ISSUED MAY 12, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

B. E. DOHERTY dba Menlo Club 4778-80 Franklin Boulevard Sacramento, CA 95818, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7123 File: 42-273963 Reg: 97040703 Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja Date and Place of the Appeals Board Hearing: March 4, 1999 Sacramento, CA

B. E. Doherty, doing business as Menlo Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his on-sale beer and wine public premises license for permitting the negotiation and sale of a controlled substance within the licensed premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivisions (a) and (b), arising from violations of Business and Professions Code §24200.5, subdivision (a), and Health and Safety Code §11352.

Appearances on appeal include appellant B. E. Doherty, appearing through

[1] *The decision of the Department, dated April 23, 1998, is set forth in the appendix.*

his counsel, Larry Pilgrim, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert M. Murphy.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on August 17, 1992. Thereafter, the Department instituted an accusation against appellant charging that on four separate dates, January 27 and 31, and February 5 and 26, 1997, a patron of the premises negotiated and later sold heroin to an undercover Department investigator. The accusation further alleged that appellant knowingly permitted the illegal negotiations and sales.

An administrative hearing was held on March 9 and 10, 1998, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the license should be revoked.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the issue that the decision and findings of the Department are not supported by substantial evidence.

DISCUSSION

Appellant contends that the decision and findings of the Department are not supported by substantial evidence, arguing that the testimony of the undercover investigator was not credible, and that appellant and/or his employees were not aware of the drug transactions alleged.

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.[2]

Contrary to the Appeals Board's limited duties, 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.

In considering whether the findings are supported by substantial evidence, the Appeals Board views the term "substantial evidence" as relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as in the present appeal, 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

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[2]The California Constitution, article XX, §22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

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 Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (a case where 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. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

A. Credibility.

Appellant argues that the investigator's demeanor, inherent bias, testimony inaccuracies, and faulty memory make his testimony, opinions, and conclusions suspect and not credible.[3]

The Department's Finding VIII compares the testimony of the Department's investigator and appellant and his bartenders. The Administrative Law Judge (ALJ) found the investigator's testimony more credible, and therefore accepted it over the testimony to the contrary. The duty of the Appeals Board is clear: the credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d

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[3] *Appellant in his brief cites testimony that appellant argues is not supportive of the Department's decision. Yet, in the brief of 11 pages, appellant has not cited the pages of the transcript record of the administrative hearing testimony that would support appellant's argument of faulty testimony and use of inherently improbable conclusions on the part of the Department investigator. This is appellant's case and the burden is on appellant to point out to the Board those specific areas of the testimony-record that support his arguments. (Horowitz v. Nobel, supra; Sutter v. Gamel (1962) 210 Cal.App.2d 529 [26 Cal.Rptr. 880].)*

315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) The ALJ is the trier of fact.

B. Knowledge.

Again, without citation to the record, appellant argues that "Yet, [the Department investigator] 'guessed' that the Appellant or his employees knew of the transactions as well as the nature of it."

Appellant cites the case of Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], and argues that "The Laube decision abolished the Department's power to revoke licenses based on drug activity in the licensed establishment, without regard as to whether or not the Licensee had any knowledge of the activity. Now, the Department [under Laube] must clearly and convincingly prove that the Licensee had knowledge." Appellant contorts the Laube decision, but not beyond recognition.

The Laube case dealt with surreptitious contraband transactions between patrons and an undercover agent--a type of patron activity concerning which the licensee had no indication and therefore no actual or constructive knowledge. The court ruled the licensee should not have been required to take preventive steps to suppress that type of unknown patron activity. The Laube premises was an "upscale type hotel, bar and restaurant operation." "The Chief of Police of Pleasanton described [petitioners'] operation as 'clean' and 'orderly ....'" The drug transactions all occurred, but for one in the restroom, at a cocktail table. The transactions were limited to no more than two bindles each, which "were passed at table top or slightly below." The Laube court also said: "[O]n occasion, an employee [of petitioners] was in the vicinity of a transaction ... [But] the evidence did not clearly and convincingly establish the

[petitioners'] employees should have reasonably known what was transpiring.'" [Brackets are the court's.] The court then enumerated some factors bearing on whether the employees should have known of the transactions: the crowded condition of the premises where the transactions took place, the music by the band, the briefness of the transactions, and the comparatively small size of the bindles. (2 Cal.App.4th at 367-368.)

Contrasted to the Laube case's facts, the facts of the present appeal show that the area around the premises was designated by the police as a Problem-Orientated Policing project and the premises was identified as one of the major problems [RT 269].

On September 2, November 24 and 28, 1996, police officers advised appellant that his premises was responsible for a large drug traffic in the area. People had openly sold narcotics in front of and inside the premises. There had been four arrests at the premises within a few weeks before November 28, 1996. Appellant was advised that a police officer had observed hand to hand sales of narcotics taking place in the doorway of the premises [RT 270-271, and Exhibit 5].

In the first transaction of January 27, 1997, a patron named Juan Ramos entered the premises and sat at a rear table, where a Department investigator saw an exchange of "something" between Ramos and others, for cash [RT 13-16]. There were obstructions between the bartenders and the transactions [RT 15-17]. Ramos then moved to the bar counter where Ramos cut a piece from an object described by the investigator as a brownish-black candy-type bar, and handed the cut piece to two persons, for cash. There appeared to be approximately eight transactions between Ramos and others while at the bar counter [RT 15-17]. The investigator approached

Ramos, asked for $20 worth of the substance, whereupon Ramos cut a piece from the bar and gave that piece to the investigator. The piece received was found to be heroin. There was no attempt to hide the transactions at the bar counter [RT 17-18, and Finding III].

The transaction on January 31, 1997, was at the bar counter, where the investigator again asked Ramos for $20 worth of narcotics, received a piece of heroin which was placed on the bar counter [RT 21-23]. A bartender was close enough to Ramos to be able to observe the transaction and also hear the conversations [RT 25, and Finding IV].

The transaction on February 5, 1997, commenced in the premises. Ramos arrived and sat next to the investigator and asked if he, the investigator, needed "twenty" -- a street name for $20 of heroin [RT 26-27]. While the negotiations occurred in the premises, the sale was consummated outside the premises [RT 27-28].

The transaction of February 26, 1997, occurred when Ramos asked the investigator if he needed a "twenty," and after receiving an affirmative reply, went to the restroom and then returned. Ramos placed a piece of heroin on the bar stool for the investigator [RT 30-31]. The bartender was standing directly across from the transaction [RT 32].

Appellant described the area around the premises as an area in extreme decline [RT 224-226]. Appellant also testified that Ramos appeared to be a regular customer apparently who had a particular spot at the bar [RT 227-228].

The Laube court stated at 2 Cal.App.4th at 379:[4]

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[4] *Being a quotation from the case of Marcucci v. Board of Equalization (1956) 138 Cal.App.2d 605 [292 P.2d 264].*

> "A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposed upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly. Once a licensee knows of a particular violation of the law, that duty becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from recurring, once the licensee knows of it, is to 'permit' by a failure to take preventive action."

We determine that the three drug sale transactions and the negotiation were done in the premises in an open and blatant manner. Appellant's employees saw or should have seen the transactions, as well as the transactions between other patrons and Ramos.

With the description of the area and the premises, and the open sale of narcotics within the premises, the caution of the Laube case does not protect appellant.

ORDER

The decision of the Department is affirmed.[5]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5] *This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.