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

AB-8226
File: 51-49347 Reg: 03054797

AMERICAN LEGION NEWHALL-SAUGUS POST 507, dba American Legion Post 507
24527 Spruce Street, Santa Clarita, CA 91321,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

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

ISSUED NOVEMBER 29, 2004

American Legion Newhall-Saugus Post 507, doing business as American Legion Post 507 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license, with revocation stayed for a two-year period, conditional upon serving a 30-day suspension[2] and no cause for disciplinary action occurring during the stayed period, for permitting slot machines and pulltabs in the premises, violations of Penal Code sections 330a, 330b, 330c, and 330.1, and for selling alcoholic beverages to people who were not members of the club or bona fide guests of club members, a violation of Business and Professions Code section 23431.

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[1]The decision of the Department, dated January 8, 2004, is set forth in the appendix.

[2]A 15-day suspension was also imposed as to count 4 of the accusation, but the two suspensions were ordered to run concurrently.

Appearances on appeal include appellant American Legion Newhall-Saugus Post 507 (appellant or the Post), appearing through its counsel, Michael B. Levin, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's club license was issued on March 3, 1967. Thereafter, the Department instituted a five-count accusation charging that appellant had possessed in the premises video slot machines and approximately 3,000 pull tabs (counts 1, 2, and 3); that appellant's bartender sold or served beer to three Department investigators who were not club members or bona fide guests of a club member (count 4); and that appellant sold or offered to sell cigarettes without California excise tax stamps (count 5).

An administrative hearing was held on November 6, 2003, at which time documentary evidence was received and testimony concerning the violations charged was presented. At the hearing, count 5 was stricken on motion of the Department.

Subsequent to the hearing, the Department issued its decision which determined that the violations alleged in counts 1 through 4 had been established.

Appellant has appealed the Department's decision, contending that the findings do not support the Department's determination that appellant's bartender sold alcoholic beverages to people who were not members or bona fide guests, and that finding of fact 11 is not supported by substantial evidence in light of the whole record.

DISCUSSION

I

Three Department investigators, working undercover, entered the bar area at the Post on November 25, 2002, investigating a complaint about gambling at the Post. The

bartender asked if they were members or knew a member, and investigator Duran replied, "Yes, Steve." This was a misrepresentation by the investigator. The bartender asked nearby members if one of them would sign the investigators in as guests. A member named Bill signed them in as guests.

Although appellant stated its contention in terms of a lack of substantial evidence to support the finding, the crux of its argument is that the bartender was entrapped by the Department investigators. In other words, appellant does not appear to deny the violation, but contends that the violation should be excused because of the improper actions of the investigators.

Findings of Fact 7 and 8 deal with the issue of the sales to the investigators:

> 7. Bartender Irma Cazares was behind the fixed bar and asked if the investigators were members of the club [or] if they knew a member, to which Investigator Duran answered "yes, Steve". There is no evidence that anyone by the name of Steve was present in the club or that there was even a club member by that name. Moreover, Duran did not know anyone who was in fact a member and his statement constituted a misrepresentation.
>
> Any misrepresentation by a person representing government authority conducting an undercover investigation is not to be condoned and this misrepresentation on the part of Duran, constituted poor judgment on his part.
>
> 8. However, bartender Cazares appeared not to be thrown off or confused by Duran's comment and she seemed to ignore it, as she asked members standing nearby if any of them would sign the investigators in as guests. A club member by the name Bill did just that, and proceeded to have the investigators sign the guest book. There was nothing in the evidence suggesting that Investigator Duran's misrepresentation influenced the decision of Cazares or Bill in facilitating the entry of the investigators into the club premises.
>
> Further there was no showing that Bill or Cazares had ever met the investigators previously or knew them in any way. The investigators were strangers to the club.

Appellant asserts that the facts establish a prima facie case of entrapment by the Department investigators. We conclude that there was no entrapment.

The test for entrapment has been stated in the California Supreme Court case of *People v. Barraza* (1979) 23 Cal.3d 675, 689-690 [153 Cal.Rptr. 459], as follows:

> We hold that the proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect - for example, a decoy program - is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime. [Fn. omitted.]

The evidence does not support a conclusion that the bartender was entrapped. The investigators simply offered the opportunity to act unlawfully, and the bartender and at least one club member did not hesitate to act on the opportunity. There was no evidence of "badgering, cajoling, [or] importuning" in this case. The ALJ found no evidence that what Duran said influenced the bartender or Bill to allow the investigators to enter, nor did we find any in our review of the evidence. Appellant has not established a defense of entrapment.

II

Appellant contends that part of Finding of Fact 11 is not supported by substantial evidence. The language in question is the first two sentences of the second paragraph of that finding:

> Although the evidence is unclear as to the amount of money earned from the Post's gambling operations, it appears to be substantial. The payout figures representing winnings received by players during this period amounted to in excess of $128,000.00.

Appellant raises several objections to this part of the finding. It points out that investigator Duran, who prepared a spreadsheet from the Post's payout sheets and concluded that the payouts were in excess of $128,000, had no accounting or auditing background. In addition, appellant argues, the Post's former president and its former financial officer testified that Duran's assumptions and methods used in reaching his conclusion were erroneous. Therefore, appellant concludes, the matter should be remanded to the Department for reconsideration of the 30-day suspension imposed for gaming machine violations.

Even if we were to accept appellant's objections to Finding 11 (which we do not), we could not say that a remand to the Department would be justified. Omitting Finding 11 in its entirety, substantial evidence remains to support the Department's determination as to the existence of the gambling violations.

Regardless of the amount of money earned by the Post from the gambling activities, appellant does not deny that it maintained illegal gaming machines on the premises. Nor does it deny the accuracy of Finding 12:

> The record is replete with knowledge on the part of members of the Post's executive board and financial board of the gambling that was going on at the premises; that it was illegal, and yet no one took any steps to end this illegal activity.

or the second paragraph of Finding 14:

> [T]he evidence strongly suggests a "head in the sand" mentality in which the end justifies the means. How can an American Legion Post, which holds itself out as a pillar of national and community values, and expects to be looked to by the youth of their community for guidance in forming critical values in morality, honesty and as law abiding citizens, conduct itself in a manner which undermines those values? Such conduct could not stand the light of day and does besmirch [the] good reputation for which the American Legion is noted.

Under the circumstances, we have no real doubt that the same penalty would be imposed were the Department to review its decision without considering the information in Finding 11. (See *Gill v. Mercy Hospital* (1988) 199 Cal. App. 3d 889, 908 [245 Cal. Rptr. 304]; *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 635 [166 Cal.Rptr. 826].) We do not agree that the alleged error in finding 11 requires that we remand to the Department for reconsideration of the penalty; even if we agreed with appellant's assertion of error, we would not remand because we see no reasonable possibility that the Department would reduce the penalty.

At oral argument before this board, the present Post Commander asked that the penalty be revised, stating that a 30-day suspension would cause extreme financial difficulty for the Post and adversely affect its ability to continue to provide services to its members and the community. The Commander noted that the individuals responsible for the gambling activities had been removed as officers of the Post and the new officers could assure that such activities would never happen again at the Post.

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].)

The Appeals Board is aware, as was the Department when imposing the penalty, of the good works done in the community by the Post, and we believe that the new Post officers will do their utmost to prevent a recurrence of the violations. However, these factors cannot negate the egregiousness of the gambling violations. While the penalty may be considered harsh, we cannot say that it is unreasonable or an abuse of the Department's discretion.

ORDER

The decision of the Department is affirmed.[3]

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

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[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.