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

AB-7933
File: 47-126827 Reg: 01050899

YANKEE DOODLES, LIMITED, dba Yankee Doodles
4100 East Ocean Boulevard, Long Beach, CA 90803,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: November 14, 2002
Los Angeles, CA
ISSUED FEBRUARY 5, 2003

Yankee Doodles, Limited, doing business as Yankee Doodles (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days, with 5 days thereof stayed for a probationary period of one year, for appellant's employee permitting the consumption of an alcoholic beverage by a person under the age of 21 in violation of Business and Professions Code section 25658, subdivision (b).

Appearances on appeal include appellant Yankee Doodles, Limited, appearing through its counsel, Mark Allen Shoemaker, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on February 4, 1997. On May 25, 2001, the Department filed a two-count accusation against

[1]The decision of the Department, dated January 3, 2002, is set forth in the appendix.

appellant. Count 1 charged that, on April 8, 2001, appellant's employee, Ana Salomon, sold, furnished, or gave, or caused to be sold, furnished, or given, an alcoholic beverage (beer) to 19-year-old Arturo Vargas (hereafter Vargas or the minor); count 2 charged that Salomon permitted Vargas to consume the beer.

An administrative hearing was held on October 5, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the alleged violation, appellant's procedures and security measures, and appellant's affirmative defenses. Salomon, two Department investigators, the minor, and several others who were present at the time testified regarding the events surrounding the violations charged in the accusation.

On April 8, 2001, Vargas entered the pub section of appellant's premises with his cousin and a friend, and the three sat at a table. Salomon went to the table and one of the other two people ordered a pitcher of Budweiser beer. It is not clear whether Salomon asked for identification from any of the three, but a videotape (Exhibit E) showed that none of the three showed her any identification. Salomon brought the pitcher of beer and two mugs to the table. A fourth person joined the three at the table and ordered a pitcher of beer from Salomon, which she brought to the table, along with one mug. Shortly thereafter, someone at or near Vargas's table dropped a mug, and appellant's employees went there and cleaned up the spill.

After the spill, the videotape shows that Vargas, on five occasions, drank beer from a mug in front of him, looking around first each time, as if checking to see that no one was watching him. It was not clear how Vargas got his own mug, but there were four mugs on the table when the Department investigators went to the table. Some of appellant's employees (other than Salomon) were walking or working near Vargas's

table at least two of the times he was drinking the beer, although the evidence did not show that they actually witnessed Vargas's drinking. Salomon testified she did not see Vargas drink the beer, since she was very busy. Appellant's manager testified he did not see Vargas drink the beer, although he had been keeping an eye on Vargas, since he thought Vargas looked under 21.

Subsequent to the hearing, the Department issued its decision which determined that only count 2 (permitting consumption) was established.

Appellant thereafter filed a timely notice of appeal in which it raises the following issues: (1) The Administrative Law Judge (ALJ) improperly quashed appellant's subpoena duces tecum; (2) the ALJ improperly refused to enforce a subpoena requiring the attendance of the Department's district administrator; (3) no physical evidence was admitted establishing that the minor drank alcohol from the mug; (4) the decision is not supported by the findings and the findings are not supported by substantial evidence; (5) the ALJ improperly excluded evidence of the related criminal proceeding, which could not have been produced at the hearing; and (6) the Department's district administrator did not comply with her agreement to notify appellant of any complaints before taking action on them.

DISCUSSION

I

Appellant contends the ALJ improperly granted the Department's motion to quash the subpoena duces tecum that appellant served on the Department. The subpoena asked for "All documents, writings, memoranda, memorandum, emails, notes, reports, instructions" with regard to: all arrests or citations made on, originating from, or resulting from crimes directly related to, appellant's premises; all investigations

of or complaints about appellant's premises; all "calls to service" regarding appellant's premises; and all correspondence regarding appellant's business that passed between any Department employee and any employee of the Long Beach Police Department, City Manager's office, Department of Financial Management, or City Prosecutor's office; any employee of Long Beach City Councilman Colonna's office; the Belmont Shore Homeowners' Association or Residents' Association; or an individual named Preston Blevins. The affidavit in support of the subpoena duces tecum alleged that good cause existed for the production of the materials requested because they "pertain[ed] to material issues of fact" in the case, would lead to the discovery of admissible evidence, and were in the Department's actual or constructive control or possession.

