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

AB-8159
File: 21-339987 Reg: 03054577

JAMES NUON, dba Circle D Liquors
2630 Geer Road, Turlock, CA 95382,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

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

ISSUED AUGUST 19, 2004

James Nuon, doing business as Circle D Liquors (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for his employee's offer to sell, and sale of, controlled substances and drug paraphernalia, in violation of Health and Safety Code sections 11379 and 11364.7.

Appearances on appeal include appellant James Nuon, appearing through his counsel, Allen R. Mitterling, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on April 29, 1998. Thereafter, the Department instituted an accusation against appellant charging that

[1]The decision of the Department, dated July 17, 2003, is set forth in the appendix.

appellant "knowingly permit[ted] the illegal sales or negotiations for such sales of narcotics or dangerous drugs on the licensed premises, in violation of Article XX, Section 22 of the Constitution of the State of California, and Section 24200.5(a) of the Business and Professions Code," on various dates in November 2002, by his employee, Kipp Griffith Murphy, to Department investigator Monica Molthen, who was working undercover.

An administrative hearing was held on May 30, 2003, at which time documentary evidence was received, and testimony concerning the violation charged was presented by Turlock police officer Brett Aamodt and Department investigators Monica Molthen and Matthew Gedney. Appellant and his brother, who is also a clerk at the premises, also testified.

Subsequent to the hearing, the Department issued its decision which determined that Murphy made illegal narcotics sales on the dates alleged and that grounds existed for discipline, and ordered the license revoked.

In his appeal, appellant makes the following contentions: The Department pled in the accusation, but did not prove nor make its decision based on, appellant's knowledge of his employee's illegal acts; substantial evidence did not support the findings and determination; and the penalty is excessive.

DISCUSSION

The accusation charged that appellant "did knowingly permit" the illegal drug sales on the licensed premises in violation of Business and Professions Code section 24200.5, subdivision (a), on various dates in November 2002. Section 24200.5, subdivision (a), provides that the Department "shall revoke a license . . . if a retail licensee has knowingly permitted the illegal sale, or negotiations for such sales, of

narcotics or dangerous drugs upon his licensed premises. Successive sales, or negotiations for such sales, over any continuous period of time shall be deemed evidence of such permission."

Findings 3 through 8 of the decision find that Murphy sold or offered to sell narcotics on various dates in November 2002. The last finding, Finding 9, states:

> There was no evidence that respondent was aware of Murphy's unlawful activities. However, he made no effort to look into her background before hiring her or to monitor her activities while she was at work.

Following Finding 9 are two Legal Conclusions:

> 1. Respondent contends, in effect, that he should not be held responsible for Murphy's unlawful activities because he was not aware of them. Those activities, however, took place in the licensed premises and were not isolated events. Under the circumstances, respondent's failure to monitor his employee's activities while she was at work was tantamount to permitting them.
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> 2. By reason of the foregoing facts, grounds exist for suspension or revocation of respondent's license, and the continuance of such license would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Sections 24200(a) and (b) of the Business and Professions Code.

The order revoking the license follows these two conclusions.

Appellant contends the Department's accusation charged him with knowingly permitting narcotics sales by his employee, but the decision is based not on appellant's knowledge of the acts, but on his permitting the acts through failure to monitor Murphy's activities. This violated due process, appellant argues, because the accusation did not charge him with failing to monitor his employee, and he prepared his defense to address the charge of the accusation that he knowingly permitted the acts.

Knowledge may be actual or constructive (such as imputed knowledge). (*Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779].) The ALJ found, in effect,

that appellant did not have actual knowledge of Murphy's illegal narcotics sales. (Factual Finding 9: he was not "aware of Murphy's unlawful activities.") However, the decision makes no mention, much less a finding, regarding constructive or imputed knowledge. The decision does not find that appellant "knowingly permitted" the illegal sales. The decision not only lacks a finding that Business and Professions Code 24200.5 was violated, it makes no reference at all to the statute appellant was charged with violating.

The ALJ made the legal conclusion that appellant's "failure to monitor his employee's activities while she was at work was tantamount to permitting them" (Legal Conclusion 1). This conclusion is, at most, a conclusion that appellant "permitted" the illegal activities; however, the statute he was charged with violating requires that he "knowingly permitted" the illegal sales.

A number of cases have held that there is a distinction between statutes such as section 24200.5 that impose discipline for violations "knowingly" done and those such as section 24200, subdivision (b), that omit the word "knowingly." The former, it has been held, require knowledge of the violations, while the latter do not. (See, e.g., *Stoumen v. Munro* (1963) 219 Cal.App.2d 302, 311-312 [33 Cal.Rptr. 305]; *Benedetti v. Department of Alcoholic Beverage Control* (1960) 187 Cal.App.2d 213, 216 [9 Cal.Rptr. 525]; *Mercurio v. Department of Alcoholic Beverage Control* (1956) 144 Cal.App.2d 626, 629-631 [301 P.2d 474].) Assuming this is true[2], the decision does not provide a

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[2]Whether this is still good law seems to have been put in question by *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377 [3 Cal.Rptr.2d 779], which held 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." If actual or constructive knowledge is required for a finding that a licensee "permitted" certain

(continued...)

basis upon which to impose discipline, because it does not find that appellant violated the statute he was charged with violating. (See *Wheeler v. State Bd. of Forestry* (1983) 144 Cal. App. 3d 522, 526-527 [192 Cal. Rptr. 693].)

ORDER

The decision of the Department is reversed.[3]

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

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[2](...continued)
behavior, it is not clear what "knowledge" is required for a finding of "knowingly permitted." The *Laube* court noted, but did not decide, the issue of what the Legislature intended by using "knowingly permit" in some statutes and simply "permit" in others. In footnote 2, on page 378 of the decision, the court said:

> One aspect of the knowledge issue has not been raised. Some cases have ruled that because the Legislature used the phrase "knowingly permit" in section 24200.5, subdivision (a), and did not use the word "knowingly" in section 24200, knowledge is not required. (See, e.g., *Benedetti v. Dept. Alcoholic Bev. Control*, *supra*, 187 Cal.App.2d at p. 216.) This argument was not raised before the ALJ or the Board and is not raised in this court by the Attorney General.

[3]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.