

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

AB-8574

File: 21-402443 Reg: 05060796

HAFID AHMED ALROWHANI dba Blue Bird Market
3431 San Pablo Avenue, Oakland, CA 94608,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: April 5, 2007
San Francisco, CA

ISSUED JUNE 12, 2007

Hafid Ahmed Alrowhani, doing business as Blue Bird Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his license, the order conditionally stayed, subject to three years of discipline-free operation and service of a suspension of 20 days, for his clerk having sold drug paraphernalia, a violation of Health and Safety Code section 11364.7.

Appearances on appeal include appellant Hafid Ahmed Alrowhani, appearing through his counsel, Olumide Kolanole Obayemi, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on September 9, 2003. Thereafter, the Department instituted an accusation against appellant charging the

¹The decision of the Department, dated April 13, 2006, is set forth in the appendix.

delivery, furnishing or transfer of drug paraphernalia by appellant's clerk on July 7, 2005.

An administrative hearing was held on February 7, 2006, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Connie Cook, a Department investigator, and by appellant/licensee Alrowhani. The evidence established that appellant's clerk offered and sold to an undercover investigator a small pen and a Chore Boy after she asked him for something in which she could smoke crack.

The Department had provided appellant/licensee with several forms alerting him of certain of the legal obligations associated with possession of an alcoholic beverage license. Included among these forms were: ABC Form 203, entitled Acknowledgment of ABC Laws, Rules and Regulations (Exhibit 2), which appellant signed, acknowledging receipt of two additional forms which warned a new licensee of the consequences of selling drug paraphernalia: ABC Form 546, entitled IMPACT Drug Paraphernalia (Exhibit 3), sets out the text of Health and Safety Code section 11364.7, and ABC Form 546-A, entitled Notice to Licensees Concerning Drug Paraphernalia (Exhibit 4), lists a number of items commonly sold as drug paraphernalia, among them pens similar to the one sold.

Subsequent to the hearing, the Department issued a decision which determined that the violation had occurred as charged in the accusation.

Appellant filed a timely appeal. Appellant did not file a brief, but was represented by counsel at the oral argument. Appellant argued that there was no evidence that he had knowledge of the transaction, that he was not responsible for the actions of his clerk, and that the clerk was a victim of entrapment. None of these arguments have

merit.

DISCUSSION

I

Appellant contends that there is no evidence he had knowledge of the transaction and that he is not responsible for the actions of his clerk. The licensee was not present at the store at the time of the transaction. Although he had been warned by the Department of the risks associated with the selling of certain products commonly used as drug paraphernalia, he did not pass that warning on to his clerk. The clerk, on the other hand, was aware of the potential illicit use of the “pen” and was on notice of its intended use when he offered it to the undercover investigator for that purpose.

A licensee is vicariously responsible for the unlawful on-premises acts of his employees. Such vicarious responsibility is well settled by case law. (*Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504, 514 [22 Cal.Rptr. 405]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 172, 180 [17 Cal.Rptr. 315]; and *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149, 153 [2 Cal.Rptr. 629].) The fact that appellant himself was unaware of the transaction is irrelevant.

The case of *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board* (1999) 76 Cal.App.4th 570 [90 Cal.Rptr.2d 523], cited by appellant, is readily distinguished. In that case, the court held that the Department had abused its discretion when it suspended the market’s license after a clerk, who had taken steps to conceal her actions from the store manager, had made an illegal purchase of food stamps. The court concluded that there was no connection

between the clandestine act of the clerk and the sale of alcohol by the store (Santa Ana Food Market, Inc., *supra*, 76 Cal.App.4th at 576), stating:

By concluding that the ABC's action in this case was an abuse of discretion, we do not intend to change the basic rules for suspension of licenses or unduly restrict the ABC from exercising its discretion. But where, as here, a licensee's employee commits a single criminal act unrelated to the sale of alcohol, the licensee has taken strong steps to prevent and deter such crime and is unaware of it before the fact, suspension of the license simply has no rational effect on public welfare or public morals.

This case is totally unlike Santa Ana Food Market, Inc. Here, the clerk was not acting surreptitiously to avoid his employer's scrutiny. In appellant's absence, he was, effectively, in charge of the store. Quite clearly he was at a level of control where his conduct must be imputed to his employer if the Department is to retain any ability to discipline licensees whose employees act in such a manner as to threaten public welfare and morals.

II

Appellant contends that the undercover investigator's statement that she wanted something with which she could smoke crack constituted entrapment. This issue was not raised at the administrative hearing, perhaps because the attorney who represented appellant at that time deemed it lacking in merit, as do we.

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

[W]e 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.

(23 Cal.3d at pp. 689-690, fn. omitted)

There is nothing in the conduct of the investigator that could be said to be pressure or overbearing conduct of the type described in *People v. Barraza*.

ORDER

The decision of the Department is affirmed.²

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

² 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.