ISSUED AUGUST 27, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

Gythio, Inc. dba Adolph's 525 Water Street Santa Cruz, CA 95060, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6953 File: 47-281324 Reg: 97039625 Administrative Law Judge at the Dept. Hearing: Michael B. Dorais Date and Place of the Appeals Board Hearing: June 3, 1998 Sacramento, CA

Gythio, Inc., doing business as Adolph's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's bartender selling an alcoholic beverage to a 19-year-old police decoy, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Gythio, Inc., appearing through its

[1]The decision of the Department, dated September 18, 1997, is set forth in the appendix.

counsel, Stephen G. Wright, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on June 22, 1993. Thereafter, the Department instituted an accusation against appellant charging that on November 20, 1996, appellant's bartender, Pamela June Peterson, sold an alcoholic beverage (ale) to Jose L. Garcia, a 19-year-old police decoy working with the Santa Cruz County Sheriff's Department.

An administrative hearing was held on July 23, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Santa Cruz County sheriff's deputy Robert McKinley; by the decoy, Jose Garcia; and by appellant's bartender, Pamela Petersen, concerning the circumstances of the sale of the alcoholic beverage to the decoy and the criminal trial arising out of the same transaction.

Subsequent to the hearing, the Department issued its decision which determined that appellant's bartender had sold a glass of Sierra Nevada Pale Ale to Garcia, who was then 19 years old, and ordered that appellant's license be suspended for 15 days. Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: 1) The Department has proceeded in excess of its jurisdiction; 2) the findings are not supported by substantial evidence in light of the whole record; and 3) the penalty is excessive.

DISCUSSION

I

Appellant argues that the Department proceeded in excess of its jurisdiction when the Department objected to the presentation of evidence regarding the not guilty verdict in the criminal case against appellant's bartender and the ALJ accepted the Department's position. The Department relied on the case of Cornell v. Reilly (1954) 127 Cal.App.2d 178, which held that a not guilty verdict in a criminal case is not dispositive of the outcome in an administrative licensing hearing. Appellant argues the facts in Cornell supported the court's decision, but the facts in the present matter do not support application of the same principles. Appellant contends that "The refusal of the ALJ to even consider the outcome to the criminal trial was error and violated due process." (App. Opening Br. at 8.)

Appellant attempts to factually distinguish Cornell v. Reilly with regard to purpose, burden of proof, and the number of acts charged. However, the question at issue here, whether an acquittal in a criminal trial is dispositive of an administrative licensing matter, is discussed separately in Cornell and is not dependent on the facts that appellant attempts to distinguish. The issue here is summarily disposed of in Cornell:

> "The somewhat related argument that Andrews' [the licensee's manager and bartender] acquittal in the criminal action constitutes a conclusive determination, binding in this proceeding, that such offenses had not been committed is equally without merit. Even if appellant had been charged

> criminally and acquitted, such acquittal would be no bar in a disciplinary action based on the same facts looking towards the revocation of a license. Traxler v. Board of Medical Examiners, 135 Cal.App. 37, 26 P.2d 710; Bold v. Board of Medical Examiners, 135 Cal.App. 29, 26 P.2d 707; Saxton v. State Board of Education 137 Cal.App. 167, 29 P.2d 873. Quite clearly, if the principle of res judicata is rejected where the defending party is identical in the two actions it necessarily follows that it is not res judicata when the prior acquittal is of a different party."

We find the analysis of Cornell v. Reilly to be applicable to the matter before us and reject appellant's contention that the ALJ erred in not considering the verdict in the criminal case against appellant's bartender.

II

Appellant contends that the ALJ's findings of credibility are not supported by substantial evidence in light of the whole record. Essentially, appellant contends that the ALJ was arbitrary or biased because "The trial transcript directly impeached" the testimony of deputy McKinley, and "If the trial transcript was in fact reviewed and considered before [the ALJ's proposed] decision was reached it is inconceivable that Deputy McKinley's credibility would not have been mentioned in the written decision." (App. Br. at 9.)

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant matter, the findings are attacked on the ground that

there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellant is really arguing about the ALJ's credibility determinations. The ALJ specifically found the bartender's (Ms. Petersen's) testimony not credible, and believed the testimony of deputy McKinley, while the trial court judge found Ms. Petersen's testimony credible and based his decision of acquittal on that testimony.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) Simply because another judge reached a different credibility decision does not make this ALJ's credibility finding erroneous. This Board will not disturb the reasonable exercise of the ALJ's discretion.

III

Appellant argues that the decision was not supported by the findings in that the penalty imposed, a 15-day suspension, ignored the evidence in mitigation.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].)

However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

In Finding VIII - Penalty Consideration, the ALJ expresses concern about the difference in "standard" penalties in sale-to-minor cases depending on whether or not a decoy is involved. In cases not involving decoys, he notes, the Department's standard penalty has been 15 days; in those involving decoys, the penalty has been 10 days. The Department recommended 10 days in this case, which did involve a decoy. The ALJ continued:

> "In light of these considerations it is appropriate that absent evidence of mitigation or aggravation, that a single standard penalty be applied in decoy and non-decoy cases.
>
> "No finding of either mitigation or aggravation is warranted in this case.
>
> "Due to the serious nature of the violation, the stronger penalty is more appropriate if one or the other of the two current standard penalties is to become the norm."

The ALJ then ordered a 15-day suspension, which the Department adopted.

Appellant has listed the "evidence in mitigation" in the record, although no reference is made to the location of this evidence in the record. It is difficult to see how most of the items listed constitute mitigation. Several of them are simply basic responsibilities under the law, such as "Ms. Petersen was aware of her duty not to sell alcohol to minors" (App. Reply Br. at 7); others are general, unsupported statements about the decoy program in Santa Cruz County, with no specific

relationship to the violation in this case:

> "Santa Cruz County in 1996 was subjected to an unprecedented effort by law enforcement in the use of minor decoys. In 1996 Santa Cruz County made more attempts and had more violations than the grant recipients of San Jose, Sacramento County, Alameda County, Fresno anc Los Angeles County combined." (Emphasis in original.) (App. Opening Br. at 11.)

While a few of the items might be considered as mitigating circumstances, notably the lack of any previous violations, we still cannot say that there is any significant evidence in mitigation, and, as pointed out by the Department, there are a number of factors that justify the penalty imposed, such as the failure of the bartender to carefully examine the identification or to request additional identification when she was "troubled" by the youthful appearance of the decoy. (Dept. Br. at 10.) We cannot say that imposition of a 15-day suspension is an abuse of the Department's discretion in this case.

CONCLUSION

The decision of the Department is affirmed.[2]

RAY T. BLAIR, JR., CHAIRMAN
BEN DAVIDIAN, MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

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