The Department moved to quash the subpoena duces tecum, alleging that the items requested were not relevant, the subpoena was overly broad, it was designed to circumvent the administrative hearing discovery provisions, and it sought information protected by the right to privacy.

The ALJ granted the Department's motion to quash. He stated that, in his opinion, the Administrative Procedure Act (APA) limited gathering documents from the opposing party to the discovery provisions of Government Code section 11507.5 et seq. As an alternative basis for quashing the subpoena, he also found that the affidavit did not establish "in full detail" how the documents sought were material to the case, as required by section 1985 of the Code of Civil Procedure.

The ALJ's first reason for quashing the subpoena would undoubtedly have been correct before July 1, 1997, when Government Code section 11450.10 became operative, superseding a portion of former Government Code section 11510, subdivision (a). Case law held that former section 11510 was "not a discovery statute

but one to compel the production of documents and witnesses at the hearing" (*Gilbert v. Superior Court* (1987) 193 Cal.App.3d 161, 166 [238 Cal.Rptr. 220]), and the administrative discovery statutes (Gov. Code §11507.5 et seq.) enacted in 1968 were held to provide the exclusive method for obtaining pre-hearing discovery from a party. (See, e.g., *Board of Medical Quality Assur. v. Superior Court* (1977) 73 Cal.App.3d 860, 862 [141 Cal.Rptr. 83]; *Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 945 [123 Cal.Rptr. 563].)

Former Government Code section 11510 provided for issuance of subpoenas and subpoenas duces tecum "for attendance or production of documents at the hearing." The language of the statute, on its face, compelled the conclusion that it was not designed as a pre-hearing discovery statute. However, Government Code section 11450.10, subdivision (a), changed the wording of the statute slightly, resulting in what appears to be a significant difference: "Subpoenas and subpoenas duces tecum may be issued for attendance at a hearing and for production of documents *at any reasonable time and place* or at a hearing." (Italics added.) With the provision for production of documents other than at the hearing, the rationale for limiting the subpoenas to production of evidence at hearings is not as compelling as previously. Although the language of Government Code section 17507.5 makes it clear that "The provisions of Section 11507.6 provide the exclusive right to and method of discovery as to any proceeding governed by this chapter," the effect of the change in section 11450.10 it is not clear.

We are inclined to believe that the information requested by appellant would fall under the heading of discovery and would be obtainable only under Government Code section 11507.6. The Department argues that, reading Government Code sections

11450.10, 11507.5, and 11507.6 together, it is clear that the subpoena provision is meant to apply to a non-party before the hearing, while the discovery provisions are limited to parties. However, with the change in the wording of the statute, we cannot say with assurance that the only way appellant could obtain the information it desired from the Department was through the discovery provisions.

We can, however, agree with the ALJ's second reason for quashing the subpoena. A subpoena duces tecum must be issued in accordance with section 1985 of the Code of Civil Procedure,[2] which requires an accompanying affidavit

> showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control.

(Code Civ. Proc. §1985, subd. (b).)

The requirements of Code of Civil Procedure section 1985 are not met by an affidavit that is "devoid of any statement of facts," and which merely states a legal conclusion that the records requested are material. (*Johnson v Superior Court* (1968) 258 Cal.App.2d 829, 835-836 [66 Cal. Rptr. 134].)

Appellant alleges in its affidavit only that the documents requested "are material to the proper presentation of a defense" and "relate or pertain to material issues of fact arising with respect to the above matter." These conclusions, unsupported by any facts, are clearly not sufficient. The ALJ properly quashed the subpoena duces tecum.

