

ISSUED JUNE 11, 1998

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

MI PLACE LTD.	)	AB-6908
dba Mi Place Restaurant)	
25 East Colorado Boulevard	)	File: 47-312785
Pasadena, CA 91103,	)	Reg: 97038795
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John A. Willd
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	April 1, 1998
	)	Los Angeles, CA
)	

Mi Place Ltd., doing business as Mi Place Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which ordered its license suspended for ten days, for its bartender having sold an alcoholic beverage, a bottle of Amstel Light, to a 16-year-old minor participating in a decoy operation conducted by the Pasadena Police Department, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658,

¹The decision of the Department, dated June 12, 1997, is set forth in the appendix.

subdivision (a).

Appearances on appeal include appellant Mi Place Ltd., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on December 20, 1995. Thereafter, the Department instituted an accusation against appellant charging that on September 20, 1996, appellant's bartender, John Henry Haas, sold a bottle of Amstel Light beer to Maria Jiminez, a 16-year-old minor decoy.

An administrative hearing was held on April 29, 1997, at which time oral and documentary evidence was received. A summary of the testimony relevant to the violation follows, some of which was in direct conflict.

Pasadena police officer Marie Sell testified that while seated in the restaurant section of the premises, separated from the bar by a plate glass window, she observed the bartender approach the minor, who handed her identification card to him.² He examined it, returned it to her, and then opened a bottle of Amstel Light beer, poured part of the beer into a glass, and set the bottle and the glass next to the minor. Jiminez paid for the beer, and officer Sell and another officer then entered the bar area, identified themselves as police officers, and informed the

² The identification was a card issued by the Department of Motor vehicles which bore a red stripe stating her age as 21 in the year 2000 [RT 35-36].

bartender he had just sold alcohol to a minor. At the time this occurred, Jiminez was still seated at the bar. Jiminez was then escorted from the bar by still another officer, Sergeant Ito, and then brought back in by him, at which time she identified Haas as the person who had sold her the beer.

Sell testified further that Jiminez was accompanied by another minor, Domino Scott, but the bartender declined to serve Scott after examining the high school identification card she produced.

Maria Jiminez testified that she ordered a beer, and the bartender suggested the Amstel Light. He asked for identification, examined it and returned it to her, then served her the beer.

Jiminez also testified about leaving the bar area with Sergeant Ito and then returning for the purpose of identifying the person who sold her the beer. She testified that she told Sergeant Ito "that's him," but did not recall whether she pointed at him.

Armen Shirvanian, one of the owners and co-founders of appellant, testified that the restaurant has had an alcoholic beverage license since it opened in 1989, with no previous discipline. He testified extensively about appellant's training of its personnel regarding the sale of alcoholic beverages and the importance that there be no sales of alcoholic beverages to minors. He testified that Haas had extensive experience as a bartender before he was hired, and, as had all other bartenders, been counseled periodically on the importance of complying with the law regarding sales to minors.

Shirvanian testified that when he observed the two decoys at the bar, he told a supervisor, Michelle Gardener, to tell the bartender to check their identification. He saw each of the two produce identification. He testified that Jiminez was no longer on the bar stool when the officers approached the bartender, and said she never did reenter the premises.

Neither Haas nor Gardener testified.

Subsequent to the hearing, the Department issued its decision which determined that the sale-to-minor-violation had occurred as alleged, and that the defenses asserted by appellant lacked merit.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the decision is not supported by its findings and its findings are not supported by substantial evidence - this contention asserts a number of subsidiary issues, including entrapment, failure to comply with Rule 141, and failure to produce evidence that the beverage which was served contained in excess of one-half of one percent alcohol by volume; and (2) the proceeding is defective by virtue of the unconstitutionality of Business and Professions Code §24210.

DISCUSSION

I

Appellant attacks the adequacy of the findings to support the decision, and challenges the sufficiency of the evidence to support the findings. Its broadside attack asserts a number of subsidiary issues which it claims warrant a reversal of

the Department's decision.

Appellant first claims the decoy operation and the Department ignored virtually all the requirements of Rule 141 and the Department's guidelines by the failure to give reasonable notice a decoy operation would be conducted; by conducting the operation during rush hour; by the decoy wearing "extensive" makeup and jewelry³; by not retaining the "buy" money; by not having the beverage analyzed; and by using a decoy who did not have the appearance of a person well under the age of 21 years.

Most of these contentions were made to the Administrative Law Judge (ALJ), who rejected them. He specifically found that Jiminez, although appearing over the age of 16, did not appear to be over 21. The ALJ also found that the City of Pasadena had sent letters to licensees and had publicized the fact the police were conducting decoy operations.

The claim that the transaction took place during rush hour is belied by the fact the evidence shows only one or two other people at the bar when the sale took place [RT 25].⁴ Any failure to retain the "buy" money is irrelevant, because no one denies the transaction occurred. The failure to analyze the beverage is also

³ The claim concerning extensive makeup, first made during oral argument to the Appeals Board, is flatly contrary to the decoy's testimony [at RT 34, 40] that she was not wearing any makeup.

⁴ Appellant's claim [RT 67] that the entire weekend evening, from 5:00 p.m. to 11:00 p.m., is rush hour, would effectively preclude any reasonable attempt via the decoy program to test whether appellant's employees are alert against sales to minors. To that extent, appellant's expansive rush hour claim does not help his case.

immaterial in light of the testimony that the decoy ordered beer and was served what was held out as beer.

Finally, appellant's claim of entrapment is equally without merit. It is difficult to see how the bartender might have been entrapped by having been shown identification which clearly stated the person offering it was not of legal drinking age. That Haas did not even testify emphasizes the weakness of this claim.

There is sufficient evidence to support the findings, and the findings support the decision. The ALJ chose to believe the testimony of the police officer and the minor. It is well settled that the credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

II

Appellant challenges the constitutionality of Business and Professions Code §24210, the code section which permits the Department to assign cases to administrative law judges employed by the Department. The California Constitution forbids an agency such as the Appeals Board from second-guessing the Legislature, by declaring that an administrative agency may not declare an act of the Legislature unconstitutional unless a state or federal court has first done so. Since this Board is unaware of any such decision, and appellant has cited none, we decline to consider this contention.

III

Appellant's hyperbolic attack on the penalty - a 10-day suspension - as being "patently unfair," "not fair," "not reasonable," and "out of all proportion to the offense," and even amounting to cruel and unusual punishment under the California and United States constitutions, is clearly lacking in merit. The law is well-settled that an administrative penalty is not punishment, and the ten-day suspension is certainly not of a magnitude as to constitute an abuse of discretion.

CONCLUSION

The decision of the Department is affirmed.⁵

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate 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.