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

AB-8147
File: 48-256764 Reg: 02054178

DUANE LEE HARBESON AND KEH FAN HARBESON, dba Non Stop Cocktails
107 East Valley Boulevard, San Gabriel, CA 91776,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: February 19, 2004
Los Angeles, CA, CA

ISSUED MAY 25, 2004

Duane Lee Harbeson and Keh Fan Harbeson, doing business as Non Stop Cocktails (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for their employee soliciting drinks in violation of Business and Professions Code[2] sections 23804; 24200, subdivisions (a) and (b); 24200.5, subdivision (b); 25657, subdivision (a); Penal Code section 303; and title 4, California Code of Regulations, section 143 (rule 143).

Appearances on appeal include appellants Duane Lee Harbeson and Keh Fan Harbeson, appearing through their counsel, Glenn F. Beckett, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

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[1]The decision of the Department, dated May 15, 2003, is set forth in the appendix.

[2]Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on March 25, 1991. On December 12, 2002, the Department filed a seven-count accusation against appellants charging that, on May 18, 2002, appellants' waitress, Jun Lu, solicited drinks from a Department investigator in violation of the statues and regulation noted above.

At the administrative hearing held on April 10, 2003, documentary evidence was received, and testimony concerning the violations charged was presented by Department investigators William Armantrout and Joseph Perez, Jr., and by co-licensee Keh Fan Harbeson.

Armantrout testified that while in appellants' premises, he ordered three Bud Light beers, paying $3.50 for each one. A woman who had been waiting on tables, later identified as Jun Lu, approached Armantrout and asked him to buy her a beer. She told him it would cost $7.00 for her beer, and he agreed, placing a $10.00 bill on the counter. The bartender, Jing Lan Xue, came up and took the money, telling Armantrout that the beer for Lu would cost $7.00. Xue brought back a small glass containing what Lu identified as "ice beer."[3] Armantrout and Lu had a brief conversation about her employment at the premises while Lu drank some of the contents of the glass.

When a group of customers came in, Lu went to wait on them, but returned later to finish her drink, which she had left on the counter with Armantrout. After finishing the drink, she held up the empty glass and smiled at Armantrout. He said "Another?" and she answered "Yes. Would you buy me another beer?" He agreed, and she told him it

[3]When Lu ordered a second beer, Armantrout watched Xue prepare the drink. Using a six- or seven-ounce glass, Xue put some ice in the glass and then poured in "a very small amount" of an amber liquid from what appeared to be a beer bottle. She then squirted a clear liquid into the glass from the "soda gun," mixed the contents of the glass together, and served the drink to Lu.

would cost $7.00. When Xue came to get the money for Lu's drink, she reminded Armantrout that it would cost $7.00, and he said "Okay."

Armantrout observed that Lu sat and drank with other customers when she was not at the bar with him. When Lu ordered a drink for herself, Xue would place pieces torn from a bar napkin on a small shelf under the bar counter.

At some point after Armantrout entered the premises, co-appellant Keh Fan Harbeson entered, went behind the bar, and greeted Xue and Lu. Both investigators observed her behind or at the end of the bar, talking to people.

At the hearing, appellants stipulated that the drinks referred to in all counts were alcoholic beverages and that Lu and Xue were employed by appellants up to and including the date of the investigation. Appellants' counsel at the time, Mr. Flanagan, stated that they were contending only that appellants had no knowledge of the violations [RT 13, 60-61].

The Department's decision determined that the violations occurred as charged, with the exception of count 3 (charging violation of section 25657, subdivision (b)), which was dismissed. Appellants filed an appeal contending: 1) The findings are not supported by substantial evidence; 2) Lu was entrapped by the investigator; 3) the evidence does not show that Keh Fan Harbeson had knowledge of the violations; and 4) the penalty is excessive. We discuss the first and third contentions together, but do not consider the second one because it was not raised at the hearing and the evidence shows that Armantrout engaged in no activity that came close to entrapment as defined in *People v. Barraza* (1979) 23 Cal.3d 675 [153 Cal.Rptr. 459].

DISCUSSION

I

Appellants contend that no evidence supports the finding of the administrative law judge (ALJ)) that "[t]here clearly was a 'scheme' for Ms. Lu to solicit Investigator Armantrout to buy drinks for her," or his rejection of their argument "that they are not culpable for the solicitations because they did not know about them, and did not permit them." (Determination of Issues I, Count 1.)

Count 1 of the accusation, with regard to which the findings referred to above were made, charged a violation of Business and Professions Code section 24200.5, subdivision (b), which states:

> Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds: ¶ . . . ¶ (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.

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Board* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85

[84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (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]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

Appellants argue that there was no evidence of solicitation, of appellants receiving any form of gain from the alleged solicitation, or of any scheme that involved appellants.

