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

AB-8091
File: 40-160973 Reg: 02052489

ELIAS T. MONTALVO and MARIA MONTALVO, dba Manny's Bar
1521 North Fairview, Santa Ana, CA 92706,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 2, 2003
Los Angeles, CA
ISSUED JANUARY 22, 2004

Elias T. Montalvo and Maria Montalvo, doing business as Manny's Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 20 days for permitting sales and service of an alcoholic beverage to a person exhibiting obvious signs of intoxication, in violation of Business and Professions Code section 25602, subdivision (a); revoking their license for permitting the solicitation of alcoholic beverages under a profit-sharing plan or scheme, in violation of Business and Professions Code section 24200.5, subdivision (b), together with violations as to solicitation of alcoholic beverages, in violation of section 25657, subdivision (a), and California Code of Regulations, title 4, section 143; and revoking their license for permitting the sales of controlled substances within the premises, in violation of Health and Safety Code section 11352, along with a violation of Health and Safety Code section 11351, possession of a controlled substance.

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[1]The decision of the Department, dated January 16, 2003, is set forth in the appendix.

Appearances on appeal include appellants Elias T. Montalvo and Maria Montalvo, appearing through their counsel, Meir J. Westreich, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer license was issued on September 5, 1984. Thereafter, the Department instituted an accusation and an amended accusation charging 42 counts:

> One count of selling and furnishing an alcoholic beverage to a person exhibiting obvious signs of intoxication;
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> Five counts of solicitation by four women under a profit-sharing plan. Also, 22 counts concerning the four soliciting women which concern various violations of the solicitation statutes and rules of the Department;[2]
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> Thirteen counts of selling controlled substances within the premises, all in the year 2001, with one sale on January 5, two sales on January 19, four sales on February 2, one sale on February 22, one sale on March 15, two sales on March 29, one sale on April 5, and a possession charge on May 18; and
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> One count reciting that co-appellant Elias T. Montalvo, mistakenly referred to as "respondent-licensee" where in fact there are two licensees in this matter, knowingly permitted the sales of controlled substances.

An administrative hearing was held on July 9 and 10, and September 25 and 26, 2002, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the charges.

Subsequent to the hearing, the Department issued its decision which determined that the charges, except as noted in footnote 2, were duly proven.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) appellants cannot be held responsible for conduct which they were not

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[2]In the decision of the Department, five counts of Business and Professional Code section 25657, subdivision (b), were dismissed being counts 22, 28, 32, 36, and 40. [See Legal Conclusion 17.]

reasonably aware, either through actual knowledge, or imputed knowledge through their employees; and (2) the penalty is excessive.

DISCUSSION

Following are some basic rules and considerations which will guide us in this review.

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 revoke a license 'for good cause' necessarily implies that its decision 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.[3]

"Substantial evidence" as noted above, 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].)

I

Appellants contend no responsibility should accrue to them as they were reasonably unaware of the criminal conduct. We note at the onset of our review that appellants do not contend the acts alleged did not occur, only that appellants should not be held responsible for that misconduct.

OBVIOUS INTOXICATION

Business and Professions Code section 25602, subdivision (a), states as follows:

> Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to ... any obviously intoxicated person is

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[3]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].

guilty of a misdemeanor.

A Santa Ana police department peace officer observed a patron within the premises who had slurred speech, red eyes, poor balance, loud speech, and was belligerent. The man ordered and was served a total of three beers within about one hour. The officer formed an opinion that the man was intoxicated and should not have been served the beers [Finding of Fact 27]. The bartender stated to the officer that that customer always acted that way when he was drunk [9/25/02 RT 68-70].

The term “obviously” denotes circumstances “easily discovered, plain, and evident” which places upon the seller of an alcoholic beverage the duty to see what is easily visible under the circumstances. (*People v. Johnson* (1947) 81 Cal.App.2d Supp. 973 [185 P.2d 105].) Such signs of intoxication may include bloodshot or glassy eyes, flushed face, alcoholic breath, loud or boisterous conduct, slurred speech, unsteady walking, or an unkempt appearance. (*Jones v. Toyota Motor Co.* (1988) 198 Cal.App. 3d 364, 370 [243 Cal.Rptr. 611].)

