ISSUED SEPTEMBER 24, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

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| NEWPORT SHARKEEZ, INC.<br>dba Baja Sharkeez<br>112-114 McFadden Place<br>Newport Beach, California 92663,<br>Appellant/Licensee,<br><br>v.<br><br><br>DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,<br>Respondent. | ) | AB-6966<br><br>File: 47-316238<br>Reg: 97040113<br><br>Administrative Law Judge<br>at the Dept. Hearing:<br>John A. Willd<br><br>Date and Place of the<br>Appeals Board Hearing:<br>July 8, 1998<br>Los Angeles, CA |

Newport Sharkeez, Inc., doing business as Baja Sharkeez (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days, for one of its employees having permitted another of its employees to consume an alcoholic beverage (beer) at approximately 3:00 a.m. on September 29, 1997, at which time it was unlawful for a licensee to give or deliver alcoholic beverages for consumption, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22,

[1]The decision of the Department, dated October 16, 1997, is set forth in the appendix.

arising from a violation of Business and Professions Code §25632.

Appearances on appeal include appellant Newport Sharkeez, Inc., appearing through its counsel, John A. Hinman and Richard D. Warren, 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 June 27, 1996. On June 6, 1997, the Department instituted an accusation against appellant charging the violation referred to above.

An administrative hearing was held on August 19, 1997, at which time oral and documentary evidence was received. At that hearing Newport Beach police sergeant David Szkaradek testified that he was on foot patrol outside appellant's premises on the morning of September 29, 1996, at approximately 3:00 a.m. While looking through a window of the premises, he observed a person later identified as Sergio Alonzo, an employee of appellant, draw from a beer tap into a Styrofoam cup, and then give the cup to another person, later identified as Nicholas San Filippo, a fellow-employee, who sipped from the cup. Szkaradek and Bradley Green, an officer Szkaradek had summoned to the scene, then entered the premises, seized the cup[2], and cited the two employees for a violation of Business and Professions Code §25632.

Although neither so claimed at the time, both Sergio Alonzo and Nicholas San Filippo testified at the administrative hearing that they were simply tasting beer from a newly-installed keg in order to test its freshness and suitability for sale.

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[2] The parties stipulated that the cup contained beer.

Subsequent to the hearing, Administrative Law Judge (ALJ) John A. Willd filed a proposed decision, which the Department adopted, in which he rejected appellant's claim that the employees were only tasting the beer to confirm a new keg's freshness, after customers had complained about the taste of the Budweiser beer served to them the preceding evening.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department erroneously proceeded on a theory of strict liability; and (2) the Department erroneously applied a literal interpretation of Business and Professions Code §25632. These issues will be addressed together.

DISCUSSION

Appellant contends that the Department erroneously applied a theory of strict liability, and erred further in interpreting Business and Professions Code §25632 literally, by finding a violation when an employee was merely tasting beer to ensure it was fresh.

Appellant has premised its appeal on three major assumptions: that its witnesses' testimony must be accepted, that they were only conducting a taste test to ensure freshness, and that the ALJ's determination, that the statute would have been violated even if they were only testing the taste of the beer when the officers came upon the scene, is erroneous. Only the last of these three contentions has any merit.

Appellant's argument is directed at dicta in the Department's decision - the assumption that if the facts established tasting, the statute would still have been

violated. While It appears from a reading of the decision, and the assessment of the "tasting" defense, that the ALJ simply did not believe appellant's witnesses, his additional determination that the statute did not permit even the slightest after-hours consumption, regardless of purpose, suggests he may not have been comfortable resting his decision solely on the issue of credibility.

This case could well have turned solely on credibility issues. The ALJ appears not to have believed the testimony of Alonzo and San Filippo that they were only tasting a new keg to be sure the beer was fresh. Neither of the two offered that explanation at the time they were cited by the police. However, Alonzo's response to officer Green that: "I didn't know I couldn't" [RT 18] could be interpreted to have meant that he did not understand he could not taste a new keg for freshness.

Concededly, there is nothing in the testimony of any of the witnesses that is inherently incredible. That being the case, we must defer to the credibility findings of the ALJ, who was able to see the witnesses and observe their demeanor while they testified. This would seem especially so here, given that vantage point, and the circumstances suggesting the "tasting" defense was an afterthought.

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].)

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 Beverage Control Appeals Board (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 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Having in mind the deference to which the Department's findings are entitled, we are nonetheless of the view that the violation made out by the evidence is a highly technical one, for which, in the absence of any prior discipline, a ten-day suspension is unreasonable. For that reason, we affirm that part of the decision which finds that the statute was violated, but remand the case to the Department for reconsideration of the penalty in light of the views expressed herein.[3]

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

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[3]This 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.