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

AB-8829
File: 48-434506 Reg: 07066886

BLUE BREW, INC., dba Bert and Ernies
825 Industrial Street, Redding, CA 96002,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: January 15, 2009
San Francisco, CA

ISSUED MAY 21, 2009

Blue Brew, Inc., doing business as Bert and Ernies (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 30 days for appellant's agents or employees selling an alcoholic beverage to Jesse Bryant, a person under the age of 21, and allowing Bryant to enter and remain in the licensed premises without having lawful business there, violations of Business and Professions Code sections 25658, subdivision (a), and 25665.

Appearances on appeal include appellant Blue Brew, Inc., appearing through George Somers (50-percent shareholder) and Ben Weaver (general manager) and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

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[1]The decision of the Department, dated January 18, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on January 12, 2006. On September 24, 2007, the Department filed an accusation against appellant charging that, on July 20, 2007, appellant's agents or employees sold an alcoholic beverage to 19-year-old Jesse Bryant, and allowed him to enter and remain in the licensed premises without having lawful business there.

At the administrative hearing held on November 15, 2007, documentary evidence was received, and testimony concerning the charges was presented by Bryant; Joshua Gorman, who was with Bryant for a time in the licensed premises;[2] Michael Rowden, a bouncer at the licensed premises; and Ben Weaver, general manager of the licensed premises.

Bryant testified that from approximately 11:00 p.m. on July 20, 2007, until about 2:00 a.m. the next morning, he was in appellant's licensed premises, drinking mixed drinks (Jack Daniels [whiskey] and Coke) and beer. He stated that he got drunk, but continued buying and consuming alcoholic beverages in appellant's bar. He estimated that he had gone to appellant's premises five times before the night in question and that each of those times he had remained there, drinking alcoholic beverages, for several hours and had become drunk. Bryant said that he had entered the premises through a gated area at the rear on the prior occasions, but on July 20, 2007, he had entered through the front entrance without having to show identification. When he left the premises, he went home on a shuttle bus provided by appellant for its patrons.

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[2]This matter appears to have arisen out of Bryant attacking Gorman with a baseball bat in the early morning of June 21, causing severe injury to Gorman. The testimony established little more about the incident than that the attack occurred and that Bryant was sentenced to six years in prison for his actions.

Joshua Gorman testified that he was also at appellant's licensed premises on the night of July 20, 2007. While there, he said, he met Bryant and they conversed for ten minutes or more, during which time Gorman observed Bryant drinking beer. During the conversation, Bryant said that he was under 21 years of age and had been allowed to enter by one of appellant's bouncers.

Michael Rowden, one of appellant's bouncers, testified that he always required identification from people attempting to enter the premises. He also said that he and two others were qualified to work at the entrances checking identification, and that he was working the back gate on July 20, 2007.

Ben Weaver, the manager at appellant's licensed premises, testified that he was at the premises five days a week, that he insisted identification be checked before a person could enter the premises, that he was aware of the patrons who entered the bar, and that he would have the employees check the identification of anyone in the bar of whom he was unsure. He said he was working in the premises that night, but did not instruct anyone to check the identification of Jesse Bryant. Weaver explained that the premises provides a van to give rides home to patrons who have been drinking and should not be driving. On a occasion, they also provide taxis for patrons.

Subsequent to the hearing, the Department issued its decision which determined that the violations charged were proved and no defense was established.

Appellant has filed an appeal making the following contentions: (1) There is no substantial evidence that Jesse Bryant was in, or purchased an alcoholic beverage from, the licensed premises, and (2) the penalty is excessive.

DISCUSSION

I

In its appeal letter, appellant contends there is not substantial evidence to support the findings. Appellant points out that there was no receipt, credit card slip, or eye witness to substantiate Bryant's statement that he purchased alcoholic beverages while in the licensed premises; Bryant did not identify the bouncer who let him in; and Bryant did not know how much the cover charge was or how much he paid for the alcoholic beverages he said he purchased.

