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

AB-9154
File: 48-260621 Reg: 10073255

McCARTHY ENTERPRISES, INC., dba Joker
2827 Pico Boulevard, Santa Monica, CA 90405,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: September 1, 2011
Los Angeles, CA

ISSUED OCTOBER 18, 2011

McCarthy Enterprises, Inc., doing business as Joker (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license for its bartenders, while on duty and in charge of the premises, having sold and negotiated for the sale of a controlled substance (powdered cocaine), violations of Business and Professions Code section 24200.5, subdivision (a) and Health and Safety Code sections 11352 and 11350.

Appearances on appeal include appellant McCarthy Enterprises, Inc., appearing through its counsel, Roger Jon Diamond, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on June 12,

[1]The decision of the Department, dated February 15, 2011, is set forth in the appendix.

1991. The Department instituted an accusation against appellant on July 14, 2010 (later amended on October 21, 2010), charging violations of Business and Professions Code section 24200.5, subdivision (a) and Health and Safety Code sections 11352 and 11350, arising from the sale and negotiation for sale of controlled substances on the licensed premises by bartenders employed by the licensee.

At the administrative hearing held on December 7, 2010, documentary evidence was received and testimony concerning the violations charged was presented by Department investigators Brad Beach, William Johnson, and Andrea Florentinus. Beach and Florentinus described a series of narcotics transactions involving Martha Flores and Theresa Beatty, bartenders employed by appellant. Testimony was also presented by lab technicians employed by the Los Angeles County Sheriff's Department who examined the powdered substance obtained during the visits to appellant's premises and determined it was cocaine.

Subsequent to the hearing, the Department determined that the charges of the accusation had been established, and ordered appellant's license revoked.

Appellant filed a timely appeal raising the following issues: (1) The Department erred in applying the mandatory revocation provision of Business and Professions Code section 24200.5, subdivision (a);[2] (2) the Department would abuse its discretion if it

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[2] Section 24200.5, subdivision (a) provides, in pertinent part:

> 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 the sales, of controlled substances or dangerous drugs upon his or her licensed premises. Successive sales, or negotiations for sales, over any

(continued...)

revoked the license based upon discretion; (3) it is an abuse of discretion to revoke a license where the licensee is unaware of the violation and was never warned.

DISCUSSION

I

The evidence established a series of transactions involving the sale or negotiation for sale of controlled substances (cocaine) by two bartenders employed by appellant, conducted on the licensed premises over a six-week period beginning on February 26, 2010, and ending on April 7, 2010, when a search warrant was served on the premises. Appellant does not challenge any of the factual findings regarding the drug activity, or the determinations that the relevant code provisions were violated, instead focusing its attack on the order of revocation.

Appellant argues that the Department erred by basing its order on Business and Professions Code section 24200.5. It argues that the Legislature, by its addition to the Business and Professions Code of section 24200.6 in 2002, and section 24200.1 in 2006, changed existing case law under section 24200.5 concerning the rule that acts of employees are imputed to the employer.

Appellant contends that the Legislature, by its enactment of Business and Professions Code section 24200.6, containing a reference to agents and employees, and the absence of a similar reference in section 24200.5, manifested its intent that a license can be disciplined under section 24200.5 only if the licensee himself committed the violation. Appellant also argues that some kind of notice like that referred to in

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[2](...continued)
continuous period of time shall be deemed evidence of permission.

Business and Professions Code section 24200.1 is required before appellant's license may be disciplined for acts of his employees.

Both of these arguments lack merit

Section 24200.6 states that the Department “may” revoke or suspend a license where a licensee “or the agent or employee of the licensee,” violates section 11364.7 of the Health and Safety Code, which criminalizes the marketing, sale and distribution of drug paraphernalia. The statute creates a warning procedure which provides for written notice from the Department or other state and local law enforcement agencies to a licensee that the sale of certain items which are commonly sold and marketed as drug paraphernalia will expose the licensee to license suspension or revocation. There is nothing in the wording of section 24200.6 that suggests an intent by the Legislature to amend section 24200.5, or abrogate the established case law under that section.

Similarly, section 24200.1 does not limit the Department's power under section 24200.5. Section 24200.1 deals with objectionable conditions that constitute a nuisance, and by its express language creates "additional bases" upon which the Department may suspend or revoke a license.

Appellant points to the reference in subdivision (d)(2) of section 24200.1 to "drug trafficking," and argues that the requirement of written notice before disciplinary action may be taken under that section is support for the proposition that the absence of knowledge on the part of the licensee is a bar to revocation.

We strongly doubt a court would construe the language of a statute which created "additional bases" for enforcement action to take from the Department a basis for suspension or revocation which has been in place for more than half a century. We certainly do not read it that way. Thus, we are not persuaded that the inclusion of the

term "drug trafficking" in a list of objectionable conditions said to constitute a nuisance, whether on or adjacent to the premises, can reasonably be construed to indicate the Legislature intended to revise case law established under section 24200.5.

Appellant also argues that the general rule that acts of an employee are imputed to his employer does not apply, because its owner, Marvin Machmueller, had no knowledge of the drug transactions, was never warned they were occurring, and fired both bartenders, as well as a third, uninvolved, bartender when he learned of the drug sales when a search warrant was served on the premises.

Mr. Machmueller is 74 years old. He testified that at the present time he is at the premises every day to do his "bank stuff," arriving at about 9:00 a.m., and leaving at 12 or 1 o'clock. The bar opens at 6:00 a.m. and closes at 2:00 a.m. The record does not indicate the time he spent at the premises during the period when the drug activities were taking place, other than his testimony that "about four or five years ago, I had a hip transplant -- replacement, and I was off quite a bit of time. So I got Terri (Beatty) involved in taking care of the place for me." [RT 234.]

