ISSUED MARCH 22, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

OCONCO, INC. dba Marlin Club 108 Catalina Avenue Avalon, CA 90704, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7365 File: 48-319490 Reg: 98044303 Administrative Law Judge at the Dept. Hearing: Lori Moreland Date and Place of the Appeals Board Hearing: January 20, 2000 Los Angeles, CA

OCONCO, INC., doing business as Marlin Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days for appellant's bartender possessing in the licensed premises a basketball pool card, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §24200, subdivision (a), and Penal Code §337a.

[1]The decision of the Department, dated February 11, 1999, is set forth in the appendix.

Appearances on appeal include appellant OCONCO, INC., appearing through its counsel, Carrie O'Conner, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on June 21, 1996. Thereafter, the Department instituted an accusation against appellant charging that, on May 30, 1998, appellant's bartender possessed in the premises a paper device for the purpose of recording and registering the selling of pools, consisting of a basketball pool card containing 100 chances on the National Basketball Association Championship Finals.

An administrative hearing was held on November 13, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the alleged violation by Department investigator Claud Rager; appellant's president and manager, Daniel O'Conner; and appellant's bartender, Alfredo Hernandez.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issue: there was not substantial evidence of illegal activity to support the findings and determinations.

DISCUSSION

Appellant acknowledges the well-settled concept of imputing to a licensee the knowledge and acts of his or her employee or agent, but contends that

knowledge is not imputed to the licensee unless there is "unmistakable proof" of illegal activity on the part of the employee or agent. Such proof, according to appellant, was not presented in this case.

Appellant essentially re-argues the evidence, charging that the ALJ ignored the testimony of the bartender as to what occurred. That the ALJ chose to believe the testimony of the investigator rather than that of the bartender, is a credibility determination that is within the discretion of the trier of fact and not this Board. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Appellant argues that there was no proof of payment for squares on the pool sheet nor of any payout from the pool. However, the offense charged does not require more than the presence of the pool sheet on the premises. (Pen. Code, §337a.)

The bartender testified at length about how the pool worked [RT 57-60]. He did not deny that the sheet was for a basketball pool, although he described it as a "fundraiser" [RT 45], since 10% of the money collected was to be donated to a charitable organization. He merely denied that he had sold any squares while he was at work in the licensed premises [RT 46, 52]. There is clearly substantial evidence to support the findings and determinations of the ALJ.

It is well settled law that a licensee has an affirmative duty to ensure the licensed premises is not used in violation of the law and that the knowledge and acts of the employees are imputed to the licensee. (Mack v. Department of

Alcoholic Beverage Control (1960) 178 Cal.App 2d 149, 153-154 [2 Cal.Rptr. 629].) This is true even for one-time acts of employees outside the scope of their employment, at least where there is some nexus between the acts and the alcoholic beverage license and the licensee has not taken "strong steps to prevent and deter such crime." (See Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board (1999) 76 Cal. App. 4th 570, 576 [90 Cal.Rptr. 2d 523].)

The illegal gambling activity of the bartender in the present appeal has a nexus to the alcoholic beverage license; the court in Santa Ana Food Market, supra, 76 Cal. App. 4th at 575, considered gambling sufficiently related to alcohol sales to establish the required nexus. In addition, there was no evidence of mandatory training to preclude such illegal activities, and the activity was carried on openly in the bar, indicating a lack of monitoring by the licensee.

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[2]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.