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

**AB-9122**
File: 47-467063 Reg: 09072002

CNR ENTERPRISES, INC., dba The Firehouse
7701 White Lane, Suite A3, Bakersfield, CA 93309-0201,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: June 2, 2011
Los Angeles, CA

**ISSUED JULY 19, 2011**

CNR Enterprises, Inc., doing business as The Firehouse (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license, with revocation stayed for one year on the condition that the license be suspended for a period of 25 days, for its bartender selling or furnishing an alcoholic beverage to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant CNR Enterprises, Inc., appearing through its counsel, Ralph B. Saltsman and Soheyl Tahsildoost, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated July 9, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on March 4, 2009. On October 20, 2009, the Department filed an accusation charging that appellant's employee or agent sold or furnished an alcoholic beverage to 18-year-old Taryn Miller on May 15, 2009.

At the administrative hearing held on January 27 and May 19, 2010, documentary evidence was received and the parties stipulated to certain facts. The Department presented testimony by Miller (the minor); Mirissa Wright, one of Miller's companions that evening; Albert Smith, a Bakersfield police officer; Fernando Moreno, a clinical laboratory scientist; and Mark McCullough, a Department investigator. The appellant's witnesses were Rikki Wallace; Nicholas Cortez, the premises' manager at the time of the incident; Andre Willingham, a bartender at the premises; and Russell Johnson, appellant's CEO.

Sometime after 11:00 p.m. on May 15, 2009, Officer Smith saw 18-year-old Taryn Miller leave the licensed premises, walking with an unsteady gait, with what appeared to be a beer bottle in her hand. Shortly thereafter, Smith found Miller in her car in the premises' parking lot, vomiting. Smith called for medical aid and Miller was taken by ambulance to a hospital.

Miller had been out that night with a group of girlfriends at the licensed premises. While they were there, several pitchers of beer were brought to the table, and Miller drank beer poured from the pitchers. At some point, she and the others went up to the fixed bar, where Miller ordered, received, and drank, but did not pay for, two margarita cocktails. Later, Miller left the premises alone and was subsequently found in the parking lot by the police officer.

The Department's accusation charged that appellant, by its "agent or employee at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to wit: distilled spirits" to Miller. The accusation also included a section on aggravation:

> For the purpose of imposition of penalty, if any, it is further alleged that minor Taryn MILLER consumed an amount of alcohol that caused her to become unconscious, to have a Blood Alcohol Concentration of over .30, and required hospitalization.

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

Appellant filed an appeal contending: (1) The Department did not establish that appellant's employee sold, furnished, or gave, directly or indirectly, a distilled spirit to Taryn Miller; (2) the decision is erroneous in that it relies on the sale or furnishing of any other alcoholic beverage than distilled spirits; (3) the decision does not adequately account for all mitigating factors presented and was improperly aggravated by unreliable evidence; (4) the administrative law judge (ALJ) improperly disregarded the testimony of one of its witnesses; and (5) the police officer's testimony should be discredited because of his arrest almost two years after this incident.

DISCUSSION

I

Appellant contends the Department did not prove that it furnished distilled spirits to Miller. Appellant argues that the testimony and documentary evidence presented by its CEO, Johnson, proved that no margaritas could have been furnished by the bartender to Miller, yet the Department's decision finds that the bartender did serve the drinks to Miller. The Department's failure to explain how it could reject appellant's

"documented, computerized, and thorough evidence" and believe the testimony of a "drunken teenager" constitutes reversible error, according to appellant.

Appellant misapprehends the burden of proof on appeal. It is *appellant's* burden to prove that there is no substantial evidence supporting the Department's decision. (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335-336 [25 Cal.Rptr.2d 842 ].)

