ISSUED DECEMBER 13, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ELENA CARRERA and JUAN CARRERA dba El Buccanero 225 W. Winton Avenue Hayward, CA 94544, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6624 File: 47-240747 Reg: 94030544 Administrative Law Judge at the Dept. Hearing: Michael C. Cohn Date and Place of the Appeals Board Hearing: September 4, 1996 San Francisco, CA

Juan Carrera and Elena Carrera, doing business as El Buccanero (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked appellants' on-sale general public eating place license, for appellants' possession for sale of cocaine, methamphetamine, and marijuana, and possession of drug paraphernalia, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of

[1]The decision of the Department dated December 21, 1996, is set forth in the appendix.

Business and Professions Code §24200, subdivision (a), and Health and Safety Code §§11351, 11378, 11359, and 11364.5, subdivision (a).

Appearances on appeal include appellants Elena Carrera and Juan Carrera, appearing through their counsel, Jesse J. Garcia; and the Department of Alcoholic Beverage Control, appearing through its counsel, John Peirce.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public eating place license was issued December 18, 1989. Thereafter, the Department initiated a five-count accusation against appellants' license on August 9, 1994. The accusation charged that appellants possessed for sale cocaine, methamphetamine, and marijuana in violation of Health and Safety Code §§11351, 11378, and 11359 respectively, and possessed drug paraphernalia, in violation of Health and Safety Code §11364.5, subdivision (a). The remaining count concerned receiving stolen property, to wit: a Smith & Wesson .44 caliber revolver, in violation of Penal Code §496, paragraph (1). Appellants requested a hearing.

An administrative hearing was held on November 20, 1995, at which time oral and documentary evidence was presented. Following the hearing the Administrative Law Judge (ALJ) issued his proposed decision, finding that appellants were in violation of Health and Safety Code §§11351, 11378, 11359, and 11364.5, subdivision (a). The count concerning stolen property was stricken at the hearing on the motion of the Department. Co-appellant Elena Carrera was found to have no actual or constructive knowledge of the presence of drugs on the premises. The Department adopted the ALJ's proposed decision in its entirety and revoked appellants' license.

Appellants thereafter filed a timely notice of appeal. In the appeal, appellants generally raise the following issues: (1) revocation of the license would be contrary to public policy, specifically because co-appellant Elena Carrera would be suffering a penalty even though an innocent party; (2) there was a lack of substantial evidence to show that co-appellant Juan Carrera sold the drugs; and (3) the penalty was excessive based on the evidence.

DISCUSSION

I

The license at issue is the property of both Juan Carrera and Elena Carrera. The ALJ found no evidence of wrongdoing on the part of Elena Carrera. Appellants thus contend that revocation of the license would constitute an egregious sanction on Ms. Carrera, an innocent party, constituting a gross violation of public policy.

Appellants rely on McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8] in their argument that it is "well settled that strict liability shall not be imposed on licensees." [App. Brief 6.] McFaddin concerned several transactions which occurred on a licensed premises involving patrons selling or proposing to sell controlled substances to undercover agents. While the licensee and its employees did not know of the specific occurrences, they knew generally of contraband problems and had taken numerous preventative steps to control such problems. The McFaddin court held that since (1) the licensee had done everything it reasonably could to control contraband problems, and (2) the licensee did not know of

the specific transactions charged in the accusation, the licensee could not be held accountable for the incidents charged.

The instant case is distinguishable, as McFaddin dealt with the imputation of employee acts to the licensee; in this matter, the focus is on the imputation of one licensee's acts to the other licensee, an innocent spouse. In §58 of Title IV of the California Administrative Code [2] the Department of Alcoholic Beverage Control has directed that where a business is the community property of husband and wife, an alcoholic beverage license may be issued or held in the name of both husband and wife, as is the situation here. Pursuant to the Department's findings, Juan Carrera would become an unlicensed spouse. Section 58, subdivision (b), provides that the license may be held in the name of only one spouse only if the unlicensed spouse is qualified and cannot participate in the business for reasons such as physical disability or absence from the state for a prolonged period. This section further provides in subdivision (c) that "[t]he unlicensed spouse must have the qualifications required of a holder of a license unless the husband and wife are not living together and have not lived together for at least six months." It is predominantly subdivision (c) which would prevent co-appellant Elena Carrera from continuing as the sole holder of this license.

The Appeals Board has examined numerous cases similar to the instant matter and has consistently reached conclusions such as it did in Wantuch (1985) AB-5111:

> "[J]udicial precedent holds that the department reasonably exercises its discretion by treating co-licensees identically when imposing discipline for the misconduct of one of the licensees. The rationale for this principle is

[2]The text of §58 is set out in full in the appendix.

> that there is but a single license, although standing in the names of two partners. When two or more persons apply for a partnership license, each of them necessarily assumes responsibility for the acts of the others with relation to the conditions under which the license is held. [quoting Coletti v. State Board of Equalization (1949) 94 Cal.App.2d 61 [209 P.2d 984].]"

The Board in Wantuch concluded: "The license is thus revocable in its entirety for the offense of only one of the licensees." The Appeals Board was even more specific in the early case of Hernandez (1961) AB-1546, when it concluded that the joint interests of the husband and wife in an Alcoholic Beverage Control (ABC) license were not severable.

That Elena Carrera, as an innocent party, must share in the penalty is unfortunate. However, it is well settled that the penalty imposed for the conduct of an offending partner must be suffered by the innocent partner as well. (Coletti, supra.) The revocation of the license does not result in the denial of "any rights granted to the wife by the Constitution or extended to her by statutory definition." (Hernandez, supra.) We must conclude, by extension, there is also no violation of public policy.

