minors obtaining and consuming alcoholic beverages in such a situation. The Board acknowledged that *Laube* required either actual or constructive knowledge to find that a licensee permitted a violation, but asserted that "the court appears to have left room for cases where, although proof of actual knowledge may not be present, circumstances might warrant inferring the existence of such." The circumstances in *AMF*, the Board said, "warrant[ed] inferring the existence of [knowledge]."

In *Song*, *supra*, the licensee was found to have permitted a minor to consume beer in the premises even though the licensee said he did not see the minor drink the beer. The Board said:

> Where, as here, alcoholic beverages are dispensed in quantities sufficient to serve more than one person - in this case, Boucher was furnished a pitcher of beer and two mugs - in an on-sale premises which numbers minors among its clientele, there is a special responsibility on the seller to ensure that the persons who share that alcoholic beverage with its purchaser are of legal drinking age. That the sharing occurs in such a manner that it goes unseen or unnoticed by the seller cannot relieve him of liability. This is because he knowingly created the risk, which then materialized, and did not have adequate controls in place to prevent it. Thus, it can fairly be said that in so doing, he permitted a violation of §25658, subdivision (b), and violated §24200 by doing so.

The Board concluded that the circumstances in *Acapulco, supra*, also warranted an inference of the licensee's knowledge and determined that the licensee permitted the violation. It found compelling the circumstance that, despite "elaborate security precautions" two minors entered and remained in the premises for an extended period of time during a large Cinco de Mayo celebration, purchasing and consuming several alcoholic beverages before being apprehended by a police officer.

In the present case, the ALJ concluded that the facts were distinguishable from those in *Laube*, and much closer to those in the three Board opinions cited. He applied the Appeals Board-created standard of inferring knowledge when the licensee creates a situation in which the risk of a violation is great and the licensee does not prevent the violation. The Department's determination that appellant knowingly permitted the violation, therefore, is based on appellant's creating the risk of these violations by licensing the entire fairgrounds, but only taking enforcement responsibility for the areas surrounding the sales venues.

In neither *Laube* nor the Appeals Board cases, however, was the licensee charged with *knowingly permitting* a violation under section 23658(d). The licensees in those cases were charged with *permitting* violations under either subdivision (a) or (b) of section 24200. Although some of the cases mention section 25658(d) or the word "knowingly," those references are no more than dicta, since the accusations involved did not charge the licensees with violating section 23658(d).

In *Nuon* (2004) AB-8159, the Appeals Board was faced with a situation somewhat similar to the present case. The licensee was charged with violating section 24200.5, subdivision (a), which requires revocation where a licensee "has knowingly permitted the illegal sale . . . of narcotics or dangerous drugs upon his licensed

premises." The Department found that the licensee's employee made illegal narcotics sales to an undercover agent. Although the Department found that the licensee did not have actual knowledge of his employee's illegal sales, it determined that the licensee's "failure to monitor his employee's activities while she was at work was tantamount to permitting [the illegal sales]," and revoked the license. The licensee appealed, contending the Department did not prove, and the decision did not require the Department to prove, that he knowingly permitted the illegal sales.

The Appeals Board reversed the Department's decision, observing that the decision "not only lacks a finding that Business and Professions Code 24200.5 was violated, it makes no reference at all to the statute appellant was charged with violating." Instead, the Department's decision was, "at most, a conclusion that appellant 'permitted' the illegal activities; however, the statute he was charged with violating requires that he "knowingly permitted" the illegal sales." In its discussion, the Board noted:

> A number of cases have held that there is a distinction between statutes such as section 24200.5 that impose discipline for violations "knowingly" done and those such as section 24200, subdivision (b), that omit the word "knowingly." The former, it has been held, require knowledge of the violations, while the latter do not. (See, e.g., *Stoumen v. Munro* (1963) 219 Cal.App.2d 302, 311-312 [33 Cal.Rptr. 305]; *Benedetti v. Department of Alcoholic Beverage Control* (1960) 187 Cal.App.2d 213, 216 [9 Cal.Rptr. 525]; *Mercurio v. Department of Alcoholic Beverage Control* (1956) 144 Cal.App.2d 626, 629-631 [301 P.2d 474].) Assuming this is true,[7] the decision does not provide a basis upon which to impose

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[7]"Whether this is still good law seems to have been put in question by *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377 [3 Cal.Rptr.2d 779], which held that 'a licensee must have knowledge, either actual or constructive, before he or she can be found to have "permitted" unacceptable conduct on a licensed premises.' If actual or constructive knowledge is required for a finding that a licensee 'permitted' certain behavior, it is not clear what 'knowledge' is required for a finding of 'knowingly

(continued...)