---

[2]"Subpoenas and subpoenas duces tecum shall be issued . . . in accordance with Sections 1985 to 1985.4, inclusive, of the Code of Civil Procedure." (Gov. Code §11450.20, subd. (a).) The Law Revision Commission comments for the 1995 amendment of Government Code section 11450.20, subdivision (a), state that "For a subpoena duces tecum, this includes the requirement of an affidavit showing good cause for production of the matters and things described in the subpoena."

II

Appellant contends that "The ALJ refused to enforce a timely and proper subpoena" served on the local district administrator of the Department, Jane McCabe.

Appellant's counsel complains about not having the testimony of McCabe, maligning the ALJ, McCabe, Department investigator Debbie Logan, and any readers of appellant's brief, in some of the most snide and abusive language that this Board has seen in a brief directed to a tribunal. However, in the course of this diatribe, appellant's counsel apparently forgot to explain why he thought it was improper for the ALJ to refuse to enforce the subpoena.

In any case, we do not believe there was a justifiable basis for asserting this as error. In fact, the subpoena was served on McCabe just three days before the hearing, when she was apparently about to leave, or had already left, on a previously planned vacation. The ALJ refused to enforce the subpoena, but did not quash it. Instead, he gave appellant's counsel the opportunity to convince him that McCabe's testimony was relevant, in which case the ALJ said he would arrange to have her testify at a later date. [RT 98.]

Counsel wanted McCabe to testify about the alleged agreement she made with counsel that she would notify appellant about any problems with the premises before instituting an action against it. Counsel did not convince the ALJ that McCabe's testimony would be relevant either to the issue of whether a violation had occurred or the issue of mitigation of penalty, should a violation be found. [RT 226.] Therefore, the ALJ refused to enforce the subpoena. We see no reason for disagreeing with the ALJ's conclusion.

III

Appellant contends no physical evidence was admitted establishing that the minor drank alcohol from the mug and not soda.

The ALJ concluded that it was not soda because the waitress testified that she did not serve soda to anyone at the table. She testified to serving only pitchers of beer. The ALJ rejected the testimony of Victor Goche that the minor was drinking a soda.

The trier of fact determines the credibility of a witness's testimony, and the Board will not ordinarily interfere with an ALJ's credibility determination, as long as it appears to be a reasonable exercise of the ALJ's discretion. *(Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) The trier of fact is also the one whose duty it is to resolve any conflicts in the evidence.

The fact that the ALJ found some parts of the waitress's testimony credible does not mean that he must, therefore, accept all of her testimony as credible. Similarly, the ALJ's failure to credit Goche's testimony about what the minor was drinking is not, as appellant asserts, "a glaring example of either direct bias or misconduct"; the ALJ considered the testimony of both the waitress and Goche and resolved the conflict in a reasonable manner. The inference that the ALJ drew – that the minor was drinking beer since only beer had been served at the minor's table – was reasonable, and this Board is bound to accept it.

Appellant's objection that no physical evidence was admitted during the hearing of the alcoholic nature of the beverage is misleading. The failure to admit physical evidence was due entirely to the appellant's failure to question, after being put on notice to do so, whether the beverage consumed was beer.

The Department asked to have the physical evidence, Exhibits 4 and 5, consisting of a pitcher, a mug, and a sample of liquid from the mug, admitted into evidence. However, the ALJ declined to admit them because, he said, the Department did not need them at that time to prove its case. The ALJ also said that if the licensee subsequently raised some question about whether it was really beer that the minor had consumed, he would then consider the Department's request to admit the exhibits. [RT 97.]

Shortly before this, the ALJ asked appellant's counsel specifically whether there was really any dispute that the sample was actually beer; counsel replied merely that he had just seen the results of the Department's tests, showing that the sample was beer, and that he "would raise a form of chain-of-custody objection, probably." [RT 82.] The ALJ stated that he did not think the test results of the sample were relevant, since the minor heard his cousin order Budweiser beer, and the law presumes that the beverage ordered was the beverage delivered. He stated that the Department did not need to prove the results or the chain of custody of the sample, unless a dispute arose later about whether it was beer the minor was drinking. [RT 83.]

In spite of opportunities to raise a question about the beverage the minor consumed, appellant did not do so. Appellant essentially waived any objection that the beverage was not beer. Therefore, it was unnecessary to admit the exhibits into evidence.

