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

AB-8956
File: 48-426130 Reg: 07066337

CESAR AGUILARMEJIA, dba 26 Mix
3024 Mission Street, San Francisco, CA 94110,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: January 7, 2010
San Francisco, CA

ISSUED APRIL 21, 2010

Cesar Aguilarmejia, doing business as 26 Mix (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license, with revocation stayed for 180 days to permit the transfer of the license to persons acceptable to the Department, for permitting various drink solicitation activities, a narcotics sale, and lewd acts by female dancers; possessing cigarettes without the appropriate tax stamps; and purchasing alcoholic beverages from other retail licensees; in violation of Business and Professions Code[2] sections 24200.5, subdivisions (a) and

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[1]The decision of the Department, dated September 25, 2008, is set forth in the appendix.

[2]Unless otherwise specified, statutory references shall refer to the Business and Professions Code.

(b); 22974.3, subdivision (a); and 23402; Department rules 143 and 143.3, subdivisions (1)(a), (b), and (c)[3]; and Revenue and Taxation Code section 30163, subdivision (a).

Appearances on appeal include appellant Cesar Aguilarmejia, appearing through his counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on July 27, 2005. On July 16, 2007, the Department instituted a 37-count accusation against appellant charging possession and operation of a slot machine (Pen. Code, § 330.1 - ct. 1); permitting violations of drink solicitation provisions (§ 24200.5, subd. (b) - cts. 3, 6, 9, 15, & 18; § 25657, subd. (b) - cts. 4, 7, 10, 16, & 19; rule 143 - cts. 5, 8, 11, 17, & 20); permitting the sale of narcotics (§ 24200.5, subd. (a) - ct. 2); permitting female dancers to commit lewd acts (rule 143.3 - cts 12, 13, & 14); possessing cigarettes without the appropriate tax stamps (Rev. & Tax. Code, § 30163, subd. (a) - ct. 21; § 22974.3, subd. (a) - ct. 37); and purchasing alcoholic beverages from other retail licensees on numerous occasions (§ 23402 - cts. 22-36).

At the administrative hearing held on May 6, 7, 8, and July 11, 2008, documentary evidence was received and testimony concerning the violations charged was presented by numerous Department investigators and other Department personnel involved in the investigation, as well as by a number of premises employees. Appellant Cesar Aguilarmejia also testified, recounting his diagnosis of leukemia in 2005 and his subsequent treatment and rehabilitation. Because of his illness, he was not present or

[3]4 Cal. Code Regs., §§ 143, 143.3.

actively involved in the management or operation of the premises during any of the time covered by the accusation. He testified that he would have his brother, who lives in San Bernardino, manage the premises until he would be able to return to active management. During the hearing, the Department moved to dismiss count 1.

After the hearing, the Department issued its decision which dismissed count 1; determined that violations of section 25657, subdivision (b), were not established, and dismissed counts 4, 7, 10,16, and 19; and sustained the remaining counts.

Appellant filed an appeal raising the following issues: (1) There is not substantial evidence supporting the finding that appellant knowingly permitted the illegal sale of narcotics in the licensed premises (count 2), and (2) imposing the penalty of revocation was an abuse of discretion.

DISCUSSION

I

Appellant contends that count 2 of the accusation, alleging a violation of section 24200.5, subdivision (a), is not supported by substantial evidence. Section 24200.5, subdivision (a) (hereafter 24200.5(a)), provides:

> Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds:
>
> (a) If a retail licensee has knowingly permitted the illegal sale, or negotiations for such sales, of controlled substances 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. As used in this section, 'controlled substances' shall have the same meaning as is given that term in Article 1 (commencing with Section 11000) of Chapter 1 of Division 10 of the Health and Safety Code, and 'dangerous drugs' shall have the same meaning as is given that term in Article 8 (commencing with Section 4210) of Chapter 9 of Division 2 of this code.

Appellant argues that there was only one narcotics sale, not a succession, and that sale was to an undercover Department investigator by a patron known only as Patricio. In addition, appellant argues, violation of section 24200.5(a), requires a finding that he "knowingly permitted" the transaction, and there is no such finding.

Finding of Fact 5 pertains to count 2:

> 5. On the evening of July 27, 2006, Department Investigator Edgar Valdes went to the premises in an undercover capacity to investigate a narcotics complaint. Valdes was aware that the [*sic*] Maricio Gonzales had told other investigators on prior visits that he was the manager. Valdes observed Maricio Gonzales clearing tables, taking out trash, behind the fixed bar, and in the premises office during the course of that evening. Valdes stopped Gonzales near the fixed bar and asked him where he could get a $20 bag of cocaine. Gonzales looked around the interior of the bar and told Valdes that the people who usually sell it are not here right now. At this time a patron who was seated at the bar, identified only as Patricio, interrupted Valdes and Gonzales and asked them what they wanted. Valdes said he was looking for a $20 bag of cocaine. Patricio made a call on a cell phone and told Valdes that a friend would come and drop it off. About 20 to 25 minutes later an unknown male entered the premises. After looking around this male then walked up to Patricio and handed him something. Patricio then handed something to the unknown male who then exited the premises. Patricio walked to Valdes and handed him a plastic baggie containing a white substance that resembled cocaine. Valdes took the baggie and paid Patricio. Valdes then walked over to Maricio Gonzales and thanked him. Valdes booked the baggie and its contents into evidence.

