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

AB-8047
File: 47-263079 Reg: 02053004

1979 UNION STREET CORPORATION, dba The Blue Light
1979 Union Street, San Francisco, CA, 94123,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: June 12, 2003
Los Angeles, CA

ISSUED JULY 30, 2003

1979 Union Street Corporation, doing business as The Blue Light (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for the sale or furnishing of alcoholic beverages to two persons under the age of 21, violations of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant 1979 Union Street Corporation, appearing through its counsel, Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on September 23, 1991. Thereafter, the Department instituted an accusation against appellant charging that, on February 15, 2002, appellant's bartender, Stephen Primo Braccini

[1]The decision of the Department, dated October 24, 2002, is set forth in the appendix.

(Braccini or the bartender), sold, furnished or gave, or caused to be sold, furnished, or given, distilled spirits, to 18-year-old Elizabeth Anne Osborn (count 1) and to 19-year-old Whitney Curtis Barnecut (count 2).

An administrative hearing was held on August 9, 2002, at which time oral and documentary evidence was received. At that hearing, testimony concerning the transactions was presented by the two minors, Osborn and Barnecut; two Department investigators, Lee Silva and Joseph McCulough; appellant's doorman, James Hagar; and appellant's bartender, Braccini.

Barnecut had gone to the premises weekly for the preceding eight or nine months. For the first month or so, the doorman had asked for her identification each time. After that, he recognized her and knew that she had shown him her identification previously, so he allowed her to enter without asking for her identification. On February 14, 2002, Barnecut arrived at the premises about 10:00 p.m. and entered without having to show identification to the doorman.

The identification used by Barnecut to gain entry to the premises appeared to be a California driver's license bearing her photograph and correct physical description but showing July 3, 1979 as her date of birth. This birthdate would make her 23 years old, although in reality she was 19 years old at the time.

According to a prior arrangement, Osborn arrived at the premises about 30 minutes after Barnecut, meeting her outside the premises where she was standing with some friends. Osborn joined the others, and when they entered the premises, Osborn walked in the center of the group to avoid being asked for identification.

Shortly after midnight, the Department investigators saw Barnecut and Osborn near the bar, where the bartender was pouring liquid into four shot glasses. Barnecut,

Osborn, the bartender, and another man drank the shots, and the bartender poured another shot for Barnecut, which she consumed. Barnecut and Osborn then picked up pint glasses of liquid and went to a table, where they consumed the drinks.

The investigators confronted Barnecut and Osborn, and took them to an office for questioning. Osborn, who initially told the investigators she was 21, admitted her real age and denied showing false identification to gain entry. The female investigator searched Osborn and found no identification. Investigator McCulough found Barnecut's false identification when he searched her purse, and he determined that it was not a valid California driver's license. Both Barnecut and Osborn were cited.

The bartender admitted that he had not checked Barnecut's identification before serving her, stating that he had known her for a month or so. He said that Barnecut ordered two "purple hooters."[2] Braccini prepared the drinks ordered by Barnecut, along with two more, one for himself and one for a friend of his who was at the bar, and poured the drinks into four shot glasses. Braccini, his friend, and Barnecut consumed three of the drinks and he did not know what happened to the other drink, which was still on the bar when he walked away to serve other customers. He denied seeing or serving Osborn in the premises that night.

Following the hearing, the Department issued its decision which determined that both counts of the accusation had been proven, and no defense had been established.

Appellant thereafter filed a timely appeal in which it raises the following issues: (1) There is no finding that the bartender actually sold or furnished an alcoholic

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[2]A "purple hooter" is an alcoholic beverage containing vodka, sweet and sour, 7-Up, and Chambord [RT 99].

beverage to Osborn nor is there substantial evidence in the record to support such a finding, and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends there is no finding that anyone sold or furnished an alcoholic beverage to Osborn and that no evidence was presented which would support such a finding. Therefore, appellant asserts, the Appeals Board should reverse the Department's decision as to count 1 of the accusation.

The only finding that mentions any service of any kind to Osborn is Finding 7:

> Shortly after midnight on February 15, ABC Investigators Gebb and McCulough entered the premises in an undercover capacity. McCulough saw Osborn near the end of the bar. Barnecut was behind the bar near Osborn. The bartender, Steven Primo Braccini, poured a liquid into four "shot" glasses. Osborn, Barnecut and two men then consumed from the glasses in one movement. Braccini poured another "shot" for Barnecut, who drank it. She then kissed Braccini on the cheek. Barnecut and Osborn picked up pint glasses containing liquid and sat at a table consuming from the glasses.

