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

AB-7564

ELDON W. BAGSTAD dba El Don Liquor
416 Pacific Coast Highway, Huntington Beach, CA 92648,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 21-30380 Reg: 99046286

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: March 1, 2001
Los Angeles, CA

ISSUED APRIL 26, 2001

Eldon W. Bagstad, doing business as El Don Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license, but stayed the revocation for a probationary period of one year and suspended the license for 10 days, for appellant's clerk delivering, furnishing, or transferring drug paraphernalia, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Health and Safety Code §11364.7, subdivision (a).

Appearances on appeal include appellant Eldon W. Bagstad, appearing through his counsel, A. Patrick Muñoz, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

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[1]The decision of the Department, dated December 16, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on June 2, 1972. Thereafter, the Department instituted an accusation against appellant charging that, on October 6, 1998, appellant's clerk, David P. Pluma, Jr. ("the clerk"), sold drug paraphernalia to Department investigators Matthew Harris and Scott Stonebrook ("the investigators").

An administrative hearing was held on July 20 and September 28, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the clerk's sales to the investigators of two small pipes and a baggie with small screens in it.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the findings are not supported by substantial evidence, and (2) the Department erroneously failed to apply the standards enunciated by the court in Santa Ana Food Market v. Alcoholic Beverage Control Appeals Board (1999) 76 Cal.App.4th 570 [90 Cal.Rptr.2d 523].

DISCUSSION

I

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. 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. The Appeals Board is also authorized to

determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

Appellant contends the Department's findings are not supported by substantial evidence. He bases this contention on the testimony of the clerk and appellant, which contradicts the testimony of the two investigators.

"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 US 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, 873-874 [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 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

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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].

Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which 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]; Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Appellant is really asking the Board to reevaluate the testimony and credibility of the witnesses. The determination of 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].)

The ALJ specifically found that "[the clerk's] testimony contained inconsistencies as to his understanding of words associated with illicit drugs. That and his general demeanor discredit his general and specific denials." (Finding X.) No reason has been given that would justify this Board in interfering with the reasonable exercise of discretion by the trier of fact.

The credible testimony of the investigators provides the substantial evidence that supports the Department's findings. Therefore, we reject the contentions of appellant to the contrary.

II

Appellant contends the Department erroneously "used a strict liability standard by imposing discipline for a single illegal act, unrelated to the sale of alcohol, without regard to whether the licensed premises is a public nuisance" in contravention of the standards announced in the recent case of Santa Ana Food Market v. Alcoholic

Beverage Control Appeals Board (1999) 76 Cal.App.4th 570 [90 Cal.Rptr.2d 523] (hereafter "Santa Ana"). (App.Br. at 5.) Appellant asserts the court in Santa Ana held that discipline may only be imposed for acts unrelated to the sale of alcohol if the premises are shown to be a public nuisance, the licensee has permitted the unlawful conduct, and "the acts in question must have a minimal nexus to the sale of alcoholic beverages, **and** the purpose of the rule must be furthered." (Ibid. at 6 [emphasis in original].)

The decision in Santa Ana was issued November 29, 1999, about a month after the ALJ's proposed decision in this matter, and almost three weeks before the Department adopted the ALJ's proposed decision as its own. The case is not mentioned or discussed in the decision issued by the Department. This Board need not remand the matter to the Department for further findings of fact, however, but can resolve this issue by applying the law as stated by the court in Santa Ana to the facts as shown by the record.

In Santa Ana, an employee, at great pains to hide the transaction from the licensee, surreptitiously and for her own personal gain, committed food stamp fraud. The licensee had taken substantial measures to prevent such criminal activity by its employees. The court held that the Department had abused its discretion when it suspended the market's license, saying that “where, as here, a licensee's employee commits a single criminal act unrelated to the sale of alcohol, the licensee has taken strong steps to prevent and deter such crime and is unaware of it before the fact, suspension of the license simply has no rational effect on public welfare or public morals.”

Appellant's argument is premised on the assumption that the unlawful transaction at issue here was unrelated to the sale of alcohol. The court in Santa Ana said that "the acts giving rise to [discipline] must have some minimal nexus to the licensee's sale of alcoholic beverages," and found that "wrongful acts by employees [which resulted in discipline] have rarely involved directly the sale of alcoholic beverages, but the acts have been traditionally considered to be adjuncts of alcohol sale, such as gambling, prostitution and drug use." (Santa Ana, supra, 76 Cal.App.4th at 575.) Although the present matter did not involve directly the sale of alcoholic beverages, it did involve one of the enumerated adjuncts of alcoholic beverage sales, drug use. The facts in this case are not like those in Santa Ana, where the unlawful purchase of food stamps was unrelated to the sale of alcoholic beverages.