> discipline, because it does not find that appellant violated the statute he was charged with violating. (See *Wheeler v. State Bd. of Forestry* (1983) 144 Cal. App. 3d 522, 526-527 [192 Cal. Rptr. 693].)

The distinction made by the courts is based on the supposition that the legislature did not just randomly include "knowingly" in some disciplinary provisions, but not in others. The following examples are typical of the language used by the courts:

> The very fact that rules and laws providing for violations for which disciplinary action may be taken, provide that some violations must be "knowingly" done and as to others the word "knowingly" is omitted, indicates that in the latter cases there is no requirement that the violations be knowing ones.

(*Mercurio v. Dept. of Alcoholic Beverage Control* (1956) 144 Cal.App.2d 626, 630-631 [301 P.2d 474].)

> It seems clear from the statutes with respect to the suspension and revocation of licenses that the Legislature has differentiated between knowingly permitting an act and merely permitting it; and that when it intends that the act must be knowingly permitted, it has said so. . . . [¶] The fact that no words expressing that idea are in the statute, when one word (knowingly) would have sufficed for that purpose, is a strong indication of the legislative intent that the offense should be complete without it.

(Brodsky v. California State Board of Pharmacy (1959) 173 Cal.App.2d 680, 691 [344 P.2d 68].)

As we pointed out in footnote 7, *ante*, the court in *Laube* acknowledged, but did not address, the distinction found by a number of courts between "knowingly permitted"

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[7](...continued)
permitted.' The *Laube* court noted, but did not decide, the issue of what the Legislature intended by using 'knowingly permit' in some statutes and simply 'permit' in others. In footnote 2, on page 378 of the decision, the court said:

> One aspect of the knowledge issue has not been raised. Some cases have ruled that because the Legislature used the phrase "knowingly permit" in section 24200.5, subdivision (a), and did not use the word "knowingly" in section 24200, knowledge is not required. (See, e.g., *Benedetti v. Dept. Alcoholic Bev. Control*, *supra*, 187 Cal.App.2d at p. 216.) This argument was not raised before the ALJ or the Board and is not raised in this court by the Attorney General."

and "permitted." As a result, this Board is without specific judicial guidance on the subject. However, we are persuaded by the cases holding that the Legislature's addition of "knowingly" to a statute means that it intended the statute to require more than, or at least something different from, statutes that did not include the term.

The Department's position would make the terms "permit" and "knowingly permit" equivalent, a position we find untenable under the circumstances. In construing statutes, the Appeals Board, like a court, is not entitled to simply disregard troublesome words in a statute, but must attempt to give significance to every word and phrase in pursuance of the legislative purpose; construing some of the words as surplusage is to be avoided. *(Gonzales & Co. v. Dep't of Alcoholic Bev. Control* (1984) 151 Cal.App.3d 172, 178 [198 Cal.Rptr. 479].) Where a word is used with a modifier in one provision of a statutory scheme, omitting the modifier when the word is used in a similar provision of that scheme is significant, indicating a different legislative intent for each provision. (*Ibid*.)

We conclude that the Legislature intended "knowingly permit" in section 25658(d) to mean something different from the unmodified "permit" found in section 24200. Therefore, establishing that appellant permitted a violation did not carry the Department's burden to show that appellant knowingly permitted a violation, and the Department's decision must be reversed.

This conclusion does not mean that the Appeals Board condones appellant's failure to take responsibility for the entire licensed area of the fairgrounds; it simply means that the Department's decision failed to establish that appellant violated the statute it was charged with violating.

ORDER

The decision of the Department is reversed.[8]

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

[8]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.