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

AB-8090
File: 21-334747 Reg: 02053448

HUDA ATIEH KHALAF dba J & D Grocery
1042 Polk Street, San Francisco, CA 94109,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ruth S. Astle

Appeals Board Hearing: January 8, 2004
San Francisco, CA

ISSUED APRIL 16, 2004

Huda Atieh Khalaf, doing business as J & D Grocery (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended her off-sale general license for 10 days for permitting the consumption of an alcoholic beverage within the licensed premises, in violation of Business and Professions Code section 25612.5, subdivision (c)(3).

Appearances on appeal include appellant Huda Atieh Khalaf, appearing through her counsel, Frank A. D'Alfonsi and Christopher C. Hall, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 6, 1997. Thereafter, the Department instituted an accusation against appellant charging the unlawful

[1]The decision of the Department, dated February 13, 2003, is set forth in the appendix.

consumption. An administrative hearing was held on November 19, 2002, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred.

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

DISCUSSION

Appellant contends that there is no substantial evidence that appellant permitted the violation.

The statute in question states in pertinent part: "No alcoholic beverages shall be consumed on the premises of an off-sale retail establishment ...."

Appellant sold a small unopened airplane-size bottle of liqueur to a patron [RT 96]. The patron left the cashier area with the bottle in a paper bag [RT 75, 84, 96], and proceeded out of the premises through the front doors.[2] The cashier area is close to the front doors.

The patron after passing through the front doors, stopped in a small set-back area between the two front doors and the sidewalk, an area which is a part of the licensed premises [Exhibit 2, and photos A-1 - A-4, B-1, B-3 - B-4]. Before stepping on to the public sidewalk, and while in the set-back area, the patron opened the bottle and consumed all of the contents [RT 10-11, 17].

A police officer was passing by the premises and observed the consumption [RT 9]. The police officer did not talk to appellant as the officer knew there was a language

[2]The record does not state that the front doors were opened or closed at the time of the sale.

barrier. The officer believed that the son of appellant was the owner (licensee) and the officer discussed the violation with him [RT 15, 18-20, 54].

Appellant argues that she did not permit the violation and contends that holding her responsible for the conduct of the patron, would amount to strict liability, essentially arguing that the Department must connect some actual or constructive knowledge by appellant that she knew or should have known that the patron would consume on the premises, to constitute a "permitting."

The case of *McFaddin San Diego 1130, Inc. v. Stroh* (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8], was a major case concerning this issue. *McFaddin* concerned several transactions which occurred on the 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 preventive 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 case of *Laube v. Stroh* (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], was actually two cases–*Laube* and *Delena*, 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 *Delena* 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 penalty should be based solely on the imputation to the employer of the off-duty employee's illegal acts.

It is true that the *Laube* case rejected "strict liability" and the concept that a licensee can have permitted something of which he or she had no knowledge.[3] Statements in the *Laube* case clarify the issue:

> The Attorney General contends that knowledge of "permitted" behavior is not required, and that neither petitioner took sufficient preventive measures because drug transaction did in fact occur. We disagree with both contentions. Having examined in detail the historical antecedents of *McFaddin*, we respectfully conclude that the [Appeals] Board's interpretation of *McFaddin* is incorrect, and leads to unwarranted liability without fault ...." [2 Cal.App.4th at page 371.]
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> The concept that one may permit something of which he or she is unaware does not withstand analysis. [2 Cal.App.4th at page 373.]
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> We respectfully differ with the [Appeals] Board's perception of *McFaddin* and its antecedents, and hold that a licensee must have knowledge, either actual or constructive, before he or she can be found to have "permitted" unacceptable conduct on a licensed premises. It defies logic to charge someone with permitting conduct of which they are not aware. It also leads to impermissible strict liability of liquor licensees when they enjoy a constitutional standard of good cause before their license - and quite likely their livelihood - may be infringed by the state. [2 Cal.App.4th at page 377.]

