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

AB-8708
File: 41-161542 Reg: 06064263

GUADALUPE PEREZ and YOLANDA PEREZ, dba Brite Spot
412 West Pacific Coast Highway, Long Beach, CA 90806,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: August 7, 2008
Los Angeles, CA

ISSUED NOVEMBER 14, 2008

Guadalupe Perez and Yolanda Perez, doing business as Brite Spot (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for their agents or employees selling, and permitting consumption of, alcoholic beverages between the hours of 2:00 a.m. and 6:00 a.m. in violation of Business and Professions Code[2] sections 25631 and 25632, and violating section 23804 by selling and permitting consumption of alcoholic beverages after 10:00 p.m., in disregard of a condition on their license.

Appearances on appeal include appellants Guadalupe Perez and Yolanda Perez, appearing through their counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated June 1, 2007, is set forth in the appendix.

[2]Statutory references are to the Business and Professions Code unless otherwise indicated.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine eating place license was issued in 1985. On November 9, 2006, the Department instituted an accusation against appellants charging the sale and consumption of alcoholic beverages after the hours allowed to do so, in violation of a condition on their license and sections 25631 and 25632.

At the administrative hearing held on March 28, 2007, documentary evidence was received and testimony concerning the violation charged was presented by Long Beach police officer Rubi Castro, premises patron José Davalo, and premises waitresses Erika Zepeda and Edelmira Perez.

Officer Castro testified that she and another officer entered the premises, which operates as a 24-hour restaurant, at 2:58 a.m. on May 28, 2006. The officers were in uniform. There were 40 or 50 people in the restaurant. Castro noticed that the waitresses began to "frantically" collect red plastic cups from the customers' tables and put the cups behind the counter.

Castro spoke to several patrons who had red cups. They told her they had ordered beer that had been served to them in the red cups. The officer noted that the cups contained a yellowish liquid that looked and smelled like beer.

Erica Zepeda, one of the waitresses, had been cited by officer Castro several months earlier for permitting consumption of beer on the premises after 2:00 a.m. Zepeda told Castro that she took the orders for the beer, but that Pedro, the night manager, served the beer. She also told the officer that co-licensee Guadalupe Perez knew about the after-hours drinking, but told Zepeda not to worry about it, that a lawyer would take care of it.

Officer Castro entered the premises again shortly after 3:25 a.m. on September 3, 2006, to assist the Fire Department. She saw the same type of red cups on the patrons' tables as she had seen on May 28. Again, there were about 40 to 50 patrons present in the premises.

Castro spoke to José Davalo, whom she had seen drinking from a red cup. The liquid in the cup looked and smelled like beer. Davalo told Castro that the cup contained beer, which he had ordered 15 minutes earlier. He had ordered Bud Light beer and had seen the waitress pour Bud Light beer into the cup.

Edelmira Perez, one of the waitresses, told Castro that Pedro, the night manager, was responsible for allowing the consumption of beer after 2:00 a.m. The officer was not able to question Pedro because, although he was present upon the officer's entry, he had apparently fled the scene.

The other waitress who testified, Erica Zepeda, either denied or could not remember what she had told officer Castro on May 28. Her testimony was somewhat confusing and contradictory.[3]

José Davalo also testified, acknowledging that he had spoken with officer Castro and that he had ordered, and received a Bud Light beer. The rest of his testimony differed from that of Castro with respect to whether the beer in the red cup was his and whether he drank from it.

Subsequent to the hearing, the Department issued its decision which determined that the charges in the accusation were proved. Appellants have filed an appeal making the following contentions: (1) The findings are not supported by substantial

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[3]The ALJ found that "Zepeda was not a credible witness and her testimony has been disregarded." (F.F. 9.)

evidence; (2) the 1997 violation was too remote in time to be considered an aggravating factor; and (3) outright revocation was not warranted by the Department's Penalty Guidelines. The second and third issues both deal with the penalty and will be discussed together.