This case involves the sale and negotiation for sale of hard narcotics, not the sale of drug paraphernalia or the failure to correct objectionable conditions. Neither statute alters settled law that the actions of a licensee's employees are imputable to their employer. (*Endo v. State Board of Equalization* (1956) 143 Cal.App.2d 395 [300 P.2d 366]; see also, *Cooper v. State Board of Equalization* (1955) 137 Cal.App.2d 672, 678 [290 P.2d 914].)

Endo v. State Board of Equalization, *supra*, involved sales of marijuana over a 96-hour period by a bartender working alone in the premises. The court upheld the Board's order of revocation under Business and Professions Code section 24200.5,

subdivision (a), on two grounds: the presumption of knowledge flowing from the evidence of successive sales over a continuous period of time, and alternatively, that

> "appellant as owner and operator of the bar and as licensee is responsible for the acts of her bartender who "knowingly permitted" the illegal sales by conducting them himself. His knowledge and permission are imputable to appellant as his employer (the owner, operator and licensee) within the scope of the principle that a "licensed employer may be disciplined to the extent of revocation of his license for the acts of his employees. "

(Endo v. State Board of Equalization, *supra*, 143 Cal.App.2d at pp. 401-402.)

Moreover, as the Department points out in its brief, the licensee in this case is a corporate entity. Mr. Machmueller may well be the sole owner and officer of McCarthy Enterprises, Inc., an entity formed for business or tax or liability reasons. However, a corporate shield and absentee management in combination can not immunize a license against discipline for conduct as serious as the drug dealing carried on in this case by the persons entrusted to manage and run the business.

Appellant argues that *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board* (1999) 76 Cal.App.4th 570 [90 Cal.Rptr.2d 523] supports its argument that the acts of an agent or employee will not be imputed to his or her employer. The case is clearly distinguishable. In that case, a clerk surreptitiously purchased food stamps at one-half their face value from a confidential informant working for the United States Department of Agriculture. The clerk was arrested moments after the sale and was immediately fired by her on-duty manager.

The court found that the Department had abused its discretion when it suspended appellant's license, holding that a single criminal act of an employee, unrelated to the sale of alcohol would not be imputed to an employer who had taken extensive measures to protect against criminal acts of its employees. The court

disclaimed any intent to change the basic rule regarding imputed conduct, finding it inappropriate on the facts of the case.

The present case is very different. Here, the persons dealing in cocaine were in charge of the operational end of the business, with no supervision of any kind. In *Santa Ana Food Market, Inc.*, *supra*, the employee was a low-level cashier, under the supervision of a manager. The imputed conduct in this case did not consist of a single criminal act, as in *Santa Food Market, Inc.*; it was instead a series of criminal transactions carried out by management.

II

Since we agree with appellant that the Department chose to base its order of revocation on the provisions of Business and Professions Code section 24200.5, subdivision (a), and since we agree with the Department that its decision to invoke that statute was correct on the facts of this case, we see no need to address appellant's contention that, were the Department to rely on its discretionary powers under section 24200, subdivision (a), it would abuse its discretion. We do, albeit briefly, address the contention made in oral argument that the Department abused its discretion when it did not stay execution of its order of revocation. It is clear from its adoption of the proposed decision that it considered whether it would be appropriate to order a stayed revocation. This was not a case of successive sales by a patron. The negotiations for the sale of cocaine and the sales of cocaine were conducted openly by the management of the premises, in the premises, while they were on duty. There is nothing in the facts that could be said as a matter of law to warrant the leniency a stay would represent, and Mr. Machmuller's age and physical health, and his decision to operate in corporate form and entrust complete management of the operation to others undoubtedly contributed

to the events which occurred.

As we said earlier in this decision, the Appeals Board must find an abuse of discretion in a Department penalty order before it can grant relief. We have found none here. We have no doubt that the decision weighed heavily on Judge Ainley's mind, given the moving argument of counsel on appellant's behalf. But what the evidence in this case showed was that appellant's bartenders had turned the premises into a drug den, where cocaine was sold, stored, used in the premises, and when the supply was short, one or two phone calls to the bartenders' outside suppliers was enough to replenish the stock and please a customer seeking the controlled substance that was at the heart of this case.

III

Appellant argued, without citing any supporting authority, that the Board lacked jurisdiction to hear and decide the appeal because it has only two members. To the best of our knowledge, this is the first time such a challenge has been made, even though the Board has historically acted with only two members in situations where an illness or other reason has prevented a member from attending.

There is nothing in the language of the California Constitution (art. XX, § 22) which created the Appeals Board or in the legislation implementing those provisions which addresses the question whether the Board may hear and decide an appeal when it does not have a full complement of members. Nor is there any general statutory provision applicable to the Board or other administrative agencies, and our research has not disclosed any California case law addressing the subject. There are provisions in the enabling legislation of some California administrative agencies which define what constitutes a quorum for that agency. (See, e.g., Gov. Code § 5524 (California

Architects Board); Gov. Code § 8524 (Structural Pest Control Board).) The Appeals Board is not one of them.

We are content to rely on authorities from courts of other jurisdictions which, drawing on general principles of common law, support the Board's long-standing practice. (See, e.g., *Federal Trade Commission v. Flotill Products, Inc*. (1967) 389 U.S. 179, 183-184 [88 S.Ct. 401] ["[I]n the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body. Where the enabling statute is silent on the question, the body is justified in adhering to that common-law rule"]; and see *Ho Chong Tsao v. Immigration & Naturalization Service* (Fifth Cir. 1976) 538 F.2d 667, 669.)

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3] 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.