The evidence of solicitation is found in Armantrout's testimony. Armantrout testified that Lu twice asked him to buy beer for her at a price of $7.00 for each beer. This was double the amount that Armantrout paid for his own beer. Since the requests themselves constitute the violations, they are considered "operative facts," and not hearsay. (See Witkin, Cal. Evid. (4th ed.) Hearsay, §§ 31-34, and cases cited therein.)

It is not necessary to prove that appellants actually received gain from the unlawful solicitation. Section 24200.5, subdivision (b), only requires proof of the existence of "any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy." The ALJ found "[t]here clearly was a 'scheme'" of solicitation, and our review of the record convinces us that substantial evidence supports that determination.

The word "plan" is defined as "a method of achieving something: a way of carrying out a design"; a "scheme" is a "plan or program of something to be done"; and "conspiracy" means "an agreement . . . made between two or more persons confederating together to do an unlawful act." (Webster's 3d New Internat. Dict. (1986) pp. 485, 1729, and 2029, respectively.) These words imply a prearranged or preplanned course of conduct. Such a course of conduct was established here by the bartender's obvious awareness of and complicity in what Lu was doing. The bartender reiterated to Armantrout that Lu's drink would cost $7.00, she collected the money, prepared the watered-down "ice beer," and put the money in the cash register.

The vicarious responsibility of a licensee for the unlawful on-premises acts of his or her employees is well settled by case law. (*Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504, 514 [22 Cal.Rptr. 405]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 172, 180 [17 Cal.Rptr. 315]; *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149, 153 [2 Cal.Rptr. 629].) "The owner of a liquor license has the responsibility to see to it that the license is not used in violation of law and as a matter of general law the knowledge and acts of the employee or agent are imputable to the licensee." (*Munro v. Alcoholic Bev. Control Appeals Bd.* (1960) 181 Cal.App.2d 162, 164 [5 Cal.Rptr. 527].)

In *Mantzoros v. State Board of Equalization* (1948) 87 Cal.App.2d 140,144 [196 P.2d 657], the court said, in response to the licensees' contention that they should not be held liable for an unlawful after-hours sale by their employee made without their knowledge or authorization:

> The licensee, if he elects to operate his business through employees, must be responsible to the licensing authority for their conduct in the exercise of his license, else we would have the absurd result that liquor could be sold by employees at forbidden hours in licensed premises and the licensees would be immune to disciplinary action by the board.

Both Lu and Xue were employed by appellants to work at the premises, and both were clearly participating in the solicitation scheme. Their knowledge and actions are imputed to appellants, regardless of whether appellants had actual knowledge of or involvement in the activities charged in the accusation. (See *Mack v. Department of Alcoholic Beverage Control*, *supra*, 178 Cal.App.2d at pp. 153-154.) Appellants also bear responsibility for the violations whether or not they were present at the time:

> Even though the owners elected to remain absent from the premises . . . and to delegate the management of the premises to the bartender . . . they could not thereby render themselves immune from their responsibilities, under the license, on the asserted basis that they did not have actual knowledge of the acts of their employee. Under such a method of operating the business, it is obvious that the owners would never be in a position to observe the acts of their employee while he was representing them in the position of bartender. The licensee had the responsibility to see to it that the license was not used in violation of law.

(Harris v. Alcoholic Bev. Control Appeals Bd., supra, 197 Cal.App.2d at pp. 180-181.)

At the time of the solicitations, appellants' license was on probation, operating under a stayed revocation, for earlier drink solicitation violations. Under the circumstances, they are held to have permitted the violations. The court in *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 379 [2 Cal.Rptr. 2d 779], said in regard to a licensee "permitting" unlawful activity:

> 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.

Appellants are considered to have permitted the violations because, knowing of the problem from the earlier discipline, they did not prevent it from recurring.

II

Appellants contend the penalty is excessive because co-appellant Keh Fan Harbeson "claims no knowledge of the underlying facts and there is no evidence . . . that 'she permitted anything to happen in her crowded bar on May 18, 2002.'" The "ultimate" penalty of revocation, appellants argue, "should be reserved for the very worst offenders."

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

Appellants were found to have violated section 24200.5, subdivision (b), the penalty for which is revocation. In addition, they were found to have violated other drink

solicitation provisions: Business and Professions Code section 25657, subdivision (a); Penal Code section 303; and Department rule 143. Appellants had stipulated to similar violations that occurred just six months before, resulting in revocation stayed for a three-year period (until April 4, 2005) on condition that no further violations occurred during that time.

Under the circumstances, we cannot say that the Department abused its discretion in ordering revocation of appellants' license.

ORDER

The decision of the Department is affirmed.[4]

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4]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.