DISCUSSION

I

Appellants contend there is not substantial evidence to support the findings that alcoholic beverages were sold or served after the hours permitted on May 28, 2006, because the evidence was inadmissable hearsay. They contend that the findings with regard to September 3, 2006, are not supported by substantial evidence because the testimony of José Davalo was inconsistent and not credible.

"Substantial evidence" is relevant evidence which reasonable minds would accept as 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]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the

Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *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, 826-827 [40 Cal.Rptr. 666].)

Government Code section 11513, subdivision (d), provides:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

Appellant argues that the only evidence that the red plastic cups contained beer on May 28, 2006, was the hearsay testimony of officer Castro that various patrons told her they had ordered beer. We disagree. As the administrative law judge (ALJ) explained in Conclusion of Law 11:

> [T]he hearsay statements merely supplement and explain the other non-hearsay evidence. Officer Castro had been to the premises a few months earlier and had cited Erica Zepeda for after-hours sales of alcoholic beverages. At that time the business was using red plastic cups to serve the alcoholic beverages. On May 28, 2006, Officer Castro once again observed the red plastic cups in use. Castro personally observed the waitresses "frantically" collecting the red plastic cups when she and her partner entered in police uniforms. Officer Castro personally observed the contents of several of the red plastic cups and noted that the color and odor of the liquid was consistent with that of beer. The statements of Daniel Rivera, Anna Moral, Victor Hugo, Harold Estrada, Rudy Ramirez and Juan Soto were declarations against their own interest. Erica Zepeda's statement to Officer Castro was in fact an admission and therefore an exception to the hearsay rule. Zepeda admitted taking orders for beer but the beer was actually served by Pedro. On top of all that, Officer Castro was also personally aware that "Yessy", the waitress who was frantically collecting the red cups, and Pedro, the night manager who was serving the beer, had both fled the location, signifying a consciousness of guilt.

The ALJ correctly concluded that the statements of the patrons supplemented the direct evidence of Castro's observations and personal knowledge.

Under the substantial evidence rule, this Board begins with the presumption that the Department's findings are supported by substantial evidence. Appellants' burden on appeal is "to show there is no substantial evidence whatsoever to support the findings." (*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970 [191 Cal.Rptr. 415].)

As noted above, the hearsay evidence supplemented and explained the officer's direct evidence. Whether or not the ALJ was correct that the patrons' statements were declarations against their own interests, or that Zepeda's statement was an admission, the statements may still be used to supplement and explain direct evidence. Therefore, substantial evidence supports the finding that the cups contained beer on May 28, 2006.

Appellants contend that Davalo's testimony was too inconsistent and lacking in credibility to constitute substantial evidence for the findings regarding the September 3, 2006, violation. However, it is the ALJ, not this Board, who is responsible for resolving conflicts in testimony and assessing credibility. The Board must accept the factual findings made unless they are clearly unreasonable. They were not unreasonable, and we reject appellants' contention.

Appellants' suggestion that the cups might have contained soda or non-alcoholic beer is no more than speculation. Even though the contents of the cups were not analyzed for alcohol content, that does not allow us to leap to appellants' conclusion that the contents "could very well have been non-alcoholic." The possibility of an alternative explanation does not negate the substantial evidence supporting the finding that the cups contained beer.

II

Appellants contend their 1997 violation of the condition prohibiting sales and service of alcoholic beverages after 10:00 p.m. is too remote to be an aggravating

factor. If that violation is not considered, they assert, outright violation is not warranted. They also argue the penalty is excessive under rule 144, the Department's Penalty Guidelines (4 Cal. Code Regs., § 144), because the Guidelines provide only a 15-day suspension for violation of sections 25631 and 25632, and a 15-day suspension with five days stayed for a probationary period of one year for a condition violation.

The Appeals Board may examine the issue of excessive penalty if 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].)

