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

AB-8012
File: 47-369433 Reg: 01051937

CMPB FRIENDS, INC. dba Garfield Sports Bar & Grill
14123-1/2 Garfield Avenue, Paramount, CA 90723,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: April 3, 2003
Los Angeles, CA

ISSUED MAY 22, 2003

CMPB Friends, Inc., doing business as Garfield Sports Bar & Grill (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days, for its bartender having sold alcoholic beverages to a minor, and having furnished one of those alcoholic beverages to a second minor, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant CMPB Friends, Inc., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on December 14, 2000. Thereafter, the Department instituted an accusation against appellant

[1]The decision of the Department, dated July 25, 2002, is set forth in the appendix.

charging a violation of Business and Professions Code section 25658, subdivision (a).

An administrative hearing was held on February 26, May 23, and July 3, 2002, at which time oral and documentary evidence was received. Jose Arais and Stuart Tuafa, both minor decoys, testified, as did Patricia Boggs, the president of appellant, and Michele Summers, its bartender.

Arias was 17 years of age at the time of the incident. He testified that he ordered two Coronas from the bartender, and that Tuafa did not say anything to her. Tuafa, who was 18 years of age at the time, testified however, that he also said "two Coronas" when the bartender asked for their order. Each was served with a bottle of Corona beer. Both testified they were not asked for identification. Arias testified that he was asked to identify the seller, and did so by pointing to her from about ten feet away. He said that Tuafa was not asked to make an identification. Tuafa, however, testified that he was also asked to identify the bartender, and did so by pointing to her while she was across the bar from him. Both acknowledged having been able to make purchases at other establishments. Arias made purchases at three of five on-sale premises, and three of 14 off-sale premises. Tuafa made purchases at two of five on-sale premises and two of 16 off-sale premises.

Boggs testified that this was the bartender's first day on the job. However, Summers had worked for Boggs in another establishment, and was familiar with the prohibitions on sales to minors.

Summers testified that her attention was focused on two teenagers sitting in the bar area, and she did not pay enough attention to what she was doing when she made the sale.

Subsequent to the hearing, the Department issued its decision which determined

that appellant was guilty of two counts of violating section 25658, subdivision (a). Summers had sold two beers to Arias (count 1), and furnished one of those beers to Tuafa (count 2). The Department ordered a 15-day suspension.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) The decision is not supported by the findings and the findings are not supported by the evidence; (2) the Department was guilty of gross misconduct; and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends that the decision is not supported by the findings and the findings are not supported by substantial evidence.

“Substantial evidence" is relevant evidence which reasonable minds would accept as a 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] and *Toyota Motor Sales U.S.A., 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].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) Where there are

conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *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 [40 Cal.Rptr. 666].)

Appellant's attack on the sufficiency of the evidence is best described as scattershot, and, to a large extent, dependent upon its erroneous reading of the record.

For example, appellant asserts, contrary to the evidence, that Tuafa never ordered an alcoholic beverage from the bartender, none was delivered to him by the bartender, and he never identified her as a person who served him an alcoholic beverage.

Tuafa testified that both he and Arias said "two Coronas" when the bartender asked for their order [RT 30]. Both he and Arias testified that the beer was placed on the bar in front of them [RT 12, 30-31]:

Arias: Q. Did she place them on the bar in front of you?

A. Yes.

Q. She placed one in front of you and one in front of Stuart?

A. Yes.

Tuafa: Q. And what did she do with the drinks?

A. She just gave it to us.

Q. Placed them on the bar in front of you?

A. Yes.

...

Q. All right. She placed one in front of you, sir?

A. Yes, sir.

Q. And what did she do with the other one?

A. She placed the other one in front of Arias.

Further, Tuafa testified that he was asked to point out the person who had sold the beer, and he did so. [RT 31-32.]

Appellant also argues that there was no evidence that what was sold to Arias was an alcoholic beverage. This argument totally ignores the fact that what was ordered and served was Corona, a well-known brand of beer (see Exhibits 2 and 3).[2]

Finally, appellant suggests that the decoys did not have the appearance of persons under 21 years of age. As proof, appellant points to Arias having made purchases in three of five on-sale premises, and Tuafa having made two purchases in five on-sale premises. Offsetting this, and not mentioned by appellant is the fact that Arias made only three purchases in 14 visits to off-sale premises, while Tuafa made only two purchases in 16 visits to off-sale premises.

The ALJ addressed the issue of the decoys' appearances, and found that each displayed the appearance which could generally be expected of a person under 21 years of age. Appellant has offered no persuasive reason for the Board to substitute its judgment for that of the ALJ, who saw both decoys in the flesh, while all the Board has

[2] The bartender conceded that she had served beer to the minors. [RT 20.]

is a photograph and appellant's less-than-objective opinion.

We are satisfied that there is sufficient support in the record for the findings and the decision.

II

Appellant premises its argument that there was misconduct and entrapment by the Department on its assumption that there was a violation of Rule 141.

As the discussion in part I indicates, we are of the view that there was no violation of Rule 141.

Although appellant has cited a number of cases addressing the issues of police misconduct and entrapment, it has offered no coherent discussion of facts which might support either of the two theories. Consequently, no useful purpose would be served by addressing the cases cited by appellant.

Similarly, appellant's reliance on *People v. Hitch* (1974) 12 Cal.3d 641 [117 Cal.Rptr. 9], in support of its argument that the Department's failure to retain the Corona beer, is misplaced. Failure to retain evidence may, in certain instances, result in the exclusion of reference to that evidence. (*People v. Hitch*, supra; see also *People v. Nation* (1980) 26 Cal.3d 169 [161 Cal.Rptr. 299].) However, the cases cited are criminal proceedings, and the rationale of those cases has never been held applicable to administrative hearings. (See Gov. Code, §11513, subd. (c); *Woodland Hills Onion* AB-4791 (1981).)

III

Appellant contends that the 15-day suspension is excessive, out of all proportion to the offense, and "extraordinarily disproportionate," such that it constitutes cruel and

unusual punishment.

It is difficult to believe appellant is serious in its characterization of the suspension.

As the decision notes, "Considering that Respondent is guilty of two counts of violating Business and Professions Code Section 25658(a), the Department's recommended penalty of a fifteen-day suspension of Respondent's license is lenient."

The Department routinely imposes a 15-day suspension for an initial violation of section 25658, subdivision (a). We are inclined to agree with the ALJ that the Department's recommendation was lenient. It was certainly not excessive.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

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