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

AB-8286
File: 48-352281 Reg: 03054473

THE TENEMPA INN, INC. dba El Tenampa Bar
4522 West First Street, Santa Ana, CA 92703,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 5, 2005
Los Angeles, CA

ISSUED JULY 6, 2005

The Tenampa Inn, Inc., doing business as El Tenampa Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered its on-sale general public premises license revoked, stayed the order of revocation for a probationary period of three years, and ordered three 15-day suspensions, to be served concurrently, for having violated Business and Professions Code sections 24200.5 and 25657, subdivision (a), and Department Rule 143.

Appearances on appeal include appellant The Tenampa Inn, Inc., appearing through its counsel, Rick Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on June 9, 1999. Thereafter, the Department

[1]The decision of the Department, dated April 22, 2004, is set forth in the appendix.

instituted an accusation against appellant charging it with numerous acts of drink solicitation by appellant's waitresses on four separate dates in March, April, and May, 2002.

An administrative hearing was held on February 18, 2004, at which time oral and documentary evidence was received. At that hearing, Santa Ana police officers testified that several waitresses employed by appellant solicited them for drinks when the officers visited the bar on four occasions over a span of two months in 2002. When the officers agreed to buy them drinks, the waitresses went to the bar and returned with a drink, usually beer in a small Styrofoam cup, for which the officers were charged $6. The officers were charged only $3.50 for each of the beers they purchased for themselves.

Subsequent to the hearing, the Department issued its decision which sustained the charges in the counts alleging violations of Business and Professions Code sections 24200.5 and 25657, subdivision (a), and rule 143.[2]

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[2] Counts 1, 6, 11, 16, 21, and 26 of the accusation charged violations of Business and Professions Code section 24200.5, subdivision (b). That section provides that "the department shall revoke a license ... (b) [i]f 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."

Counts 2, 7, 12, 17, 22, and 27 charged violations of Business and Professions Code section 25657, subdivision (a). That section provides that it is unlawful "[f]or any person to employ, upon any licensed on-sale premises, any person for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, or to pay any such person a percentage or commission on the sale of alcoholic beverages for procuring or encouraging the purchase or sale of alcoholic beverages on such premises."

Counts 4, 5, 9, 10, 14, 15, 19, 20, 24, 25, 29, and 30 charged violations of Department Rule 143 (4 Cal. Code Regs., §143.) Rule 143 provides that "[n]o on-sale (continued...)

Appellant has filed a timely notice of appeal. In its appeal, appellant contends that the evidence does not support the findings and the findings do not support the decision. More specifically, appellant argues that there is no evidence that it knew or should have known the servers might be charging a premium on the drinks purchased for them, and, moreover, there is no substantial evidence of any scheme or conspiracy to pay to the servers a percentage of the proceeds of the drinks they solicited. Appellant appears to concede that a violation could be found as to count 2,[3] but argues there is no evidence in the record to support such findings as to the remaining counts charging violations of sections 24200.5, subdivision (b), and 25657, subdivision (a). Appellant does not contest the findings as to the counts charging violations of Department Rule 143, and the 15-day penalty assessed with respect to those charges.

DISCUSSION

Appellant concedes there was drink solicitation. It argues, however, that there is no evidence of knowledge on the part of the licensee, and no evidence that the waitresses received a percentage of the proceeds of the drinks they solicited, both

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[2](...continued)
retail licensee shall permit any employee of such licensee to solicit, in or upon the licensed premises, the purchase or sale of any drink, any part of which is for, or intended for, the consumption or use of such employee, or to permit any employee of such licensee to accept, in or upon the licensed premises, any drink which has been purchased or sold there, any part of which drink is for, or intended for, the consumption or use of any employee."

Counts 3, 8, 13, 18, 23, and 28 of the accusation were dismissed. These counts charged violations of Business and Professions Code section 25657, subdivision (b), alleging that appellant had employed or knowingly permitted persons to loiter in the premises for the purpose of soliciting the purchase of alcoholic beverages.

[3] The server involved in this count told the Department investigator she got a percentage of the $6 she charged for her drink.

essential elements of the Business and Professions Code sections involved, and upon which rests the Department's order of revocation.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.

"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 [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, as here, 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].) Where there are

conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the 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, 51 [248 Cal.Rptr. 271]; *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].)