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[3] *Laube v. Stroh* is most frequently cited for the following proposition: "The *Marcucci* case perhaps states it best. A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes 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." (Citations omitted)

We proceed into the issue in this matter whether appellant should be held responsible, or in other words, did she "permit" the violation. Appellant testified she knew people consumed alcoholic beverages outside the premises, apparently near the corner area. The premises is located at that corner, with the front doors a short distance from the corner [RT 99 and photo C].

The police officer testified that a large number of people loiter in and around[4] the premises, and the officer has issued a large number of citations on a daily basis for consumption on that street corner [RT 55-56]. The whole of the record speaks to loitering on the sidewalk and consumption at the corner, not within the premises [RT 48-49, 55-57, 63-64, 99]. The police officer spoke of situations [on at] (sic) the store, which needed to be addressed by the owner [RT 48-49]; warnings were given to appellant or her son concerning control of loitering and alcohol consumption in front of the premises [RT 56, 63]; and the son of appellant was told it was his responsibility to control "that issue" [RT 57].

The record is barren on the question of consumption on or in the premises.

Considering the concept and evidence of "permitting," it is possible, from a reading of the record, to conclude that when the patron tilted the head back to drink, appellant at the cash register could have seen the consumption, as appellant was approximately five to six feet away [see Photo B-2]. Testimony shows appellant had an unobstructed view of the drinking patron [RT 14]; but the officer was not sure appellant did, in fact, see the consumption [RT 47]; there were people in the premises at the time

[4]There is ample testimony that people loiter near or in front of the premises [RT 48-49, 55-57, 63, 99]. However, the questions and answers concerning loitering are extremely ambiguous, and seem to imply the control of loitering is the responsibility of appellant, not an issue as to the violation charged.

of consumption [RT 78-79]; and there were people in line at the cash register at the time of the consumption [RT81]. We ask ourselves, if appellant did see the consumption, what could she do about it?

With that said concerning the record, for foundational purposes, some fundamental principles may be in order.

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. The Department's exercise of discretion "is not absolute but must be exercised in accordance with the law, and the provision that it may suspend or revoke a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare and morals." (*Martin v. Alcoholic Beverage Control Appeals Board* (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513] quoting from *Weiss v. State* Board of Equalization (1953) 40 Cal.2d 772, 775.)

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.[5]

"Substantial evidence" as referred to in the preceding paragraph, is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., 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].)

Considering the contention of substantial evidence, the administrative law judge (ALJ) took official notice that there were previous records of disciplinary action in this matter [RT 55]. There is no evidence, substantial or otherwise, that consumption in or on the premises was ever addressed by the police officer to appellant, her son, or any employee. The only apparent problem addressed to appellant or her son, was the widespread sidewalk consumption in the immediate area, which should not have been an issue in this matter [RT 48-49, 55-57, 63-64].

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

Finding of Fact 4 states appellant knew or should have known of the consumption by the patron. The evidence shows the patron stood in a set-back between the front doors and the sidewalk, lifted a very small bottle, and drank the contents [RT 31, 45-47]. The act of consumption was quick and continuous, with the testimony saying appellant, acting as the clerk, had a clear line of sight of the drinking [RT 14], but it is unknown if appellant did see the consumption [RT 47], as appellant was serving other customers [RT 78-79, 81].

Finding 4 also states the violation was "not a first time problem." There is no evidence that consumption in or on the premises was ever a problem [RT 48-49, 55-57, 63-64].

The last two sentences of Finding 4 are not factual or supported by any evidence: "The premises is in a neighborhood where patrons are more likely to try to consume alcohol on the premises. Further, selling single, small bottles also increases the likelihood that a patron will consume the contents of the bottle on the premises."

Finding 5 states that once appellant was told of the consumption on her premises, she was responsible for that violation of law. While a true statement of lawful responsibility, there is no evidence that appellant, or her employee son, or any employee, were ever told of any consumption in or on the premises.

The major portion of the matter goes to notice: did appellant know or should have known the patron would consume in that premises' property between the front door and the public sidewalk. Without notice, or other evidence of known prior misconduct, appellant could not be said to have "permitted" the violation.

ORDER

The decision of the Department is reversed.[6]

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

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