

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

BEERNESS, INC.	)	AB-7375
dba Beerness)	
1614 California Street	)	File: 48-299657
San Francisco, CA 94109,	)	Reg: 98044431
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Michael B. Dorais
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	November 18, 1999
	)	San Francisco, CA

Beerness, Inc., doing business as Beerness (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended appellant's on-sale general public premises license for 25 days for appellant's bartender selling an alcoholic beverage to a person under the age of 21 years and allowing the underage person to enter and remain within the premises, being contrary to the universal and generic public welfare and morals provisions of the

¹The decision of the Department, dated March 11, 1999, is set forth in the appendix.

California Constitution, article XX, §22, and Business and Professions Code §24200, subdivision (a), arising from violations of Business and Professions Code §§24200, subdivision (b), 25658, subdivision (a), and 25665.

Appearances on appeal include appellant Beerness, Inc., appearing through its counsel, Joanne M. Reming, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on November 7, 1994. Thereafter, the Department instituted an accusation against appellant charging that appellant's bartender had sold an alcoholic beverage to a person under the age of 21 years, and also allowed that person to enter and remain in the premises. The underage person was working at the time as a decoy, and under the supervision of officers of the San Francisco Police Department.

An administrative hearing was held on January 19, 1999, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation had been proven true.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raised the issue that there is no substantial evidence to support the findings and the findings do not support the decision, as there was no face to face identification of the seller of the beverage as required by the rules of the Department.

DISCUSSION

Appellant contends there is no substantial evidence which supports the findings and the findings do not support the decision, arguing that there was no face to face identification of the seller of the beverage as required by the rules of the Department.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as in the instant matter, 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].)

California Code of Regulations, title 4, § 141(b)(5), commonly referred to as Rule 141, states in pertinent part as follows:

"Following any completed sale, but not later than the time of the citation, if any, is issued, the peace officer directing the decoy shall ... have the minor

decoy who purchased alcoholic beverages to make a face to face identification of the alleged seller of the alcoholic beverages.”

The decision’s Finding III, in pertinent part states:

“... Officer Hom testified clearly and unequivocally in a credible fashion, that this important procedural step occurred in response to his question of the decoy as to who sold him the beer, before Officer Hom issued a citation to the bartender.”

The decision’s Determination of Issues I, states: “Evidence established that the decoy made a face to face identification of the person who made the illegal sale of an alcoholic beverage to the decoy.”

Appellant cites the recent case of Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575, 577-578, 581 [79 Cal.Rptr. 2d 126, for the proposition that there must be a face to face identification, which if absent, creates a complete defense. The court stated the rule and commented: “Since it is undisputed that no attempt (reasonable or otherwise) was made to reenter Acapulco’s premises (or remain on those premises) so that the decoy who purchased the beer could make a face-to-face identification of the bartender ... it follows that Acapulco’s suspension cannot stand.” The court stated that “... upon completion of the transaction, he [the police officer] had informed the bartender that she had sold beer to a minor, and identified the decoy as the minor. It is undisputed that the police officer did not have the decoy make the required face-to-face identification of the bartender.”

Thus the issue for review is whether there is substantial evidence of a face

to face identification of the seller by the decoy. The record shows concerning the decoy's testimony:

"A. The undercover officer approached me, sat down next to me, and I identified the bartender who had sold me the beer.

Q. All right. And at that point the bartender was standing across from you and the officer?

A. Yes." [RT 11.]

The record shows concerning the police officer's testimony:

"Q. Okay. After you identified yourself as a police officer and told her [the bartender] she had served to a minor, what occurred next?

A. I asked the decoy, 'Is this the person that sold you the beer?' (¶) Michael's right next to me and Michael said, 'She's the one. She's the bartender that sold me the beer.'

Q. And where is the bartender at the time located?

A. Three feet in front of me. I was on one side of the counter and she was on the other side of the counter.

Q. And as you looked at her was she looking at the decoy herself?

A. She looked at me. I pointed to Michael. She looked at the decoy and she looked back to me and I explained to her what happened."² [RT 19.]

While the Administrative Law Judge did not make a credibility determination

²On direct examination, the bartender stated "Not that I recall" to the question: "At any time did the decoy identify you, point to you and said, 'this is the woman that sold me the beer?' To the question "Did the officer at the time that you were there say to the decoy, 'Is this the woman that sold you the beer?' to which she replied: "not that I heard, no." [RT 30.] On cross examination, the bartender stated she did not recall whether the decoy identified her. On redirect, the bartender stated "No" to the question: "... to the best of your knowledge, did the decoy identify you in your presence?" [RT 33.]

concerning the bartender's testimony, he did make a credibility statement concerning the testimony of the officer: "... [the officer] testified clearly and unequivocally in a credible fashion, that this important procedural step occurred in response to his question of the decoy as to who sold him the beer, before Officer Hom issued a citation to the bartender." [Finding III.] Determination of Issues I states: "Evidence established that the decoy made a face to face identification of the person who made the illegal sale of an alcoholic beverage to the decoy." 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].)

In this case we find the requisite face to face identification was made. The decoy identified the seller to the peace officer while the decoy was looking at the seller. The seller's face was visible to the decoy and the officer, and the seller was within a reasonable distance from them at the time of the identification. The seller was aware, or should reasonably have become aware, that an identification process was occurring, by reason of the words and/or actions of the decoy and the peace officer, singling out the bartender as the seller to the person making the identification.

Turning to the question of the absence of a tape recording of the dialogue between the decoy and the seller, as the decoy had been wired with a recorder,

such recording was listed on the police reports to which appellant had access. The reports would be a item of discovery presented to appellant. Discovery are those items in the possession of the Department. Such tape would be evidence retained by the police. If appellant had acted with due diligence, arrangements could have been made to obtain the tape.

Appellant's brief (page 12) states the tape concerned the credibility of the decoy and could be used to attack the decoy's testimony. This is for cross examination. Appellant should have considered this before the hearing and made arrangements to gain access to the tape prior to the hearing.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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 order as provided by §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 §23090 et seq.