

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

AB-8176

File: 42-259572 Reg: 03054393

NICHOLAS GUZMAN dba Quatro Estrellas
4467 Bandera Street, Montclair, CA 91763,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: April 8, 2004
Los Angeles, CA

ISSUED JULY 8, 2004

Nicholas Guzman, doing business as Quatro Estrellas (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his on-sale beer and wine public premises license for permitting his father, Antonio Guzman, to sell and furnish controlled substances within the premises, in violation of Business and Professions Code section 24200.5, subdivision (a),² and Health and Safety Code section 11379.

Appearances on appeal include appellant Nicholas Guzman, appearing in his own behalf, and the Department of Alcoholic Beverage Control, appearing through its

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

²Section 24200.5, subdivision (a), in pertinent part states: "Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds: [¶] (a) 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...."

counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on May 13, 1991. Thereafter, the Department instituted an accusation against appellant charging that on five occasions, appellant's father sold a controlled substance, methamphetamine, within the premises.

An administrative hearing was held on June 5, 2003, at which time oral and documentary evidence was received. At that hearing, appellant gave testimony concerning his family affairs: a few years previous his wife was diagnosed with cancer, and she died some time later in April of 2001; appellant managed the affairs of his three children, ages 8, 13, and 14 years; and he tried to manage the premises and the family, during his wife's illness and after her death.

His father came to the premises during some of the morning hours and cleaned the premises. Appellant tried to keep his the father from the premises as appellant knew the father had been arrested for narcotics violations.

Subsequent to the hearing, the Department issued its decision which determined that the violations had occurred and there was insufficient evidence in mitigation to alter what otherwise would be an appropriate penalty.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant pleads for consideration under the circumstances.

DISCUSSION

The Appeals Board has reviewed the entire record, including the transcript of proceedings before the Department, and has considered appellant's plea or argument before the Appeals Board at its hearings in Los Angeles, for some consideration of the

circumstances of the sales in light of the ordeal of appellant, and for a penalty just short of outright revocation.

The decision of the Department in Finding VI summarizes the record:

Although [appellant] has gone through some very difficult times as a result of his wife's illness and eventual death, the multiple sales of drugs that took place at the premises occurred more than one year after the death of [appellant's] wife and the sales took place at night when the bar was open and operating. Even though [appellant] testified that he tried to keep his father out of the premises, he obviously did not try hard enough especially in light of the fact that he was aware of his father's July 2000 arrest for possession of methamphetamine for sale and in light of the fact that he had a gut feeling that his father was up to something. As the evidence indicates, Mr. Waltman [a security officer at the premises] and at least one female bartender were aware that [appellant's] father was in and out of the premises. [Appellant] could have given his employees and his security company strict instructions stating that his father should not be allowed in the premises when he [appellant] was not present and/or under any circumstances. Finally, as is indicated above, we are not dealing here with an isolated incident of drug sales that took place when the premises were closed or with an isolated incident by a patron which was carried out in such a manner that [appellant] had no way of knowing what was going on. We are dealing with multiple drug sales by [appellant's] father that took place inside the premises and over a period of approximately four and one half months.

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 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 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.)

While in the vast majority of these types of violations, there are few if any, causes to question the penalty. This matter appears to the Board to be different. The Department's Determination of Issues I and II, states that the father was [appellant's] "...agent, employee, or servant ... [and appellant] knowingly permitted the illegal sales" We conclude from the facts of the matter, there is insufficient evidence that the father was more than a patron at the time of the sales.

The decision seems to consider the crises' appellant encountered, but weighs these encounters against the multiple sales. The record surely seems to show no knowledge of the sales by appellant, or any concrete evidence of such knowledge, or reasonable assumptions, sufficient to warrant a total revocation of appellant's license and means of support. The problem was ascertained, that essentially a patron (in this case appellant's father) sold controlled substances in the premises while open and operating. No evidence shows appellant or any employees knew of the sales.

ORDER

The decision of the Department is reversed as to penalty and remanded to the Department for reconsideration of the penalty.³

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

³This 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.