The evidence established a consistent pattern of drink solicitation extending over a two-month period - waitresses solicited customers for drinks, sometimes as a condition for talking to them, and were provided beer from the bar in small foam cups. The waitresses paid an unknown amount of money to the bartender, and charged the customer $6 for the small cup of beer. The customers were charged only $3.50 for the 12-ounce bottles of Corona beer they purchased for themselves. The waitresses retained the $6 payment in their personal “bank.” The pattern varied little even though several different waitresses were engaged in the acts of solicitation during the period covered by the investigation.

Appellant argues that there is no evidence the waitresses received a percentage of the proceeds paid for the drink, yet concedes that the manner in which the waitresses paid the bartender and charged the customer could have resulted in a markup of the price.[4] Appellant also concedes that there is evidence of at least one

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[4] “From the testimony here, it is clearly [sic] that the servers were going to the bartender, paying for the drink, coming back and charging the customer. Those amounts paid to the bartender and charged to the customer may or may not have been (continued...)

instance where a waitress received a percentage of the proceeds of the drink. (App. Br., page 3.) Nonetheless, appellant argues, while the servers may have paid the bartender an unknown amount for each drink and charged a premium on the drinks solicited, all this was done without knowledge on the part of the licensee or his employees.

Appellant's manager, although denying that the waitresses received a percentage of the money the bar collected for drinks, admitted that the bar had experienced problems with drink solicitation.[5] Given that experience, one would expect some greater level of diligence on the part of the licensee.

This is an appropriate case for the instructive language of *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 379 [3 Cal.Rptr.2d 779] on the question of licensee knowledge:

> The *Marcucci* [*v. Board of Equalization* (1956) 138 Cal.App.2d 605 [292 P.2d 264]] case perhaps states it best. 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.

In the present case, the licensee was on notice that drink solicitation was a recurring problem.

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[4](...continued)
the same. The logical inference to draw is that they were paying the premises one amount for the drink and selling it to the customer for another." (App. Br., page 3.)

[5] RT 76: Q. Did the business during that time period have a policy or procedure concerning the waitresses asking customers for drinks?

A. Not usually, but sometimes they do that, but when that was done, the office would be called and they would be fired.

Indeed, it strikes us as virtually impossible that the licensee could not have known that drink solicitation was on-going, especially when that solicitation was facilitated by the manner in which the waitresses were permitted to collect for the drinks they solicited, and by the bar's furnishing of the foam cups which the waitresses uniformly used in the solicitation scheme.

That said, the only direct evidence that the waitresses received a percentage of the proceeds of the drinks they solicited was that of an admission by one of the waitresses. Appellant argues this evidence can only relate to the count of the accusation relating to that particular solicitation.

The Department argues that proof the waitresses received a percentage of the drink proceeds lies in the fact they kept the difference between the $6 they charged for the cups of beer and the $3.50 they charged the customers for the customers' beer.

Although there is no evidence of what the waitresses were charged for the cups of beer, it seems reasonable to assume that they were not charged any more than that charged for the 12-ounce bottles of beer the investigators bought, and probably something less. Thus, the Department's argument appears to have merit.

We think it can fairly be said that appellant permitted the solicitation to occur, under the test of *Laube v. Stroh*, *supra*. However, because of a difference in the language of the two statutes at issue, we think the counts charging violations of section 25657, subdivision (a), cannot be sustained. That section requires the licensee to *pay* a percentage to the person soliciting, or employ for the purpose of soliciting, while the broader language of section 24200.5, subdivision (b), requires only that the scheme or conspiracy be permitted. Since the price charged for the cup of beer was $6, regardless of which waitress was involved, it is reasonable to infer that it was done

pursuant to a scheme, plan or conspiracy, and not by happenstance. However, the evidence does not support a finding that the waitresses were paid by appellant for their solicitations, or employed by appellant for the purpose of soliciting.

All in all, we think the record supports the findings as to violations of section 24200.5, subdivision (a), since the evidence permits a finding that appellant, through its employees, permitted the scheme, plan, or conspiracy. and that these findings support the stayed order of revocation. Additionally, since two of the three 15-day suspensions ordered to be served concurrently survive, there is no need for any reconsideration of the penalty.

ORDER

The decision of the Department is affirmed.[6]

SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[6] 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.