

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

AB-9610

File: 47-438100 Reg: 16083833

MAS FINA CANTINA, INC.,
dba Mas Fina Cantina
2780 State Street, Carlsbad, CA 92008,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: July 6, 2017
San Francisco, CA

ISSUED JULY 31, 2017

Appearances: *Appellant:* Melissa Gelbart and Donna J. Hooper, of Solomon
Saltsman & Jamieson, as counsel for Mas Fina Cantina, Inc.
Respondent: Jonathan Nguyen as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Mas Fina Cantina, Inc., doing business as Mas Fina Cantina (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 15 days because its clerk sold alcoholic beverages to two non-decoy minors in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on May 15, 2006. On February 18, 2016, the Department filed an accusation charging that appellant's

1. The decision of the Department, dated September 14, 2016, is set forth in the appendix.

bartender, Erin Shustak, sold an alcoholic beverage to Cesar Montoya and Isai Gutierrez, both 20 years old, on November 20, 2015.

At the administrative hearing held on June 1, 2016, documentary evidence was received and testimony concerning the sale was presented by the minors, Cesar Montoya and Isai Gutierrez; by Agent Tony Lee of the Department of Alcoholic Beverage Control; and by Christopher Vance, a criminalist with the San Diego Sheriff's Department Regional Crime Laboratory. Appellant presented no witnesses.

Testimony established that on the date of the violation, Agents Lee and McIntire went to the licensed premises in an undercover capacity. While they were present, Agent Lee observed two males enter the premises and sit at a table. Lee observed the two males to be youthful in appearance. They were later identified as Gutierrez and Montoya.

Gutierrez and Montoya were seated about 10 to 15 feet away from Agent Lee. Lee observed a female bartender, later identified as Erin Shustak, approach Gutierrez and Montoya and have a brief conversation with them. Shustak then went behind the fixed bar and poured drinks from a tap into glasses. Lee was not able to see the tap from which the drinks were poured but he did observe that the liquid was dark brown in color and had foam on top. Shustak then served the drinks to Gutierrez and Montoya. At no time did Lee observe either Gutierrez or Montoya produce any identification to Shustak.

Agents Lee and McIntire approached Gutierrez and Montoya and identified themselves as peace officers. Gutierrez and Montoya were asked to produce identification. Neither had any identification. Both Gutierrez and Montoya were searched. No identification was found. They each gave their birthdates using their true

month and day, but used the year 1994. Given that misinformation, Gutierrez and Montoya would have been 21 years old.

Because of their youthful appearance and the fact that neither Gutierrez nor Montoya had any identification, Agent Lee attempted to verify their identity through the California Department of Motor Vehicles by accessing the California Highway Patrol dispatch. This query disclosed that Gutierrez and Montoya gave the true month and day of their birthdays, but that both were born in 1995, not 1994. Gutierrez and Montoya were both 20 years old. Lee confronted Gutierrez and Montoya with this information. Both then admitted to being 20 years old.

Agent Lee obtained samples of the drinks that bartender Shustak served to Gutierrez and Montoya. They were booked into evidence and submitted to the San Diego Sheriff's Department Crime Lab for analysis.

Christopher Vance, a criminalist who has qualified and testified as an expert witness in approximately 80 criminal trials and 50 Department of Motor Vehicle hearings, performed the analysis of the samples obtained by Agent Lee. Both samples were determined to have an alcohol concentration of 5.9%. This is consistent with beer, which is an alcoholic beverage.

Gutierrez testified that he was born on August 23, 1995. He went to the licensed premises with Montoya. Gutierrez said he went to the restroom and when he returned Montoya had a Samuel Adams beer in front of him. Gutierrez then told bartender Shustak that he would also have a Samuel Adams. Gutierrez said that Shustak served him the beer. Shustak never asked Gutierrez for identification. Gutierrez admitted telling Agent Lee that he was born in 1994. Gutierrez testified that he has never possessed a

fake identification. This was the first time he had been at the licensed premises and he did not have any identification with him that day.

