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

AB-8367
File: 47/58-302120 Reg: 03056331

FORTY NINER SHOPS, INC. dba The Nugget
1250 Bellflower Boulevard , Long Beach, CA 90815,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: August 4, 2005
Los Angeles, CA

ISSUED OCTOBER 12, 2005

Forty Niner Shops, Inc., doing business as The Nugget (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for its employees at a catering event having served beer to and permitted consumption by La Shawna Carter, a 19-year-old non-decoy minor, a violation of Business and Professions Code sections 25658, subdivisions (a) and (b),[2]

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[1]The decision of the Department, dated December 9, 2004, is set forth in the appendix.

[2] Business and Professions Code section 25658, subdivisions (a) and (b), provide:

> (a) Except as otherwise provided in subdivision (c), every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
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> (b) Any person under the age of 21 years who purchases any alcoholic beverage, or any person under the age of 21 years who consumes any alcoholic beverage in any on-sale premises, is guilty of a misdemeanor.

and 23399, subdivision (d),[3] in conjunction with Business and Professions Code section 24200, subdivision (b).

Appearances on appeal include appellant Forty Niner Shops, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on March 10, 1995.

On November 25, 2003, the Department filed a two-count accusation, charging the sale of beer to, and the permitting of consumption thereof by La Shawna Carter ("Carter"), a 19-year-old minor. An administrative hearing was held on June 30 and November 2, 2004, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of Carter and Victoria Brown, a Department investigator. Roman Gulon and Clint Carpenter testified on behalf of appellant.

On July 11, 2003, appellant operated a beer garden near an outdoor concert held on the California State University Long Beach campus, pursuant to a one-day

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[3] Section 23399 authorizes the issuance of a caterer's permit to a holder of an on-sale license. Such a permit authorizes the sale of alcoholic beverages at an event located any place in the state approved by the Department. Subdivision (d) thereof provides:

> At all approved events, the licensee may exercise only those privileges authorized by the licensee's license and shall comply with all provisions of the act pertaining to the conduct of on-sale premises and violation of those provisions may be ground for suspension or revocation of the licensee's license or permit, or both, as though the violation occurred on licensed premises.

caterer's permit. The concert was sponsored by the campus' Associated Students. The beer garden was to serve as a rest area for parents of persons attending the concert. Security guards hired by the Associated Students were on duty to check the identification of those entering the beer garden to verify they were at least 21 years of age. The event drew a much larger crowd than anticipated, resulting in long lines of people waiting to enter the beer garden, and long delays in the identification process. Paper wrist bands were given to those over the age of 21.

Victoria Brown, a Department investigator, testified that she entered the beer garden, purchased tickets to be exchanged for beer, and obtained a beer from the beer truck. While there, she observed Carter holding a glass of beer and sipping from it. Brown confronted Carter and asked her how old she was. Carter said she was 22. When Brown told Carter she would have to verify her age, Carter admitted she was 19.

Carter testified that she was given a wrist band by an unidentified security guard without having shown any identification, even though friends who were with her had displayed identification to the security guard. While wearing the wrist band, Carter purchased four tickets redeemable for beer, gave two to a friend, and redeemed one of the tickets for a glass of beer. She testified that she may have taken one sip of the beer before being confronted by a Department investigator. She identified two security guards to the investigator, one or the other of whom had given her the wrist band.

Roman Gulon, general manager and chief executive officer of appellant described the services appellant supplies to the Long Beach campus and its students. Clint Campbell testified that he is the person responsible for overseeing the retail operations of appellant, including catering. Campbell described the July 11 event, and explained that a private security service had the responsibility for checking identification

of those seeking to enter the beer garden area. He also described remedial measures taken by appellant following the incident.

Subsequent to the hearing, the Department issued its decision which determined that the violations had occurred as alleged, and ordered the suspension from which this timely appeal has been taken.

In its appeal, appellant raises the following issues: (1) appellant was denied due process as a result of an ex parte communication to the Department's decision maker; and (2) the decision is not supported by substantial evidence.

DISCUSSION

Appellant asserts the Department violated its right to procedural due process when the attorney representing the Department at the hearing before the administrative law judge (ALJ) provided a document called a Report of Hearing (the report) to the Department's decision maker (or the decision maker's advisor) after the hearing, but before the Department issued its decision. The Appeals Board discussed this issue at some length, and reversed the Department's decisions, in three appeals in which the appellantsalleged due process violations virtually identical to the issues raised in the present case: *Quintanar* (AB-8099), *KV Mart* (AB-8121), and *Kim* (AB-8148), all issued in August 2004 (referred to in this decision collectively as "*Quintanar*" or "the *Quintanar* cases").[4]

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[4] The Department filed petitions for review with the Second District Court of Appeal in each of these cases. The cases were consolidated and the court affirmed the Board's decisions. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. The cases are now pending in the California Supreme Court and, pursuant to Rule of Court 976, are not citable. *(Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615, review granted July 13, 2005, S133331.)

