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

AB-8183
File: 47-350965 Reg: 02054095

INLAND PACIFIC INVESTMENTS, LLC dba Carlos O'Brien's Cantina
440 West Court Street, San Bernardino, CA 92401,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 2, 2004
Los Angeles, CA

ISSUED NOVEMBER 19, 2004

Inland Pacific Investments, LLC, doing business as Carlos O'Brien's Cantina (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 20 days, with 10 days thereof conditionally stayed for one year, for having violated a condition on its license by permitting the consumption of alcoholic beverages in an unlicensed area adjacent to the licensed premises under the control of the licensee, a violation of Business and Professions Code section 23804.[2]

Appearances on appeal include appellant Inland Pacific Investments, LLC, appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic

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[1]The decision of the Department, dated August 14, 2003, is set forth in the appendix.

[2] Business and Professions Code section 23804 provides:

> A violation of a condition placed on a license pursuant to this article shall constitute the exercising of a privilege or the performing of an act for which a license is required without the authority thereof and shall be grounds for the suspension or revocation of such license.

Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on November 20, 2000. Thereafter, the Department instituted an accusation against appellant charging that appellant violated a condition on its license by permitting the consumption of alcoholic beverages in an unlicensed area adjacent to the premises and under the control of the licensee.

An administrative hearing was held on June 3, 2003, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and ordered the suspension from which this timely appeal has been taken.

In its appeal, appellant raises the following issues: the decision is not supported by substantial evidence; the penalty constitutes cruel and unusual punishment; and Business and Professions Code section 24210 is unconstitutional.[3]

DISCUSSION

I

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

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[3] We do not intend to address this issue. The California Constitution, article 3, section 3.5, bars an administrative agency from declaring a statute unconstitutional. We note, however, that the issue has been the subject of several court decisions rejecting claims of unconstitutionality. (See *CMPB Friends v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1250, 1258 [122 Cal.Rptr.2d 914]; *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board/Vicary* (2002) 99 Cal.App.4th 880, 883-886 [121 Cal.Rptr.2d 729].)

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].)

The events which led to the accusation took place during an annual event known as "Route 66," during which, among other things, certain streets are blocked off for a vintage car show. The premises in question were located within the blocked-off area. A parking lot adjacent to the premises was also blocked off, and two rows of tables and chairs replaced the usual parking. A condition on appellant's license prohibits the consumption of alcoholic beverages on any property adjacent to the licensed premises. A violation of a license condition is grounds for a suspension or revocation. (See footnote 2, *supra*.)

Appellant has not challenged the critical findings, or the evidence supporting them, but instead seeks to explain what happened as unavoidable in spite of it having taken "every reasonable precautionary measure" to prevent what happened. Taken at face value, the findings (set forth in italics) are amply supported by substantial evidence:

> *5. Department investigator Scott Stonebrook [Stonebrook] was in San Bernardino on September 20, 2002, performing enforcement duties during the*

“Route 66" event. “Route 66" involves the showing of vintage and classic cars in center city San Bernardino inside an area of town that is temporarily closed to vehicular traffic. Respondent’s Licensed Premises is in the closed-off area. Stonebrook was working with his partner-Investigator Matt Hydar [Hydar], Supervising Investigator Ed Harris and two Officers from the San Bernardino Police Department.

6. Stonebrook was standing on Court Street when he noticed two adult males consuming beer from 12-ounce bottles in the parking lot immediately east of Respondent’s Licensed Premises. Stonebrook was familiar at that time with the existence of conditions endorsed upon Respondent’s license. He knew of the prohibitions contained in condition 1.

7. The two males were drinking alcoholic beverages in the area marked with red “X’s” on Exhibits 4 and C in a parking lot that is usually available for parking by patrons of Respondent’s business, but during the Route 66 was not being used to park cars. There is a doorway that directly connects the Licensed Premises to the subject parking lot. (Exhibits 3 (p. 2), 4, C and E.) The parking lot was fitted out with tables, chairs, food and musical amplification equipment that day.

8. Stonebrook then entered the first floor of the Licensed Premises. He walked up to the bar counter with Hydar where Hydar ordered two bottles of Bud Light from Respondent’s on-duty bartender, Celia Chavez. Hydar paid for the beers and asked bartender Chavez if they could take the beer to the parking lot. She told Hydar that they could, but they would have to pour the beer into plastic cups. She gave the Investigators two plastic cups and they poured their beer into the cups.

9. Stonebrook and Hydar then left the Licensed Premises through the northeast exit door (Exhibits 3 (p.2) and E) and took their beers out onto the parking lot where the two males had been seen earlier. As they did so, they passed a male security guard without making any effort to conceal the alcoholic beverages. The security guard paid no attention to the investigators. Once outside, the two Investigators drank from their beers. The original two men were still outside with their alcoholic beverages.