The police officer's testimony, being a percipient witness to the signs of intoxication shown by the patron observed, was sufficient to meet the requirements of case law. (*Jones v. Toyota Motor, Co.* (1988) 198 Cal.App.3d 364 [243 Cal.Rptr. 611]; *In re William G.* (1980) 107 Cal.App.3d 210 [165 Cal.Rptr. 587]; and *People v. Murrietta* (1967) 251 Cal.App.2d 1002 [60 Cal.Rptr. 56].)

A licensee is vicariously responsible for the unlawful on-premises acts of his employees. Such vicarious responsibility is well settled by case law. (*Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; *Harris v. Alcoholic Beverage Control Appeals Board* (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; and *Mack v. Department of Alcoholic Beverage Control*

(1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].)

We do not consider the findings and conclusions of the Administrative Law Judge (ALJ) as arbitrary or abusive. A reading of the entire record leads us to conclude that substantial evidence supports the decision of the Department.

SOLICITATION OF ALCOHOLIC BEVERAGES

Business and Professions Code section 24200.5, along with subdivision (b) states as follows:

> Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds:
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> (b) If the licensee has employed or permitted any persons to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under any commission percentage, salary, or other profit-sharing plan, scheme, or conspiracy.

Business and Professions Code section 25657, subdivision (a), states as follows:

> It is unlawful: (a) For any person to employ, upon any licensed on-sale premises, any person for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, or to pay any such person a percentage or commission on the sale of alcoholic beverages for procuring or encouraging the purchase or sale of alcoholic beverages on such premises.

California Code of Regulations, title 4, section 143 (Department's Rule 143), states as follows:

> No on-sale retail licensee shall permit any employee of such licensee to solicit, in or upon the licensed premises, the purchase or sale of any drink, any part of which is for, or intended for, the consumption or use of such employee, or to permit any employee of such licensee to accept, in or upon the licensed premises, any drink which has been purchased or sold there, any part of which drink is for, or intended for, the consumption of use of any employee. (¶) It is not the intent or purpose of this rule to prohibit the long-established practice of a licensee or a bartender accepting an incidental drink from a patron.

The record shows that solicitations occurred on February 2, March 15, and on

March 29, 2001 [Findings of Fact 14-16, 19-20, 26, 30-31]. All four of the soliciting females were employees, two of whom were bartenders.

As stated above, a licensee is vicariously responsible for the unlawful on-premises acts of his employees. Such vicarious responsibility is well settled by case law. (See *Morell*, *Harris,* and *Mack,* supra.)

The law demands that a licensee use substantial efforts in maintaining a lawfully-conducted business. "The law requires more than that a licensee make some colorable efforts toward the maintenance of lawfully conducted premises. The law demands that he in fact so conduct his business that it meets the minimum requirements of decency and morality." (*Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446, 450].)

The record is clear as to the solicitations by the employees. The record is also clear that appellants failed in their duty to reasonably maintain and run a lawful business. The misconduct was over an extended period of time and had the appearance of a blatant and open operation.

CONTROLLED SUBSTANCES

Health and Safety Code sections 11351 and 11532 state in pertinent part, as follows:

> [11351] ... [E]very person who possesses for sale or purchases for purposes of sale (1) any controlled substance ... shall be punished by imprisonment in the state prison for two, three, or four years.
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> [11532] ... [E]very person who transports, imports into this state, sells furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance ... shall be punished by imprisonment in the state prison for three, four, or five years.

The record shows that during a period of over four months, sales of controlled

substances were easily purchased within the premises on 12 occasions [Findings of Fact 4-13, 17-18, 20-23, 25, 29, 32, 34-35]. It appears that the drug trafficking was by Agustin Bustos, a person who frequented the premises, and sold controlled substances to unidentified persons as well as to undercover peace officers, mainly occurring within the restroom of the premises, except on one occasion [Findings of Fact 25].