The Board held that the Department violated due process by not separating and screening the prosecuting attorneys from any Department attorney, such as the chief counsel, who acted as the decision maker or advisor to the decision maker. A specific instance of the due process violation occurs when the Department's prosecuting attorney acts as an advisor to the Department's decision maker by providing the report before the Department's decision is made.

The Board's decision that a due process violation occurred was based primarily on appellate court decisions in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 [5 Cal.Rptr.2d 196] (*Howitt*) and *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 [133 Cal.Rptr.2d 234], which held that overlapping, or "conflating," the roles of advocate and decision maker violates due process by depriving a litigant of his or her right to an objective and unbiased decision maker, or at the very least, creating "the substantial risk that the advice given to the decision maker, 'perhaps unconsciously' . . . will be skewed." (*Howitt*, *supra*, at p. 1585.)

Although the legal issue in the present appeal is the same as that in the *Quintanar* cases, there is a factual difference that we believe requires a different result. In each of the three cases involved in *Quintanar*, the ALJ had submitted a proposed decision to the Department that dismissed the accusation. In each case, the Department rejected the ALJ's proposed decision and issued its own decision with new findings and determinations, imposing suspensions in all three cases. In the present appeal, however, the Department adopted the proposed decision of the ALJ in its entirety, without additions or changes.

Where, as here, there has been no change in the proposed decision of the ALJ,

we cannot say, without more, that there has been a violation of due process. Any communication between the advocate and the advisor or the decision maker after the hearing did not affect the due process accorded appellant at the hearing. Appellant has not alleged that the proposed decision of the ALJ, which the Department adopted as its own, was affected by any post-hearing occurrence. If the ALJ was an impartial adjudicator (and appellant has not argued to the contrary), and it was the ALJ's decision alone that determined whether the accusation would be sustained and what discipline, if any, should be imposed upon appellant, it appears to us that appellant received the process that was due it in this administrative proceeding. Under these circumstances, and with the potential of an inordinate number of cases in which this due process argument could possibly be asserted, this Board cannot expand the holding in *Quintanar* beyond its own factual situation.

II

Appellant contends that the Department, because it was unable to identify either the person who served Carter the beer, or the security guard who supplied her with the wristband, failed to satisfy its burden of proof. Appellant suggests that someone not working on behalf of appellant could have given Carter the beer, and that she may have obtained the wristband from someone other than a security guard. Appellant argues that because Carter was not asked to identify who served her the beer, and because her identification of the security guard who supplied her the wristband was less than certain, the Department's decision is not supported by substantial evidence. Additionally, appellant claims that Carter's identification of the security guard was unduly suggestive, and that there is no evidence Carter consumed any beer.

"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, 51 [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 argues that the inability of the Department to identify the person who served Carter the beer amounts to a failure of proof of violation of section 25658, subdivision (a).[5]

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[5] Unless otherwise noted, all statutory references are to the Business and Professions Code,

Carter testified that she purchased tickets to be redeemed for beer. She was unaware of any other purpose for the tickets. She testified that she went to the area where the beer was located, and redeemed one of the tickets for a plastic glass of beer. She described the transaction as a purchase, and testified that she thought the beer was obtained from kegs.

We think the combination of circumstances - an area where the beer was located, the exchange of a ticket for beer, and appellant as the entity operating the beer concession - compels the conclusion that Carter was served beer by one whose conduct would be charged to appellant. The likelihood of an unauthorized person having access to the beer supply and being in a position to trade beer for tickets strikes us as extremely remote.

Appellant also argues that the evidence does not support a violation of section 25658, subdivision (b), i.e., consumption by Carter. Appellant cites Carter's testimony that she did not believe she had taken "even one sip," and argues that investigator Brown was watching from "afar," so could not have actually seen beer go into Carter's mouth. Thus, says appellant, the Department failed to prove that appellant caused or permitted consumption of an alcoholic beverage.

The record does not indicate how far apart Brown and Carter were. Brown testified she saw Carter consume "several times." Asked if she had consumed part of the drink, Carter testified "If anything I may have taken one sip, but I don't even think I did that." The ALJ apparently chose to accept Brown's testimony about what she had observed over Carter's somewhat less than positive denial of having consumed any of the beer.

While it is certainly true that there are gaps in the evidence, as well as

contradictions, we are satisfied that the Department has proved its case. Carter's testimony about how she obtained the beer persuades us that it was served to her by one whose conduct would be imputed to appellant, and Brown's testimony that she observed Carter sipping several times is enough to support the inference that beer was consumed.

Appellant suggests Carter may have gained entrance to the beer garden through the use of false identification. She had no identification on her person when apprehended. Even if we were to assume that Carter used false identification, without proof of what it was appellant cannot meet the requirements of Business and Professions Code section 25660 that such identification be issued by a governmental entity and reliance upon it be reasonable.

ORDER

The decision of the Department is affirmed.[6]

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

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[6] 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.