The standard to be used by the Appeals Board in reviewing a decision of the Department has been stated as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends,*[*Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002)] 100 Cal.App.4th [1250,]1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

*(Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility, and we must defer to those determinations in the absence of a clear showing of an abuse of discretion. (*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 ALJ stated in paragraph 5 of the

Conclusions of Law that he "specifically relied" on the testimony of Miller and Wright in determining that Miller was served at least one, and perhaps two, margaritas by appellant's bartender. This testimony provides substantial evidence in support of the determination.

The documentary evidence produced by appellant was, at best, inconclusive. The ALJ was unconvinced by the documents, explaining, in Conclusions of Law 6, why they did not show what appellant said they showed. We note also that the copies of receipts provided were supposed to reflect items rung up by Willingham "during the time period that ABC . . . [was] interested in," but appear to be only a random sampling of the receipts he generated that night. In addition, there was no explanation of the queries used to generate the various reports nor how Johnson decided which receipts to print out.

Appellant is asking this Board to reweigh the ALJ's factual and credibility determinations. However, appellant's disagreement with those determinations is not sufficient to show that there has been an abuse of discretion. Indulging, as we must, in all legitimate inferences in support of the Department's determination, it is clear that substantial evidence supports the Department's decision and the ALJ was fully justified in not accepting the documents provided as conclusive evidence of what was or was not served to Miller by appellant's bartender that night.

Appellant's demand for an explanation of the ALJ's reasoning, relying on the case of *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836], is rejected. As this Board has explained many times, the Department is not required to explain its reasoning. (*Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 778-779 [122 Cal.Rptr. 543].)

II

Appellant contends that the decision must be reversed because it relies on evidence of beer being furnished when the accusation only charged the furnishing of distilled spirits. It asserts that, because findings regarding the furnishing of beer are "irrelevant" to the accusation, making those findings in the decision must mean they were a basis for the conclusion.

It appears that appellant is attempting to allege a violation of due process. Although not explained in appellant's brief, the principle upon which it apparently relies is that a licensee cannot be disciplined upon the basis of a charge not made in the accusation. (*Wheeler v. State Bd. of Forestry* (1983) 144 Cal.App.3d 522, 533 [192 Cal.Rptr. 693].) This is because the licensee would not have notice and an opportunity to prepare a defense, both of which are fundamental to procedural due process.

The findings that beer was served to and consumed by the minor are not used as the basis for concluding that the charge of the accusation should be sustained; it is clear that the determination relies solely on the furnishing of one or more margaritas to the minor. Conclusion of Law 5 states:

> Cause for suspension or revocation of the Respondent's license exists . . . in that, on May 15, 2009, Andrew Willingham, inside the Licensed Premises, sold an alcoholic beverage to Taryn Miller, an individual under the age of 21, in violation of section 25658(a). . . .
>
> In making this determination, the testimony of Miller and Wright is specifically relied upon. Miller clearly remembered that she ordered two Margaritas, while Wright clearly remembered Miller being served at least one Margarita. Willingham did not deny serving any drinks to Miller; rather, he could not recall if he had.

Although the determination that appellant was subject to discipline could not be based on the service of beer to the minor, the Department is entitled to consider

evidence of other possible violations in determining the type and extent of the discipline to be imposed for the charged violations. (*Ralph Williams Ford v. New Car Dealers Policy & Appeals Bd*. (1973) 30 Cal.App.3d 494, 499-500 [106 Cal.Rptr. 340].)

Beer was the only other alcoholic beverage shown to have been served to the minor. The service of some type of alcohol other than the two margaritas was properly considered in determining the penalty to be imposed. It was one of the factors in aggravation, as explained in the "Penalty" section of the decision (at p. 6):

> The Respondent argued that, if the accusation were sustained, no aggravation was appropriate. In addition to disputing the evidence of Miller's blood-alcohol level . . . the Respondent noted that it was not charged with serving beer to Miller. . . .
>
> The Respondent is correct that the sale or service of beer to Miller was not charged. The evidence is clear, however, that Miller was served two Margaritas and, further, that such service contributed to her state of intoxication – she had not consumed any alcohol prior to entering the Licensed Premises, but had to be hospitalized upon leaving it. Further, her blood-alcohol level was the result of the alcohol she consumed at the Licensed Premises. . . .