This is an example of a fast and loose operation which was conducive to the sales of controlled substances. The record shows the operation of selling controlled substances was easy and open to all, who cared to observe, to see. It seems inconceivable that management which appears grossly deficient, or employees, would not have observed and questioned the constant trafficking from premises proper to bathroom and back. The whole scenario speaks to acquiescence to observable misconduct.

From a reading of the record, it is evident to us that the decision of the Department is founded on substantial evidence.

KNOWLEDGE, ACTUAL AND IMPUTED

Appellants argue that they did not know of the unlawful activities of their employees, and that of Bustos in selling the cocaine. Appellants cite three cases in an attempt to show that the law recognizes their plea of innocence to the violation of law.

The case of *McFaddin San Diego 1130, Inc. v. Stroh* (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8], 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 preventative 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. The *Laube* court stated:

> "The *Marcucci* [*Marcucci v. Board of Equalization* (1956) 138 Cal.App.2d 605 [292 P.2d 264]] 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 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. This is a more reasonable alternative to the Board's interpretation of *McFaddin,* and one more consistent with logic and reasonable fairness. The Attorney General, at oral argument, essentially conceded the point by stating that his main concern – which we certainly share – was the Department's ability to act against the licensee who knows of illicit activity and fails to prevent its recurring.'"

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, supra*; *Morell v. Department of Alcoholic Beverage Control, supra; Mack v. Department of Alcoholic Beverage Control*, supra; and *Endo v. State Board of Equalization* (1956) 143 Cal.App.2d 395 [300 P.2d 366, 370-371].)

The last case cited is *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board* (1999) 76 Cal.App.4th 570, 576 [90 Cal.Rptr.2d 523]. A store clerk using her own funds, purchased federal food stamps at one-half their value. She made the purchases apparently carefully so that management could not ascertain the illegal purchases. The court held the finding of fault was an abuse of discretion, stating: “But 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 the public welfare or public moral.”

These three cases have little comfort or protection to appellants.

The Department, through the administrative law judge, made the crucial determination that the protestations of innocence and lack of knowledge were not true. In Findings of Fact 21, the decision states that co-appellant Elias Montalvo warned an undercover peace officer that there were two “cops” in the bar. Findings of Fact 22 states that the same co-appellant also warned Bustos, the major cocaine seller in the premises, that there were “cops” in the premises. All the drug transactions occurred on Thursday and Friday evenings, times when co-appellant Elias Montalvo was at the premises.

The administrative law judge, after hearing the entire matter, concluded that the drug selling "was so pervasive that the license holder had to know what was going on based solely on the constant activity in the men's restroom. Unbelievably, Montalvo denied knowing about it at all." [Legal Conclusions 23.]

In defense, co-appellant Elias Montalvo "denied seeing drugs being dealt in his bar and he denied seeing anyone he knew to be a drug dealer in his bar. He denied ever warning Bustos or anyone about the presence of police in the bar" [Findings of Fact 40].

Legal Conclusions 23, 24, and 25 state essentially that co-appellant Elias Montalvo did know of drug dealing in the premises, and did warn Bustos and others of police within the premises.

As we have said in many previous decisions, it is the administrative law judge who hears the evidence, and is charged with deciding who is to be believed, and who is not. Absent a clear showing of an abuse of discretion, this Board cannot override the determination of the administrative law judge.

II

Appellants contend the penalty is excessive.

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].)

The Department had the following factors to consider: (1) a bartender sold three

alcoholic beverages to a person exhibiting obvious signs of intoxication; (2) four females, all employees had a well orchestrated solicitation scheme that was from all appearances open and obvious to the casual observer; and (3) the obvious and continuous drug trafficking from bar proper to the restroom was blatant.

Considering such factors, the appropriateness of the penalty must be left to the discretion of the Department. The Department having exercised its discretion reasonably, the Appeals Board will not disturb the penalty.

ORDER

The decision of the Department is affirmed.[4]

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

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[4]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.