IV

Appellant contends the decision is not supported by the findings and the findings are not supported by substantial evidence.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[3]

"Substantial evidence" is relevant evidence which reasonable minds would accept as a 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, 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].) Where there are

---

[3]The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

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 Bev. Control App. 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. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

In particular, appellant argues that the evidence failed to establish that appellant "permitted" the minor's consumption of beer. It contends that the ALJ erred by failing to apply the standard of *Laube v. Stroh* (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779] (*Laube*) when determining that appellant permitted the violation.

Laube, however, does not help appellant. In *Laube,* the court held a licensee not responsible for surreptitious drug transactions the licensee had no reason to suspect were occurring among patrons of the "upscale hotel, bar and restaurant." The court criticized the Department's use of a strict liability standard in "permitting" cases and, relying on language in *Marcucci v. Board of Equalization* (1956) 138 Cal.App.2d 605 [292 P.2d 264],[4] said:

> A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly. Once a licensee knows of a particular violation of the law, that duty

[4] *Marcucci* had this to say about consumption by minors on the premises: "A licentiate conducting the sale of beverages under an on-sale license is charged with an active duty to prevent minors from consuming intoxicating liquor on the licensed premises . . . ."

> becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from recurring, once the licensee knows of it, is to 'permit' by a failure to take preventive action.

(*Laube*, *supra*, 2 Cal.App.4th at p. 379.)

The appellant in *Chavez* (2000) AB-7377, charged with permitting the consumption of beer by a minor, raised contentions similar to those appellant raises here. In *Chavez*, the minor was seated at a table with two friends. One of the friends, who was of legal drinking age, ordered and paid for some beer. The waitress brought six bottles of beer to the table in a bucket, and the friend gave the minor one of the bottles of beer, which the minor drank from. There was no evidence that any of the licensee's employees observed the minor drinking the beer. The licensee argued that the Department was holding him strictly liable, contrary to the holding in *Laube*.

The Board stated that the failure of the employees to see the minor drinking did not preclude a finding of permitting the consumption. "Neither violation would have occurred if the waitresses had exercised ordinary caution. . . . [S]upplying six bottles of beer to three individuals, one of whom was a minor, and then ignoring what was done with the beer, was simply an invitation to trouble. . . . [and] negligence on the part of appellant's employees was a significant causative factor in the [violation] which followed." The Board concluded in *Chavez* that the "[a]ppellant's emphasis on his alleged lack of knowledge ignores that part of Laube v. Stroh which imposes a duty on a licensee to be 'diligent in anticipation of reasonably possible unlawful activity,'" and that serving six bottles of beer at a table where there were only three individuals, one of whom was a minor, "and then paying no attention to what happens -cannot be considered diligent by any measure."

In the present case, appellant's premises was open to all ages, and minors could, and did, enter and remain in the pub area as well as the dining area. In addition, appellant serves pitchers of beer which can obviously serve more than one person. Even if appellant was careful to provide only enough mugs with a pitcher of beer to serve patrons over 21, it is obvious that a minor obtaining an alcoholic beverage from someone in his party was a "reasonably possible unlawful activity" which appellant should have anticipated.

Salomon said she checked the identification of everyone at the table when a pitcher of beer was ordered and that Vargas did not have identification, so she did not bring him a mug when she brought the pitcher to the table. However, after serving the pitcher of beer, the waitress did not go back to check on the table until Victor Goche joined the others there, and she did not pay any attention to Vargas after the first time she went to the table, because she was very busy.

William Warren, the shift manager on duty, testified that he suspected Vargas was a minor because of his youthful appearance, so he kept an eye on him several times that afternoon. He testified that it was his practice to observe people that appeared youthful, and to count glasses on a table if he suspected there was a minor sitting there. However, he did not go to the minor's table except when he went there to clean up a broken glass, and he did not recall counting the glasses at the table where Vargas was sitting. He also testified that he had never been told of any minors drinking in the premises.