Nowhere did the court in Santa Ana say that discipline may only be imposed if the premises are shown to be a public nuisance. Rather, referring to the Department's "broad authority to act, even in the absence of fault on the licensee's part or actual knowledge of wrongdoing that might lead to suspension or revocation," the court stated that "This power *has been likened to* the government's ability to declare a nuisance." (Emphasis added.) The court went on to quote from Yu v. Alcoholic Beverage Control Appeals Board (1992) 3 Cal.App.4th 286, 296 [4 Cal.Rptr.2d 280]:

> " 'The constitutional provision says that the existence on the licensed premises of a condition injurious to the public welfare is enough for revocation. [Citation.] *As in applying the law of nuisance,* fault is not relevant; *the power of the Department derives from the police power to prevent nuisances* regardless of anyone's fault in creating them. Thus it is said that *the licensee is charged with preventing his premises from becoming a nuisance* and it will not avail him to plead that he cannot do so. [Citation.]' " (Emphasis added.)

(Santa Ana, supra, 76 Cal.App.4th at 573-574.)

The court referred to the existence of a nuisance as a basis for discipline, but clearly did not limit discipline to a finding that the premises was a public nuisance. Rather, the court was explaining that, as in the case of a nuisance, a licensee can be held liable for conditions on the premises whether or not the licensee is found to be at fault.

With regard to the licensee permitting the unlawful conduct, appellant's reliance on Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], is misplaced. Laube v. Stroh, was actually two cases--Laube and De Lena, both of which involved restaurants/bars--consolidated for decision by the Court of Appeal. The Laube portion 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--and the court ruled the licensee should not have been required to take preventive steps to suppress that type of unknown patron activity.

The De Lena portion of the Laube case concerned employee misconduct, wherein an off-duty employee on four occasions sold contraband on the licensed premises. The court held that the absence of preventive steps was not dispositive, but the licensee's liability should be based solely on the imputation to the employer of the off-duty employee's illegal acts.

The imputation to the licensee/employer of an employee's on-premises knowledge and misconduct is well settled in Alcoholic Beverage Control 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, 370-371].) The employee misconduct in the present case falls under the analysis of the De Lena portion of Laube v. Stroh, and the misconduct is properly imputed to the licensee.

Appellant's final assertion is that, in order for the conduct of employees to be imputed to a licensee, "the acts in question must have a minimal nexus to the sale of alcoholic beverages, **and** the purpose of the rule must be furthered." As noted above, the act here clearly had at least a minimal nexus to the sale of alcoholic beverages. The court in Santa Ana stated that the rule of imputed liability was designed to prevent licensees from staying away from their licensed premises to avoid liability for wrongful acts occurring there and to encourage licensees to monitor the actions of their employees and patrons and to relieve the ABC from proof problems. The court found that those purposes were not served by imposing discipline where 1) a licensee took great measures to deter criminal activity by employees through education and surveillance, and 2) was unaware of an employee's criminal act until after the fact.

Appellant argues that he meets the two criteria used by the Santa Ana court to relieve the licensee there from liability for its employee's misconduct. The record in the present case shows that appellant did not know of the clerk's misconduct until after the fact, but it does not show that he "took great measures to deter criminal activity by employees through education and surveillance." Although appellant did have a camera trained on the register area to provide surveillance of activities there, the record shows that no training was given to employees regarding the sale of items as drug paraphernalia. Appellant testified he knew that people could use the rolling papers and pipes he sold to smoke marijuana. He stated that he would not sell a pipe to someone

who specifically told him they were going to smoke drugs with the pipe, but he didn't think it was his responsibility to be concerned with the use his customers made of them; he just sold them. [RT 91-92]. When asked what training he gave his clerks with regard to selling the pipes in question, appellant said, "Well, we know what they're sold for. [The clerks] know why I buy them. They know that people smoke tobacco in them. We've seen them stand there smoking tobacco. That's what - - that's the training I give them, and that's what we sell them for." The ALJ summed up appellant's testimony regarding the training he provided about selling the pipes: "Bottom line, . . . he doesn't feel that there's any particular training required." [RT 95.] When asked if anyone had advised him not to sell a pipe to someone who wanted to buy a pipe in which to smoke marijuana, the clerk answered "no" [RT 110-111].

Appellant did not take the "great measures to deter criminal activity by employees through education and surveillance" that the Santa Ana court found as partial justification for relieving the licensee there from liability. The Department's decision would not have been different had it applied the standard set out in Santa Ana, and it must be affirmed.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]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.