II

Appellants contend that there was insufficient evidence to support the findings of violations of Health and Safety Code §§11351, 11378, 11359, and 11364.5, subdivision (a). Appellants concede that Juan Carrera was at least "constructively responsible" for the drugs that were on the premises, but argues that there is insufficient evidence that Mr. Carrera participated in the sales of the drugs. [App. Brief 7.]

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as in the instant matter, 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, 873-74 [Cal.Rptr. 925].) The court in County of Mariposa v. Yosemite West Associates (1988) 202 Cal.App.3d 791, 807 [248 Cal.Rptr. 779] stated: "'[I]n examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made.' (Bancroft-Whitney Co. v. McHugh (1913) 166 Cal.140, 142 [134 P. 1157].)"

The record shows that in addition to the controlled substances, other indicia were also seized including plastic baggies and a scale [R.T. 11-12, 14-15]. Both items contained drug residue [R.T. 12]. In light of this evidence, coupled with the quantity of drugs found, the ALJ found it reasonable to infer that the drugs were possessed by Mr. Carrera for the purposes of sale [findings 8-9].

The court in People v. Williams (1971) 5 Cal.3d 211, 215 [485 P.2d 1146] stated: "The elements of the offense of . . . restricted drugs for sale are physical or constructive possession with knowledge of presence and narcotic character" (emphasis

added). Inconsistencies in Mr. Carrera's testimony, as well as his general demeanor, led the ALJ to conclude that Juan Carrera had full knowledge of the illegal substances on the licensed premises and that he possessed those items by exercising both dominion and control over them.

The question before the Appeals Board is whether there is substantial evidence to sustain the implied finding that the foregoing elements of dominion and control have been established. It is well settled that possession for the purpose of sale may be established by "circumstantial evidence, and that the quality and value of the contraband held, particularly when viewed in light of the . . . testimony" are factors which may indicate that the contraband was held for the purpose of sale rather than for individual use. (People v. Johnson (1984) 158 Cal.App.3d 850 [204 Cal.Rptr. 827]; People v. O'Hearn (1983) 142 Cal.App.3d 566, 570 [191 Cal.Rptr. 481]; People v. Shipstead (1971) 19 Cal.App.3d 58, 77 [96 Cal.Rptr. 913].)

We conclude that it was not improper for the ALJ to take into consideration the inconsistencies in testimony and the unconvincing attitude and demeanor of Mr. Carrera in finding that there were violations of the Health and Safety Code, since determining the credibility of a witness's testimony is within the reasonable discretion accorded to the trier-of-fact. (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].)

Appellants argue that because revocation, according to Wright v. Munro (1956) 144 Cal.App.2d 843 [301 P.2d 997], is a "severe and serious penalty," it should be

afforded the standard of "clear and convincing evidence." This contention is without merit. Evidence Code §115 states that "[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." Wright v. Munro is the only ABC Act case to mention a "clear and convincing" standard of proof. Careful reading of that case, however, leads to the conclusion that the court actually applied "preponderance of the evidence" as the standard: "[T]he evidence produced, although weak, supports the findings and judgment, and that is all that is required" (301 P.2d at 1000). The Appeals Board has consistently held that the burden of proof to be used in ABC Act cases is "preponderance of the evidence." (Midway Resources (1996) AB-6490; Haddad (1994) AB-6373; Bruno's (1993) AB-6307; McGuire Enterprises (1985) AB-5258.)

Appellants argue in the alternative that there is greater evidence that one of appellants' employees owned the drugs, negating the justification for a penalty imposed against appellants. We reject this argument, as did the ALJ. Even if there were sufficient credible evidence to support this argument factually, appellants would still bear responsibility for the presence of the drugs. Juan Carrera testified that in addition to being used for storage purposes, the room in which the drugs and paraphernalia were found was used as his personal office [RT 42]. Further, some items were found inside locked filing cabinets that also contained business records [RT 16, 43, 48]. It is reasonable to assume that Mr. Carrera was aware of the items' existence, even if they did not belong to him personally. In addition, the imputation to the licensee/employer of an employee's on-premises knowledge and misconduct is well settled in ABC Act

case law. (See Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405 411]; Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633]; Endo v. State Board of Equalization (1956) 143 Cal.App.2d 395 [300 P.2d 366, 370-71].)

Appellants' contention that there is a lack of substantial evidence showing that Mr. Carrera participated in drug sales is rejected.

III

Appellants argue that the penalty is excessive, emphasizing that there has been no other unlawful conduct at the premises since the date of initial licensing. Appellants also contend that there is insufficient evidence to warrant the penalty meted out by the Department. They concede that Mr. Carrera's conduct "cannot be excused" and he must "shoulder the responsibility" in regard to ensuring that drugs are not stored on his premises. [App. Brief 8.] They also concede that if Mr. Carrera was "someone not only aware of the drugs' presence in the establishment, but also profiting from it," that revocation would be appropriate. [App. Brief 8.] They argue, however, that there is no concrete evidence which would support the ALJ's finding of possessing the drugs for sale.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will

examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

While a licensee's record of conduct may influence the severity of the penalty imposed, it is merely one factor to consider and is certainly not the definitive determinant in the Department's decision. Contrary to the implication of appellants' argument, there is substantial evidence here to support much more than a mere metaphoric slap on the wrist for an "error in judgement."

Appellants do not seem to argue that no penalty is warranted, but rather that a less severe punishment is more appropriate. It is unfortunate that Elena Carrera must suffer for the acts of her husband, but the Department is charged with protecting the welfare of the public in general, and the penalty here is clearly within the allowable discretion of the Department in carrying out that responsibility.

CONCLUSION

The decision of the Department is affirmed.[3]

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

[3]This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.