Finding 6 stated that the contents of the plastic baggie were analyzed and determined to be cocaine.

Conclusions of Law 3 and 4 also deal with count 2:

> 3. Section 24200.5 provides that "the department shall revoke a license . . . (a) If a retail licensee has knowingly permitted the illegal sale, or negotiations for such sales, of narcotics or dangerous drugs upon his licensed premises."
>
> 4. Cause for suspension or revocation of Respondent's license was established as to Count 2 of the Accusation by reason of the matters set forth in Findings of Fact, paragraphs 5 and 6, for violation of Section 24200.5(a). Maricio Gonzales was managing the business. When Valdes

> asked about buying some cocaine Gonzales did not respond by asking Valdes to leave or throwing him out. Instead Gonzales looked around the bar to try to locate the people who normally sell cocaine. When Patricio intervened and offered to arrange for the buy, Gonzales did nothing to prevent it from occurring. Afterwards Valdes even thanked Gonzales. It should also be noted that on each subsequent visit to the business investigators attempted to purchase narcotics but were unable to do so.

Section 24200.5(a) requires a finding that the licensee "knowingly permitted" drug transactions in the premises. Since there was only one sale involved, the presumption of knowing permission arising from successive sales does not apply. Appellant's knowing permission must be established by some other means.

The Department, however, did not establish that appellant *knowingly permitted* the transactions; it established that appellant *permitted* the transactions.

The Appeals Board has addressed this question in two cases, *Nuon* (2004) AB-8159, and *Ovations Fanfare* (2007) AB-8551. In both those cases, the Department charged violations of statutes requiring that the licensee "knowingly permitted" the violation, but sustained the accusations based on findings that the licensees "permitted" the violations.

The licensee in *Nuon* was charged, as is appellant here, with violating section 24200.5(a). The Department found that the licensee's employee made illegal narcotics sales to an undercover agent and that the licensee had no actual knowledge of the illegal sales. It determined, however, 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 that he "knowingly permitted" the illegal sales, as required by section 24200.5(a).

Following the example of a number of cases that have considered the question,[4] the Board concluded that the Legislature intended a distinction between disciplinary provisions that use "knowingly permitted" and those using only "permitted." The Appeals Board reversed the Department's decision in *Nuon* because it made no finding that section 24200.5(a) was violated or that the licensee knowingly permitted the sales. The Board said that 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."

This issue arose again in *Ovations Fanfare* (2007) AB-8551, in which the licensee was charged with violating section 25658, subdivision (d) (hereafter 25658(d)), which prohibits an on-sale licensee from *knowingly permitting* a minor to consume an alcoholic beverage in a licensed premises. The ALJ determined that the licensee knowingly permitted the violation, using a standard created by the Appeals Board in several earlier cases in which knowledge was inferred when the risk of a violation was great, the risk had been created by the licensee, and the licensee did not prevent the violation. However, the standard used by the ALJ arose from appeals in which the licensees were charged with permitting violations, not knowingly permitting violations.

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[4]See, e.g., *Brodsky v. California State Board of Pharmacy* (1959) 173 Cal.App.2d 680, 691 [344 P.2d 68] ["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 . . . , is a strong indication of the legislative intent that the offense should be complete without it."]; *Mercurio v. Dept. of Alcoholic Beverage Control* (1956) 144 Cal.App.2d 626, 630-631 [301 P.2d 474] ["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."].

In *Ovations Fanfare*, the Board reversed the decision of the Department, saying:

> 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*.)

In the present case, the Department found that appellant violated section 24200.5(a), but made no specific finding that appellant knowingly permitted the illegal sales of narcotics. The findings support a determination that appellant permitted the sales, but that is not sufficient where he must be shown to have knowingly permitted them. The determination with regard to count 2 must be reversed.

This conclusion does not mean that the Appeals Board condones the activities in appellant's premises; it simply means that the Department's decision failed to establish that appellant violated the statute he was charged with violating.

II

Appellant contends that the penalty is an abuse of discretion because the Department did not state which count caused it to impose the penalty of revocation. He argues that reversing count 2 eliminates one of the two statutes that mandates revocation, and it is not clear whether the other mandatory revocation statute led to the penalty that was imposed. Appellant also asserts that the Department's penalty guidelines do not show revocation as a standard penalty for any of the remaining 30 violations that were sustained.

The Department's discretion in imposing penalties is certainly broad enough to sustain the penalty imposed here even with only 5 violations of the mandatory revocation provision and 25 other violations involving drink solicitation, lewd behavior, missing tax stamps on cigarettes, and prohibited liquor purchases from another retailer.

ORDER

The decision of the Department with regard to count 2 is reversed, but in all other respects is affirmed.[5]

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

[5]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.