No error resulted from the evidence[2] and findings regarding the service of beer to the minor.

III

Appellant contends that the Department is required by Department rule 144 (Cal. Code Regs., tit. 4, § 144) to consider the mitigation factors it presented at the hearing, but that it failed to do so. In addition, appellant asserts that the penalty was improperly aggravated by unreliable evidence. In appellant's opinion, the proper penalty should have been a 25-day suspension, all stayed.

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[2]We note that appellant did not object at the hearing to any of the evidence showing that beer was served to the minor.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

While the Department is bound by its own regulations, rule 144 does not in any way restrict the Department's proper exercise of its discretion. The extent to which the Department considers mitigating factors is a matter within its discretion, and the Board may not interfere with that discretion absent a clear showing of abuse of discretion. Rule 144 also does not change this Board's review of penalties imposed by the Department. As long as the penalty imposed is reasonable, the Board will uphold it.

Appellant objects to the evidence of Miller's blood alcohol content (BAC) as unreliable. It argues that the machine used to determine the BAC was not proven to be accurate or functioning properly. Appellant is in error. The machine was shown to have an internal calibration process; if it needed recalibration, it would not run the test on the blood sample. The ALJ found that the evidence was sufficient to show that Miller's BAC was over .30 percent when she was hospitalized after drinking at appellant's licensed premises. Appellant failed to produce any evidence that the machine testing was inaccurate.

Appellant's belief that the penalty should have been less does not show that the Department abused its discretion in imposing the penalty. Considering the factors in aggravation – Miller was served sufficient alcohol to require hospitalization; her blood alcohol level exceeded 0.30 percent; no one checked her identification, yet she was given a wristband indicating she was at least 21 years old; appellant had only been licensed for two months when this occurred – the penalty of stayed revocation and a 25-day suspension is clearly within the bounds of what is reasonable.

IV

Appellant contends the Department improperly disregarded the "key evidence" of one of its witnesses, Rikki Wallace. Wallace's testimony, appellant asserts, proved that Mirissa Wright, one of the Department's key witnesses, lied on the stand when she said she had not been drinking before arriving at the Firehouse.

Wallace testified that she and her boyfriend left the Firehouse at about 11:00 p.m. on May 15, 2009, and got into a truck in the parking lot. A young woman approached who said "that her friend had passed out in the parking lot; that they were all underage; that she was scared they were going to get in trouble because they were underage. And she wanted us to take her back home to Taft." [2 RT 111-112.] Wallace also testified that the young woman "said they were drinking prior to them getting to the Firehouse." [2 RT 113.] The young woman did not tell Wallace her name and Wallace did not give the young woman a ride home.

The ALJ allowed the testimony at the hearing as possible administrative hearsay, with a standing objection by the Department. In the decision, Wallace's testimony was discussed in Finding of Fact 14:

> Rikki Wallace testified that she was outside the Licensed Premises when the ambulance arrived. She was not a percipient witness to any of the relevant events of the evening. Rather, she testified about a conversation she had with a another girl, whom she did not know. Her entire testimony consisted of hearsay and is not relied upon.

Appellant states that Wallace's testimony about the girl's statement that "they were drinking prior to them getting to the Firehouse," falls under multiple hearsay exceptions, "including the exceptions for prior inconsistent statements and spontaneous statements." Therefore, appellant argues, it was error for the ALJ to treat Wallace's testimony as hearsay and he should have considered the girl's statement in reaching a decision.

Appellant relies on Evidence Code section 1235: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Appellant argues that Wright's statement to Wallace about drinking before getting to the Firehouse directly contradicts Wright's earlier testimony that she did not have anything to drink before she got to the Firehouse and, therefore, the statement is admissible.

