

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

AB-8195

File: 47-347773 Reg: 03054364

CTTT ORANGE, INC. dba Café Tu Tu Tango
20 Boulevard West, Building J, Suite R10, Orange, CA 92868,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: August 5, 2004
Los Angeles, CA

ISSUED SEPTEMBER 17, 2004

CTTT Orange, Inc., doing business as Café Tu Tu Tango (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its bartender, Roberto Moreira (Moreira), having sold distilled spirits (mixed drinks, referred to as “buttery nipples,” containing butterscotch schnapps and Bailey’s Irish Creme liqueur, served in a shot glass), and permitted the consumption thereof by Rachel Burger (Burger) and Khyla Hislop (Hislop), both minors, in violation of Business and Professions Code section 25658, subdivisions (a) and (b).

Appearances on appeal include appellant CTTT Orange, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

¹The decision of the Department, dated September 18, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on December 2, 1998. On January 30, 2003, the Department instituted an accusation against appellant charging the sale of alcoholic beverages to, and permitting consumption thereof by, two minors, on September 26, 2002. An administrative hearing was held on April 22 and August 5, 2003, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Gerrit Green, an investigator employed by the Department of Alcoholic Beverage Control, and by Burger and Hislop, the minors in question. Roberto Moreira testified on behalf of appellant.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and which rejected appellant's claim of a defense under Business and Professions Code section 25660.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant renews its contention that it established a defense under Business and Professions Code section 25660.

DISCUSSION

Appellant does not claim that the administrative law judge (ALJ) applied an inappropriate standard, or that he misconstrued the law. Instead, appellant asks "Is it fair to hold a licensee strictly liable for the calculated illegal act of a third party," and argues that it is "simply not fair to require a server, dealing with hundreds of customers to scrutinize the identification and the appearance of the customer such that it is a certainty beyond all doubt that they are the same individual." (App. Br. at page 2.)

What is not in dispute in this case is that the bartender served alcoholic beverages to, and permitted their consumption by, three individuals, two of whom,

Burger and Hislop, were under the age of 21. Also not in dispute is the fact that the bartender asked for and was shown identification cards issued by the State of California which showed that the persons whose photographs and physical descriptions were on the cards were over the age of 21. The identification card presented by Burger was one issued to Juana Alba; Hislop displayed an identification card issued to Michelle Vaughn.

What is in dispute is whether the bartender acted reasonably in relying upon the identification displayed by the two minors. The (ALJ) found that neither Burger or Hislop resembled the persons whose photographs and descriptions appeared on the cards, and that Moreira did not meet the test of good faith reliance because he did not act as a reasonable and prudent man would have acted under the circumstances:

Burger held out for Moreira's inspection a California identification card in the name of Juana Alba. (Exhibit 2.) The identification appears to be a valid California identification card, says the presenter is 5 feet, 5 inches tall, weighs about 180 pounds and was 21 years of age in May 2001. The photograph show a Latina female with very dark brown or black hair. At the time she presented the Exhibit 2 identification, Burger stood about 5 feet, 4 inches tall and weighed about 115 pounds. Her hair was worn down, showed brown roots with significant blond coloring. Significantly, the photograph on the Exhibit 2 identification and Rachel Burger do not look like the same person. Moreira appeared to glance at the Exhibit 2 identification without taking physical possession of it. He asked no questions of Burger about her date of birth, her address or her physical description. He did not shine a flashlight on her to see her better nor did he ask her to step back from the bar counter so he could see more of her.

Hislop held out for Moreira's inspection a California identification card in the name of Michelle Vaughn. The identification appears to be a valid California identification card, says the presenter is 5 feet, 6 inches tall, weighs about 135 pounds and was 21 years of age in March 2001. The photograph shows a dark-skinned Black female with dark brown curly hair. At the time she presented the exhibit 3 identification, Hislop stood about 5 feet, 7 inches tall and weighed about 104 pounds. Significantly, the photograph on the Exhibit 3 identification and Khyla Hislop do not look like the same person. The facial characteristics and skin coloring do not resemble one another at all. Moreira appeared to look at the Exhibit 3 identification for a couple of seconds, again without taking possession of it. He asked no questions of Hislop about her date of birth, her address or her physical description. He did not shine a flashlight on her to see her better nor did he ask her to step back from the bar counter so he could see more of her.

(Findings of Fact 8 and 9.)

The evidence in this case showed that Respondent's bartender did not meet the test of a good faith reliance on the showing of identification. He did not act as a reasonable and prudent man would have acted under the circumstances.

a. As to Rachel Burger, in person she does not look anything like the person in the photograph on the ID she presented. (*Compare* Exhibits 2 and 5.) If that isn't enough, the ID said the owner was 5 feet, 5 inches tall and weighed *180 pounds*. (Findings of Fact, ¶8.) Burger was 5 feet, 4 inches tall and weighed 115 pounds. (*Id.*) It does not satisfy to say the light was dim and the bartender could only see her from her neck up. All he had to do was ask her to step back from the counter to where he could see the entire person. He failed to do that. (*Id.*) He had a flashlight available to him and did not use it. (Findings of Fact, ¶9.) In fact, it is doubtful that bartender Moreira even took physical possession of the ID. (Findings of Fact, ¶8.) His reliance on it was not reasonable as to Burger.

b. Khyla Hislop stood 5 feet, 7 inches tall and weighed 104 pounds. (Findings of Fact, ¶9.) She was extremely slender. (*See* Exhibit 4.) She did not look anything at all like the photograph in the ID she presented. (*Compare* Exhibits 3 and 4.) The same discussion applies to Hislop as to Burger above. Moreira simply did not act reasonably in accepting the Exhibit 2 ID as to Hislop.

(Conclusion of Law 9.)

It was appellant's burden to persuade the trier of fact that bartender Moreira acted as a reasonable and prudent man in checking the identification cards displayed to him. It obviously did not do so. The ALJ cast doubt on the credibility of Moreira's testimony, citing a number of instances where his description of what he did when he checked the identification cards disagreed with that of the two minors and the Department investigator. (Finding of Fact 20.) Additionally, Moreira acknowledged that the lighting was dim, and he did not use a flashlight to get a better view of Burger and Hislop. A prudent person would have done so.

Whether or not a licensee has made a reasonable inspection of an ID to determine that it is bona fide is a question of fact. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Masani)* (May 27, 2004) 118

Cal.App.4th 1429 [13 Cal.Rptr. 826].) This Board, like the court in *Masani*, “must assume that the ALJ’s observations of physical evidence support his findings.” (*Id.*, at p. 1446.)

Appellant is asking this Board to reweigh the evidence and substitute its judgment for that of the ALJ. The Board may not do this. So long as the ALJ’s findings are supported by substantial evidence - we have reviewed the record and they are - this Board is bound by them. (*Masani, supra.*)

ORDER

The decision of the Department is affirmed.²

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

² This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

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