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

AB-8393
File: 47-350965 Reg: 04057851

INLAND PACIFIC INVESTMENTS, LLC, dba Carlos O'Brien's
440 West Court Street, San Bernardino, CA 92401,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: December 1, 2005
Los Angeles, CA

ISSUED: JANUARY 30, 2006

Inland Pacific Investments, LLC, doing business as Carlos O'Brien's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its employee 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 Inland Pacific Investments, LLC, appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated January 27, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on November 20, 2000. On August 20, 2004, the Department filed an accusation against appellant charging that on April 22, 2004, appellant's bartender, Victor Garcia, furnished tequila, an alcoholic beverage, to 19-year-old Maria Moran (the "minor").

At the administrative hearing held on November 17, 2004, documentary evidence was received and testimony concerning the violation charged was presented by the minor, Moran; by San Bernardino police officer Reuben Cordoba; and by the bartender, Garcia.

Moran testified that she entered the premises with Christina Corrales. Wristbands were given out to patrons who were at least 21, but neither Moran nor Corrales received a wristband. Moran was wearing a sleeveless dress, so her lack of a wristband was obvious. Inside, while Moran and Corrales were standing near the bar, a friend of Corrales ordered two shots of tequila from the bartender. Moran saw the two glasses on the counter, picked one up, and drank it. She said she did not see who poured the tequila or put it on the counter.

The bartender testified that he poured two shots of tequila for a young woman wearing a wristband and set them on the bar counter. After being paid for the drinks and making change, he went on with his work. He did not see Moran drink the tequila.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been established. Appellant filed a timely appeal contending that the findings do not support the determination that the bartender furnished an alcoholic beverage to the minor.

DISCUSSION

Appellant contends that no evidence exists in the record from which it can be concluded that the bartender furnished an alcoholic beverage to the minor. Rather, appellant asserts, the evidence shows that the minor "suddenly and without warning 'grabbed' a shot [of tequila] placed in front of another person." (App. Br. at p. 7.) Appellant argues that to "furnish" an alcoholic beverage in violation of Business and Professions Code 25658, subdivision (a), there must be an affirmative act of furnishing, that "[m]ere nonfeasance" does not violate the statute, citing the case of *Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141 [221 Cal.Rptr. 675].

The pertinent facts, as found by the ALJ, are as follows (Findings of Fact [FF] 5-9, 11, 12, 15):

> 5. On April 22, 2004, Moran and her friend, Christina Corrales [Corrales], entered Respondent's Licensed Premises sometime around 11:30 p.m. Upon entry, Moran . . . was not given a wristband of any sort. It should have been obvious to anyone with interest that Moran was not wearing a wristband, since she wore a dress with shoulder straps and no sleeves.
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> 6. After a short while, Moran and Corrales were part of a group of four or more persons standing near a fixed bar counter on the ground floor of Respondent's night club. In the group, in addition to Moran and Corrales, was a female friend of Corrales and a male who was identified by San Bernardino Police Officers as Carlos Barrera [Barrera].
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> 7. . . . . The third female was wearing a white wristband, but was never identified.
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> 8. White wristbands were given upon entry to persons who satisfied Respondent's door people that they were 21 years of age or over.
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> 9. The third female ordered two tequila shots from Respondent's on-duty bartender, Victor Garcia [Garcia]. . . . Garcia poured a shot into each of two plastic cups, using a bottle of the well tequila, Tres Reyes. The person who ordered the tequila shots gave Garcia a $20 bill and Garcia went to the cash register and made change. He returned the change to the female and noticed that the two shots of tequila were still sitting on the bar counter. Garcia then went on about his business and paid no attention to the disposition of the tequila. [¶] . . .[¶]

> 11. Moran reached out and grabbed one of the two cups holding the tequila. She drank all or most all of it and then grabbed a slice of lime from a cup or container on the bar holding lime wedges. Moran took a bite of the lime and discarded the lime into the nearby empty cup that had held the tequila.
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> 12. It was not established that bartender Garcia saw Moran drink the tequila. What happened to the second cup of tequila was not established. [¶] . . .[¶]
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> 15. Both Moran and Garcia denied that Garcia had served the tequila drink to her.