Appellant does not dispute the fact that consumption took place on the parking lot. Instead, it blames a brief, unpredictable lapse in judgment on the part of Tyrone Van Wilkerson, the owner of the company which supplies appellant its security guards and one of the two men first seen in the parking lot with beer, and Bret Blackwell, a Budweiser distributor, who was the other man in the parking lot with beer. Both men

supposedly stepped into the parking lot with their beer in order to make and/or receive phone calls, not realizing that they were not supposed to take beer into the parking lot. Van Wilkerson testified that the two were on their way back into the restaurant when apprehended by the investigators, a claim disputed by the investigators. Had Van Wilkerson and Blackwell not been in the parking lot, it is unlikely the investigators themselves might have tested appellant's compliance with the license condition. Thus, appellant asserts, it cannot be said to have "permitted the violations."

Appellant's manager testified that all employees had been told that patrons could not take alcoholic beverages to the parking lot. However, the bartender testified that she did not know if patrons were permitted to do so, and that she told the investigators to check with the security guard who she assumed was at the door.

It seems reasonable that, by stationing a security guard at the door to the parking lot, appellant was attempting to control egress to the parking lot, and, presumably, to comply with the condition prohibiting consumption of alcoholic beverage in the parking lot. The question is, was this a reasonable exercise of diligence? The ALJ found that it was not.

Wilkerson testified there was no security guard at the door when he and Blackwell went into the parking lot, explaining his absence as due to a shift change or to the guard's tardiness in arriving for duty. Stonebrook, however, testified that when he and Hydar went into the parking lot with their beer, they passed directly by the security guard, who paid little or no attention to them. Scott Doubrava, the security guard, did not testify.

Appellant's manager admitted that a better job could have been done with respect to the posting of signs making it clear where drinking was prohibited.

The administrative law judge (ALJ) described the way the parking lot was set up with tables as “nearly invit[ing patrons to take alcoholic beverages into that forbidden area,” at a time “when extra vigilance should be used.” (Conclusions of Law 4 and 6.)

In some respects, the violations (the accusation treated each man’s presence in the parking lot as a separate violation, for a total of four) can be considered technical. On the other hand, as the ALJ observed, even though the violations took place at a time when business was anything but usual, it was also a time when extra vigilance should have been used.

Appellant cites *McFaddin San Diego 1130, Inc. v. Stroh* (1989) 208 Cal.App. 3d 1384 [257 Cal.Rptr. 8] and *Laube v. Stroh* (1992) 2 Cal.App.4th 364 [3Cal.Rptr.2d 779] for the propositions that the imposition of strict liability has been rejected for these types of violations by non-employees, and that a licensee cannot be held to have “knowingly permitted” misconduct by non-employees when the licensee has taken every reasonable precautionary measure to preclude exactly such a violation of a condition.

There are a number of things wrong with appellant’s argument. Among other things, it ignores the fact that neither *McFaddin* nor *Laube* involved condition violations, and, of greater significance, ignores very important language in *Laube* warning a licensee what it must do:

> 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.

(*Laube v. Stroh, supra*, 2 Cal.App.4th at 379.)

Appellant can be said not to have been diligent in instructing its employees about the reasonable possibility that guests might take their drinks to the parking lot, as witnessed by the bartender who admitted she did not know of the prohibition, and even facilitated the problem by furnishing the investigators the plastic cups.

II

Appellant says that the suspension - a 20 day suspension with 10 of those days conditionally stayed for one year - is cruel and unusual punishment.

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 Bev. Control Appeals Bd./ 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 Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Appellant's counsel argued for a suspension shorter than 15 days, hoping, in the event a violation was found, that the matter could be resolved by payment of a fine. [RT 118.] A suspension of 20 days, even with 10 of those days stayed, is beyond the range of penalties which can be resolved by a fine. (See Bus. & Prof. Code § 23095.)

The Department recommended a 25-day suspension, with 10 days stayed. The penalty imposed by the ALJ was midway between the two recommendations, but not so lenient that appellant could avoid a short suspension.

Appellant argued that its business is important to the vitality of downtown San Bernardino, and that even a short suspension would jeopardize its ability to stay in existence. Appellant's argument was supported only by the testimony and estimates of its manager, and implicitly rejected by the ALJ.

The penalty is within the normal range for violations of this kind, and we are not in a position to say that the Department abused its discretion in ordering the suspension it did.

ORDER

The decision of the Department is affirmed.[4]

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

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[4] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.