

ISSUED JANUARY 21, 1997

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

ELISEO HERNANDEZ	)	AB-6630
dba El Palenque)	
1622 S. Pioneer Blvd.	)	File: 42-220755
Norwalk, CA 90650,	)	Reg: 94030577
Appellant/ Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Ronald M. Gruen
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	October 2, 1996
	)	Los Angeles, CA
)	

Eliseo Hernandez, doing business as El Palenque (appellant), appealed from a decision of the Department of Alcoholic Beverage Control¹ which unconditionally revoked appellant's on-sale beer and wine public premises license, for appellant having pled nolo contendere to the crime of assault with a deadly weapon, and for allowing and permitting within the premises, the sales, and negotiations for sale, of controlled substances, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §24200.5, subdivision (a), and Health and Safety Code

¹ The decision of the Department, dated January 4, 1996, is set forth in the appendix.

§11352.

Appearances on appeal include appellant Eliseo Hernandez, appearing through his counsel, Tim Casey; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on August 30, 1988. Thereafter, the Department instituted an accusation alleging the plea to, and conviction of, the crime of assault with a deadly weapon, and for allowing and permitting the sales or negotiations for sale of controlled substances, within the premises.

An administrative hearing was held on August 31 and November 27, 1995, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the alleged misconduct. Subsequent to the hearing, the Department issued its decision which revoked appellant's license. Appellant thereafter filed a timely notice of appeal.

This matter was originally scheduled to be heard on August 7, 1996, but was continued to the October calendar. Appellant's brief was not received by the Appeals Board until September 30, 1996. The Board has reviewed the entire record, and is satisfied that there is substantial evidence to support the findings, determinations and order of the Department.

DISCUSSION

Appellant argues that he was denied due process when the Administrative Law

Judge (ALJ) went forward with the hearing despite the fact that he had appeared without counsel, and failed to afford him the assistance promised at the commencement of the hearing. Appellant asks whether in these circumstances he was lulled into a false sense of security, "thereby diverting him from participating with the assistance of counsel?" [App.Br. 2].

Our review of the record persuades us that appellant's arguments are without merit. The evidence in support of the Department's Accusation was overwhelming. The drug transactions in appellant's place of business were open, blatant and repeated, and in many instances directly involved appellant's employees. While the ALJ found that it had not been shown that appellant himself had ever directly participated in the cocaine transactions (Special Finding A), there was testimony in the record which would have supported a finding that appellant knew or should have known that the drug transactions were occurring. [See, e.g., RT 47, 82-83].²

The principal contention of appellant is that he was forced to go forward with the hearing without counsel. He contends that a continuance should have been granted as a matter of courtesy, since the Department had earlier been granted a continuance; because the ALJ said one would have been granted if requested prior to the hearing, and he had made such a request; and because the matter was outside appellant's knowledge and expertise.

² In his notice of appeal, appellant denied that he had been in charge of the day-to-day business activities on the premises for three years, because of his on-going treatment for diabetes. However, there is undisputed testimony that appellant was, in fact, present, either seated at the bar, or playing pool, when several of the drug transactions in issue took place [RT 47, 82-83].

Appellant did not request a continuance until the day of the hearing. The record indicates that appellant was furnished notice of the date of the hearing on or about June 8, 1995. The hearing had been continued once before, at the Department's request, and without objection from appellant. At least six witnesses for the Department were present, and a seventh en route, on the morning of the day noticed. Understandably, the ALJ was reluctant to continue the matter subject to the mere suggestion that appellant might retain counsel, particularly in light of appellant's insistence that he could not afford counsel.

A review of the record reveals that the ALJ displayed appropriate concern over the fact that appellant was appearing without counsel [see, e.g., RT 9, 23, 63, 105, 106, 108]. The record is devoid of any evidence that appellant sought, prior to the hearing, a continuance for the purpose of giving him time to obtain an attorney. Until the conclusion of the first day of hearing, appellant consistently represented that he could not afford an attorney [see, e.g., RT 6, 9-10, 13, 21-22, 24]. Appellant even asked whether he was eligible for a public defender [RT 24].

The ALJ did, as appellant asserts, state that he would "do everything within his power to assist ... [appellant] and facilitate your examination of the witnesses and help you with any evidence that you may wish to present." [App.Br. 2, 5; RT 10]. This did not, as appellant assumes, obligate the ALJ to act as appellant's defense counsel.³

³ In fact, the ALJ, in one instance, registered his own objection to certain testimony and ruled it inadmissible [RT 19]. On many other occasions, the ALJ informed appellant of his right to question witnesses and, when his turn came, to call witnesses and/or testify on his own behalf. [See, e.g., RT 17, 19, 26, 30].

The hearing was conducted fairly, appellant was permitted to participate, and leeway was afforded him that would not have been afforded to an attorney [see RT 63].⁴

Appellant contends (App.Br., p. 4) that after informing appellant that the matter would be continued at the conclusion of the Department's case, the ALJ then allowed appellant to testify on his own behalf before affording the continuance which he indicated he would grant. This contention is factually incorrect. Appellant did not testify on the first day of hearing.

At the conclusion of the first day of hearing, the ALJ continued the matter to permit appellant time to retain an attorney. The ALJ was concerned that a continuance would only result in further delay,⁵ but on appellant's assurance that he intended to hire an attorney, granted the continuance. Appellant was ordered to obtain an attorney, who was to notify the Department no later than September 29, 1995, that he

⁴ ALJ Gruen:

"Well, I knew it would be difficult for you, so I understand. And you're not a lawyer, so I take that into account. If you were an attorney, I would handle this differently, I assure you."

⁵ ALJ Gruen:

"... I have no assurance that you will have an attorney here if we continue this matter to another date. ... My concern is what I've already indicated to you about having the attorney present. I am not satisfied that there will be an attorney here.

" It is contrary to the public interest to continue a case and drag the case on unless there is a cogent reason to do so, and I find no cogent reason."

[RT 109].

represented appellant. If this did not occur, the matter was to be automatically recalendared for a continued hearing where appellant himself would present any witnesses or other evidence for his case [RT 116].

The hearing resumed on November 27, 1995. Appellant represented that he had consulted an attorney and was quoted fees he could not afford. Appellant then testified on his own behalf. He called no other witnesses, and presented no documentary evidence. His own testimony was to the effect that the drug transactions were without his knowledge and beyond his control. As to the assault with a deadly weapon charge, he stated that the weapon had discharged accidentally.

The ALJ accepted appellant's testimony that the drug transactions were without his knowledge. [See Special Finding A]. However, the ALJ also found that appellant was ineffectual in preventing the cocaine transactions that were taking place in the bar area, the billiard table area and the rest room; that the narcotics activity on the premises was "rampant and out of control," and involved appellant's patrons and bartender-employees; that "the establishment was an open and notorious location for the gathering of drug dealers, facilitators and buyers;" and that appellant was "incapable of coping with or controlling the narcotics traffic on the premises."

CONCLUSION

There is substantial evidence in the record in support of the charges in the Accusation and the ALJ's Findings, Special Findings and Determinations. Appellant was afforded all due process the law requires and more. The penalty of revocation was

appropriate in light of the conduct which took place.

The decision of the Department is affirmed.⁶

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

⁶ 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.