Montoya testified that he was born on July 17, 1995. While at the licensed premises with Gutierrez, he ordered a Samuel Adams beer from bartender Shustak. He was not asked for identification, nor was he asked any age-related questions. Shustak served him the Samuel Adams beer. Montoya testified that he had been to the licensed premises on two prior occasions. Both times he was served beer by different servers. He was never asked for identification. He has never possessed fake identification.

Agent Lee interviewed bartender Shustak at the time of the violation. Shustak admitted serving Gutierrez and Montoya Samuel Adams beer. She told Lee that she had identified Montoya a couple weeks before. She never asked Montoya for identification.

After the hearing, the ALJ issued a proposed decision, which determined that the violation charged was proved and no defense was established.

On June 22, 2016, following submission of the proposed decision, the Department's Administrative Hearing Office sent a letter to appellant and to Department counsel offering both parties the opportunity to comment on the proposed decision. That letter stated:

Administrative Records Secretary and Concerned Parties:

Enclosed is the Proposed Decision resulting from the hearing before Department of Alcoholic Beverage Control, Administrative Hearing Office in the above entitled matter.

All concerned parties and their attorneys of record are being sent a copy of this Proposed Decision. All concerned parties and attorneys of record are hereby informed that you may submit comments regarding this Proposed Decision to the Director for consideration prior to any action being taken by the Director. Comments to the Director regarding this Proposed Decision shall be mailed to the Administrative Records Secretary. Additional comments submitted for review by the Director, if

any, must also be submitted to all parties and their attorneys. For the convenience of all concerned, a list of those parties and their addresses is attached.

Pursuant to General Order 2016-02, the Administrative Records Secretary will hold this Proposed Decision until 14 days after the date of this letter. After that the Administrative Records Secretary will submit this Proposed Decision along with any comments received from concerned parties to the Director for consideration.

(Letter from John W. Lewis, Chief Admin. Law Judge, Dept. of Alcoholic Bev. Control, Jun. 22, 2016 [hereinafter "Comment Letter"].) As suggested in the final paragraph, the Comment Letter reflected a comment procedure adopted by the Department pursuant to its General Order 2016-02. (Dept. of Alcoholic Bev. Control, "GO-Ex Part and Decision Review," Gen. Order 2016-02, at § 3, ¶¶ 5-6 (eff. Mar. 1, 2016) [hereinafter "General Order"].)

On July 5, 2016—thirteen days after the date of the Comment Letter—counsel for appellant submitted "Comments to the Director re Proposed Decision," which challenged the legality of the comment procedure itself. The Department submitted no comments.

Ultimately, the Department adopted the proposed decision without changes.

Appellant then filed this appeal contending the Department's comment procedure is contrary to the Legislature's intent, constitutes an underground regulation, and encourages ex parte communications.

DISCUSSION

We recently addressed an identical argument in *7-Eleven, Inc./Gupta* (2017) AB-9583. In that case, we concluded the Department's comment procedure, as outlined in General Order 2016-02, constitutes an unenforceable underground regulation. The comment procedure was identical in this case. We therefore reach the same legal

conclusion here, and refer the parties to *Gupta* for our complete reasoning. (*Id.* at pp. 11-24.)

Furthermore, we find that the sole comment, submitted by appellant, had no effect on the outcome of the case, and therefore, that the comment procedure did not materially undermine appellant's due process rights. (See *id.* at pp. 26-19.)

As we have noted elsewhere, however, the Department's comment procedure creates a minefield of potential due process issues. (See *id.* at p. 29 ["The Department's decision to bypass the rulemaking process deprived it of the opportunity to review public comments that might have alerted it to potential pitfalls in the comment procedure."].) We therefore remind the parties that "we shall remain particularly vigilant in future cases, and will not hesitate to reverse where the Department's improperly adopted comment procedure materially infringes on an appellant's due process rights." (*Id.* at p. 27.)

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

2. 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.