Appellant argues that this finding, which is based on the testimony of investigator McCulough, is not supported by substantial evidence. McCulough, appellant points out, testified that when the drinks were being poured, Osborn was "off to the side of the bar" [RT 119, 97].

Appellant asserts that to establish a violation of section 25658, subdivision (a), there must be a finding that Braccini made the shot for Osborn. Finding 7 does not say that and, appellant argues, it could not, because the testimony did not establish that Braccini made the drink for Osborn or served it to her. The evidence and the findings show, at most, appellant asserts, that Osborn consumed an alcoholic beverage on the premises, but that was not the violation charged.

It is true, as appellant observes, that there is no finding or evidence that the bartender served Osborn a drink he had prepared for her. However, appellant cites no authority for its contention that this is required for establishing that a violation occurred, and we do not believe the statute's application is so restricted.

Section 25658, subdivision (a), provides that "every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor." While the evidence here does not support a charge of selling an alcoholic beverage to Osborn, it seems clear that Braccini either furnished, or at the very least, caused to be furnished, an alcoholic beverage, in the form of a purple hooter, to Osborn.

"Furnish" means to provide or supply.[3] Braccini poured purple hooters into shot glasses and Osborn consumed one of them. Whether or not Braccini intended, when he prepared the drinks, for Osborn to drink one of them, is irrelevant. He mixed it, put it in a glass, and it somehow got into Osborn's hand so she could drink it while standing there at the bar. Whether Braccini handed it to her directly, gave it to Barnecut who then gave it to Osborn, or simply set it on the bar counter where Osborn could pick it up, he furnished, provided, or supplied the drink to Osborn.

II

Appellant contends that the Department abused its discretion in adopting the penalty ordered by the ALJ, since it is greater than the 25-day suspension recommended by the Department's counsel at the conclusion of the hearing. The ALJ's order, adopted by the Department, provided for a 25-day suspension with regard

[3]Funk and Wagnalls Standard College Dict. (1973).

to the count involving Barnecut (count 2), but stayed the suspension for a one-year probationary period; with regard to Osborn (count 1), a 25-day suspension was ordered. The order concludes with the statement that "The discipline imposed herein shall be served concurrently for an actual suspension of 25 days."

The Appeals Board may examine the issue of an excessive penalty raised by an appellant (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (*Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].)

The net effect of this order appears to be an immediate 25-day suspension, with the potential, should another violation occur within one year, of a total 50 days of suspension arising from this action. This is clearly a more severe penalty than the straight 25-day suspension recommended by the Department at the hearing.

The Appeals Board has considered that the penalty recommendation made at the hearing represents the Department's "best thinking," and where an ALJ recommends a more severe penalty, without an explanation of the basis (or with an inadequate or unjustified basis) for doing so, has held that the penalty is arbitrary.

> This Board has said more than once that when an administrative law judge departs upward from the recommendation made by Department counsel at the administrative hearing, he or she is obligated to set forth reasons for doing so. This is because the Board assumes that counsel's penalty recommendation represents the Department's best thinking at the time, and, in the absence of an explanation, any penalty greater than that which was recommended is arbitrary.

(*7-Eleven, Inc. / Kamboj* (2001) AB-7678.)

The ALJ found that the circumstances surrounding Barnecut's use of a false identification constituted "strong mitigation." While the Department argues that this is

reflected in the stayed suspension for the Barnecut violation, the imposition of another 25-day suspension negates the mitigation: a 25-day suspension (the Department's original recommendation covering both counts) must be served immediately, with a potential doubling of the penalty hanging over the head of the licensee for a year. The effect of ordering the suspensions to run concurrently is unclear. This would appear to be inconsistent with the penalties as ordered.

This penalty requires another look by the Department and either a modification to comport with the Department's original recommendation, as modified by the mitigation found by the ALJ, or an adequate explanation and clarification of the arbitrary penalty imposed.

ORDER

The decision of the Department is affirmed except as to the penalty, which is reversed, and the matter is remanded to the Department for reconsideration of the penalty.[4]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]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.