We agree that the 1997 violation was too remote to be used as an aggravating factor. It appears, however, that it was not used as aggravation, but rather as a sign that appellants were on notice, at least from that time, as to what the condition meant and that it would be enforced.[4]

Appellants argue that imposing revocation is an abuse of discretion because of their long violation-free period, almost nine years, between the 1997 violation and the

[4]Appellants petitioned for modification of the condition later in 1997, a hearing was held, and the modification was denied early in 1998.

next violation in December 2005. They cite *Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal.2d 589 [400 P.2d 745, 43 Cal.Rptr. 633] (*Harris*), in which the Court agreed with the conclusion of the Appeals Board that the penalty of revocation imposed by the Department was an abuse of discretion. One of the reasons given for the Court's conclusion was that the licensee had no record of prior discipline for the five years he had held the license.

Harris, *supra*, is clearly distinguishable from appellants' case. In *Harris*, the licensee had no prior discipline; at the time of the violations at issue here, appellant not only had the 1997 violation, but also *four "after hours" violations within one year* – December 3, 2005; February 12, 2006; May 28, 2006; and September 3, 2006.

Appellants also argue that imposing revocation in this case does not comply with the Department's Penalty Guidelines (the Guidelines). The Guidelines do not prescribe hard and fast rules for penalty impositions in all circumstances. The penalties listed are those "that the Department usually imposes for the first offense of the law listed," and do not preclude or impede the Department's proper exercise of its discretion. (4 Cal. Code Regs., § 144, Appendix - Penalty Policy Guidelines.)

In appellants' case, the Guidelines have very little relevance. The violations were their third and fourth in less than a year, not the first since licensing. In addition, these were not inadvertent violations, but intentional. The ALJ devoted several paragraphs in the Conclusions of Law explaining the appropriateness of revocation in the present case:

> 13. The Department's recommendation of an aggravated penalty is well taken. First of all, Respondents were disciplined for violating Condition 1 on their license for sales, service and consumption after 10:00 p.m. in 1997. (See Exhibit 5). Shortly thereafter Respondents requested a hearing to modify that condition on their license. A hearing was held in

1997 and a decision was rendered which denied the requested modification. (See Exhibit 6). Respondents were fully aware of the condition on their license and knew exactly what it meant.

On December 3, 2005, Respondents were again disciplined for serving an alcoholic beverage after 10:00 p.m. (See Exhibit 4). On February 12, 2006, Respondents were disciplined for permitting sales, service and consumption of alcoholic beverages between 2:00 a.m. and 6:00 a.m. (See Exhibit 3). In this present case we have the same violations occurring not once, but twice, within a few short months of the February 12, 2006, incident.

14. Respondents' actions on both dates covered by this accusation were not mistakes or errors. They were in fact intentional acts. Respondents have made it quite obvious that they have no interest in complying with the law or the conditions on their license. What makes this case egregious is that despite this knowledge of wrong-doing, Respondents chose to continue serving alcoholic beverages after hours and attempted to conceal this unlawful activity by serving the alcoholic beverages in the red plastic cups. Rather than cease the unlawful after-hours sales after the first violations, Respondents chose to continue to do it, attempting only to conceal it.

15. The Department has a duty to protect public welfare and morals. This is normally accomplished through the voluntary compliance of the Department's licensees to the rules, regulations and laws associated with the license. When compliance does not work, discipline results. In most cases the discipline usually causes compliance to occur. In this case it did not.

No mitigating evidence or factors were presented. All we have is a mountain of aggravating evidence and factors. Respondents have been given more than ample opportunities to insure that there is no sale[,] service or consumption of alcoholic beverages after 10:00 p.m., and more specifically between 2:00 a.m. and 6:00 a.m. Respondents have chosen not to comply with the law.

Allowing this license to continue would be doing a disservice to the thousands of licensees who do voluntarily comply with the law, something which Respondents refuse to do. As such Respondents have demonstrated by their own actions that they do not deserve to hold an ABC license.

We agree that revocation is fully warranted in the present case.

ORDER

The decision of the Department is affirmed.[5]

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

[5]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.