The Department argues that the statement is not admissible because appellant did not establish that the girl who spoke to Wallace was Mirissa Wright. We agree. Appellant tried to establish, by the process of elimination, that the unidentified person who talked to Wallace had to be Mirissa Wright. Appellant based its argument on what Wallace said the girl told her: that she was from the town of Taft and that she drove to the Firehouse with the girl who had passed out. However, appellant did not show that Wright was the only one in the group of girls at the Firehouse who lived in Taft nor

could appellant exclude the possibility that the girl was with the part of the group that drove to the Firehouse in a second car. Wallace's testimony on this point is far from definitive.[3]

The Department also points out that, in any case, the testimony could not come in as an exception to the hearsay rule under Evidence Code section 1235 because it was not "offered in compliance with Section 770." Section 770 of the Evidence Code provides:

> Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:
> (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or
> (b) The witness has not been excused from giving further testimony in the action.

Appellant did not give Wright "an opportunity to explain or to deny the statement" while cross-examining her, and Wright was excused as a witness after her testimony almost four months before Wallace testified, leaving no opportunity to question her on the subject.

Appellant also states that Wright's statement to Wallace qualified as an Evidence Code exception to the hearsay rule as a spontaneous statement. While there is such an exception in Evidence Code section 1240, this was not argued at the hearing, no

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[3]Wallace's testimony on this point, even though guided by appellant's attorney, is just as likely to mean that the girl drove to the Firehouse as part of the larger group as it is to mean that she actually arrived in the car that Taryn Miller drove:

> Q: What did she say about that, about how she got to the Firehouse?
> A: That they had drove there.
> Q: "They" meaning?
> A: Her – her and the girl that was passed out. I don't recall that she said anybody else – that she said that her – she was with the girl that had passed out.

specific evidence was elicited to qualify the statement under that code section, and we still don't know if it was Wright who made the statement.

We find no error in the rejection of Wallace's testimony.

V

Appellant contends that newly discovered evidence requires that this case be remanded to the Department for a new hearing. The newly discovered evidence is the arrest of a former Bakersfield police officer, Albert Smith, Jr., on February 11, 2011, "for allegedly participating in sex acts with prostitutes both while he was on and off duty," as reported in the on-line edition of the Bakersfield Californian. (Kotowski, *Officer Arrested on Suspicion . . . .* (Feb. 11, 2011) < http://www.bakersfield.com/news/local/ > [as of May 20, 2011].) Appellant argues that this new evidence is not only relevant, "it completely destroys the credibility of a key witness." (App. Opening Br. at p. 22.) Appellant asks this Board to take official notice of the on-line article reporting the arrest, a copy of which it attaches to its brief as Exhibit 1. In addition, it asks that the record be augmented to include the article "and related evidence." (*Ibid*.)

The Appeals Board may consider "relevant evidence, which, in the exercise of reasonable diligence, could not have been produced . . . at the hearing before the Department" (Bus. & Prof. Code, § 23084, subd. (e)), and may remand the matter to the Department "for reconsideration in light of such evidence." (Bus. & Prof. Code, § 23085.) Rule 198 requires that a request for consideration of newly discovered evidence include information about the evidence, its relevance, witnesses and their expected testimony, and exhibits to be introduced at a new hearing. (4 Cal. Code Regs., § 198.)

The Department argues that the declaration attached to appellant's brief does not provide all the information required. While we agree the declaration submitted is rather vague and general about some of the required information, appellant's contention is deficient primarily because it is not relevant.

Appellant has not shown that the person named in the article is the same Albert Smith who testified at the administrative hearing. Even if that had been established, this is only an arrest, not a conviction. As reprehensible as the charged conduct may be, it would not necessarily affect the witness' credibility in this case. Nothing in Smith's testimony about events in 2009 had anything to do with the charges that may have been brought against him in 2011.

Far from being a "key witness" as appellant alleges, the Department's decision would not have been different had Smith not testified or if his testimony were stricken. We fail to see how this arrest is relevant to Smith's hearing testimony. Appellant has not shown any basis for a new hearing or for augmenting the record.

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, 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.