Claudia Bartolini, one of appellant's owners, testified that part of her job when in the premises was to see if there were minors there. She did not know that Vargas was a minor, but she noticed him because he had no glass or mug in front of him on the

table. She went by the minor's table twice that afternoon, but did not check to see how many mugs were on the table or what was in them.

Keith Luttrell, head of security for appellant, testified about the security system they had set up for checking identification at the door and marking the hands of minors. However, he also testified that those measures were not used during the day; the carding was left up to the waitresses and bartenders then.

Vincent Dwyer, appellant's chief financial officer and secretary, testified that, in his nine years with appellant, there had been no problems with serving minors.

Obviously, appellant's employees were aware of the potential for a violation involving a minor, and several of them were aware that Vargas could be a potential violator. Yet the waitress was "too busy" to pay attention to what Vargas was doing, and those who had noticed and purportedly were watching Vargas never saw him drinking or even in possession of a glass or mug. Appellant's system of careful checking for minors was to no avail since it was not in effect during the day, when this violation occurred. We cannot say that appellant and appellant's employees were diligent in this case regarding the "reasonably possible unlawful activity" of a minor consuming an alcoholic beverage in appellant's premises.

V

Appellant contends the ALJ improperly excluded evidence of the related criminal proceeding, which could not have been produced at the hearing. Appellant argues that, even if not binding, the finding that Salomon was innocent is additional relevant evidence that there was no violation.

In *Janal's Entertainment, Inc.* (2000) AB-7385, the Board noted that, "because the standard of proof in a criminal matter – beyond a reasonable doubt – is higher than

the preponderance-of-the-evidence standard that is applicable in an license disciplinary matter," a dismissal or acquittal in a related criminal case is not "relevant evidence" and is properly excluded from the record. The Board also relied on *Gikas v. Zolin* (1993) 6 Cal.4th 841 [25 Cal.Rptr. 2d 500] and *Cornell v. Reilly* (1954) 127 Cal.App.2d 178 [273 P.2d 572], which both held that an acquittal in a criminal case is not dispositive in an administrative disciplinary proceeding based on the same underlying conduct.

The Board in *Janal's Entertainment, Inc.*, *supra*, decided that the dismissal in the criminal case was properly excluded from the record, and we reach the same result here. The result of the criminal charge is not persuasive for the same reason that it is not binding: the standard of proof in the criminal case is different from that in the disciplinary proceeding. In addition, the criminal case is not relevant because the criminal charge was against the waitress, Salomon, while the disciplinary action is against the licensee. (See *Cornell v. Reilly*, supra, 127 Cal.App.2d at 187.)

VI

Appellant argues that the Department's district administrator did not comply with her agreement to notify appellant of any complaints before taking action on them. This, it asserts, prevented its attorney from advising it to take further action that might have prevented this violation.

There was evidence at the hearing of a meeting involving appellant, its counsel, district administrator McCabe, and other Department and Long Beach officials. Appellant contends that the meeting produced an agreement that McCabe would notify appellant about any complaints before taking any action.

Even if appellant had proved that McCabe made such an agreement, the Department cannot be bound by an agreement which might abrogate its constitutional authority and duty to enforce the law and to protect the public welfare and morals. As the Department points out, an agreement not to prosecute for a violation would clearly be void as against public policy.

Appellant's reliance on *Duval* (1999) AB-7162, is misplaced. In that appeal, the Department admitted that the licensees were told of an existing Department policy to issue “warning letters” for first violations by participants in Department-sponsored training, but argued that because the particular employee who sold to a minor did not attend the training, it was not bound to follow that policy. The Board disagreed, saying "We do not believe that the Department can, in fairness, make representations to licensees and then refuse to honor those representations based on a restriction that was not clearly communicated, if communicated at all, to the licensees." This admitted departmental policy instituted as an incentive for licensees in general to receive training to help prevent violations is a far cry from an alleged private agreement given for no apparent reason other than to benefit appellant.

ORDER

The decision of the Department is affirmed.[5]

TED HUNT, CHAIRMAN
E. LYNN BROWN, 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.