

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

AB-8984

File: 47-422811 Reg: 07067398

VITELLO'S, INC., dba Vitello's Restaurant
4349 Tujunga Avenue, North Hollywood, CA 91604,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 4, 2010
Los Angeles, CA

ISSUED DECEMBER 13, 2010

Vitello's, Inc., doing business as Vitello's Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for its bartender furnishing an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Vitello's, Inc., appearing through its counsel, Rick A. Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on March 28, 2005.

¹The decision of the Department, dated November 14, 2008, is set forth in the appendix.

On November 28, 2007, the Department filed an accusation charging that appellant's bartender, Richard James Napier, furnished an alcoholic beverage to 18-year-old Courtney Van Heyningen on August 25, 2007. Although not noted in the accusation, Van Heyningen was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on September 10, 2008, documentary evidence was received, and testimony concerning the sale was presented by Van Heyningen (the decoy) and by Marlon Lindsey, a Los Angeles Police Department officer. Matthew Epstein, the owner of the premises and president of Vitello's, Inc., also testified regarding training and procedures employed at the premises.

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

Appellant filed a timely appeal contending that the Department exceeded its jurisdiction in imposing the penalty, because the findings were not supported by substantial evidence.

DISCUSSION

The sole issue on appeal is whether the findings were supported by substantial evidence. "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].)

Appellant argues that there was insufficient evidence for the Department to establish that the decoy was in actual possession of the alcohol, in order to prove that a furnishing or sale of an alcoholic beverage took place. The administrative law judge (ALJ), however, clearly finds that an alcoholic beverage was furnished to the decoy in his Findings of Fact 7:

The decoy had been accompanied to Respondent's store by a number of officers of the Los Angeles Police Department [LAPD]. Officer Marlon Lindsey was inside Respondent's bar when decoy Van Heyningen entered the restaurant. He was seated at a bar stool about 5 feet from where she sat in a position to see and hear what occurred between Napier and Van Heyningen. Officer Lindsey sent a message to LAPD Officer Acevedo indicating there had been a violation once the beer was served to the decoy. Backup police officers, including Acevedo, entered the restaurant and approached the bartender. Officers advised Napier of the violation and Officer Acevedo asked decoy Van Heyningen who had served her the beer. She pointed out bartender Napier and said that he was the one. At the time of the identification the decoy and the bartender were about 2 feet apart, standing next to one another. Later, the Exhibit 2 photograph was taken of the decoy, the bartender and the bottle of beer. Still later, Napier was issued a citation.

The ALJ discusses appellant's concern about the "completion" of the transaction, and finds that a transaction was indeed completed in his Conclusions of Law 4 :

Respondent questioned whether the alcoholic beverage transaction between bartender Napier and decoy Van Heyningen had been completed. The evidence merely established that the beer was put down in front of the decoy. She did not pay for it and she did not drink from it. No evidence established how long the beer sat in front of her before the police officers took over. Maybe, it was suggested, bartender Napier was about to request her identification. The last is pure speculation and no evidence was elicited even suggesting that bartender Napier felt there had been interference with performance of his duties. As for timing, enough time existed for covering Officer Lindsey to “message Officer Acevedo” of the violation and for Acevedo and others to enter the bar area. (Findings of Fact, ¶ 7.) It is also not unusual for a bartender not to collect money after serving a single drink and no one expects an under age decoy to ever consume from the alcoholic beverage. The service of an opened bottle of beer as established here is sufficient.

A reasonable person would easily accept the evidence presented here as reasonable support for the conclusion that appellant’s bartender furnished an alcoholic beverage to this minor decoy, as affirmed by the testimony of both the decoy and the police officer, and as memorialized in Exhibit 2. We disagree with appellant that insufficient evidence exists to support the ALJ’s findings.

ORDER

The decision of the Department is affirmed.²

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

²This 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.