"Substantial evidence" is relevant evidence which reasonable minds would accept as 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 an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826];

Kruse v. Bank of America (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

In addition, it is the province of the administrative law judge (ALJ), as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

In the present case, the ALJ made determinations of fact and credibility with regard to the discrepancies noted by appellant, and we are bound to accept those determinations unless they are shown to be unreasonable and an abuse of discretion. The ALJ discussed these matters in Determination of Issues I:

> At the November 15, 2007 Administrative Hearing, Respondent contended that Jessie Bryant is not a credible witness and his testimony should be disregarded.
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> Respondent bases this contention on the criminal conduct of Jessie Bryant. While it was established that Bryant is serving six years in a California prison for his criminal actions, Respondent did not offer other evidence regarding Bryant's lack of credibility.
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> Respondent is correct that Jessie Bryant is a proven criminal, but Bryant's testimony concerning his six visits to Respondent's bar is credible. Nothing was brought out at the hearing which showed Bryant's testimony should be discounted by reason of bias, interest or motive.
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> Respondent did show that Bryant's capacity to recollect details – specifically the price of a Jack Daniels and Coke – was imperfect but this minor fact did not alter the credibility of his account of his visits to Respondent's bar.

The ALJ had the opportunity, which this Board has not, to see Bryant testify and to judge his credibility. This Board is compelled to defer to the ALJ's determination for practical, as well as legal, reasons as long as that determination is not patently unreasonable.

Having accepted Bryant's testimony as credible, the ALJ was well within the bounds of his discretion to base his findings on that testimony. "It is the rule . . . that the testimony of one witness, if believed by the trier of fact and if not inherently improbable, is sufficient to sustain a finding." (*Alperson v. Mirisch Co*. (1967) 250 Cal.App.2d 84, 93 [58 Cal.Rptr. 178]; accord, *Dart Industries, Inc. v. Commercial Union Ins. Co*. (2002) 28 Cal.4th 1059, 1075 [52 P.3d 79; 124 Cal.Rptr.2d 142].) We cannot say that Bryant's testimony was inherently improbable and, therefore, substantial evidence existed to support the findings.

II

Appellant alleges that the Department offered to settle the matter before the hearing with a 15-day suspension and said this would be the maximum penalty that could result from the hearing. It contends that had it known a 30-day suspension could result from the hearing, it would have hired an attorney to represent it.

Even if appellant had raised this issue at the hearing and had presented proof to substantiate its allegations, "the mere fact – if it be a fact – that the [D]epartment had once offered a settlement more favorable than the discipline ultimately imposed, is not, in and of itself, a ground for setting aside the penalty ultimately adopted." (*Kirby v. Alcoholic Beverage Etc. Appeals Bd*. (1971) 17 Cal.App.3d 255, 261 [94 Cal.Rptr. 514] (*Kirby*).)

The court in *Kirby, supra,* at pages 260-261, explained the reasons behind this statement:

> Even in cases strictly criminal, there is a public policy in favor of negotiations for compromise (*People v. West* (1970) 3 Cal.3d 595 [91 Cal.Rptr. 385, 477 P.2d 409]; a fortiori there is an equal policy in cases such as this. The department, acting on the basis of written reports, secures a prompt determination, at little administrative cost; the licensee avoids the risks that testimony at a formal hearing may paint him in a worse light than the reports and, also, avoids the costs and delay of a hearing. The licensee who rejects a proffered settlement hopes that the hearing will clear -- or at least partially excuse -- him and he hopes that, even if he is not found innocent, he will be dealt with less harshly than the department proposes. But if the department can never, no matter what a hearing may develop, assess a penalty greater than that proposed in its offer, a licensee has little to lose by rejection. Only the *cost* of a hearing is risked; he could not be otherwise harmed. In that situation, licensees would be induced to gamble on the chance of prevailing at the trial, while the department would lose much of its inducement to attempt settlement. The law should not permit that kind of tactic by an accused.

In any case, appellant did not raise this issue at the hearing, much less provide evidence substantiating its allegations. Therefore, we do not address this contention.

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]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.