The ALJ addressed appellant's argument that the violation was not established by the evidence in Conclusion of Law 6:

> 6. Respondent argued the violation alleged had not been established by the evidence. It focused on the evidence concerning [Oscar] Barrera and argued it had not been established that that night Barrera was an agent or employee of Respondent. Respondent focused attention on the evidence given in Exhibit A and in her hearing testimony by the minor, Moran, and argued that she was most believable. In this there is agreement. Nevertheless, Moran's testimony does not absolve Respondent of liability. When the nightclub lawfully permits underage persons to mingle with those 21 years of age and over long after dinner time in a nightclub environment, it cannot blind itself of its responsibility to ensure that underage persons do not consume alcoholic beverages. The evidence clearly showed that a single female with a wristband ordered and was served two cups of tequila. Bartender Garcia never found out for whom the second cup was intended. It is not enough for him to pour the two drinks, take payment and walk away. He must ensure that the two drinks both go to someone who may lawfully buy and consume them. In this he failed completely.

Appellant is arguing, essentially, that there is not substantial evidence to support the conclusion that the bartender furnished an alcoholic beverage to the minor. "Substantial evidence" is relevant evidence which reasonable minds would accept as 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]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the

Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].)

In *Sagadin v. Ripper*, *supra*, a father was found liable for furnishing alcohol to underage party-goers later injured in a motor vehicle crash on the basis of his statement to his son, who was hosting a party for friends, that he expected any of his own beer consumed at the party to be replaced. The court held that the jury could have reasonably drawn an inference that this authorized the son to furnish beer to the guests, thus constituting the requisite affirmative act as a matter of law.

Appellant argues that there can be no furnishing in this case because the bartender did no affirmative act of actually serving an alcoholic beverage to Moran. The bartender, according to appellant, did no more than acquiesce in Moran obtaining an alcoholic beverage: Moran did not order an alcoholic beverage from the bartender; the bartender did not serve any alcoholic beverage to Moran; and the bartender did not charge Moran for the alcoholic beverage.

The Board has considered similar contentions before. In *Acapulco Restaurants, Inc*. (1997) AB-6794, a friend of 20-year-old Alison Hawthorne purchased two mixed drinks at the bar from the bartender and brought them back to the table, where Hawthorne drank from one of them. Acapulco argued that the bartender did not furnish the alcoholic beverage to Hawthorne because he performed no affirmative act of furnishing to her which *Sagadin v. Ripper, supra,* held was essential in order to find furnishing. The Appeals Board rejected that argument, saying: "Given that a patron . . . was purchasing two drinks, the bartender's failure to make any attempt to check whether the intended recipient of the second drink was of legal age, and permitting the drinks to leave the bar without having done so, is sufficiently affirmative in nature as to satisfy any such requirement which may be read into the statute."

More recently, the Board considered whether a bartender furnished an alcoholic beverage to a minor in *1979 Union Street Corporation* (2003) AB-8047. In that case, 18-year-old Elizabeth Osborn was seen drinking one of the two "purple hooters" her friend had ordered from the bartender. The bartender also prepared the same drinks for himself and a friend of his at the bar, making four mixed drinks altogether. The bartender (Braccini), his friend, and Osborn's friend drank three of the drinks. The bartender said he did not know what happened to the other drink, which he said was still on the bar when he walked away to serve other customers, and he denied seeing or serving Osborn that night. The Board rejected this argument:

> It is true, as appellant observes, that there is no finding or evidence that the bartender served Osborn a drink he had prepared for her. However, appellant cites no authority for its contention that this is required for establishing that a violation occurred, and we do not believe the statute's application is so restricted.
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> Section 25658, subdivision (a), provides that "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." While the evidence here does not support a charge of selling an alcoholic beverage to Osborn, it seems clear that Braccini either furnished, or at the very least, caused to be furnished, an alcoholic beverage, in the form of a purple hooter, to Osborn.

"Furnish" means to provide or supply. Braccini poured purple hooters into shot glasses and Osborn consumed one of them. Whether or not Braccini intended, when he prepared the drinks, for Osborn to drink one of them, is irrelevant. He mixed it, put it in a glass, and it somehow got into Osborn's hand so she could drink it while standing there at the bar. Whether Braccini handed it to her directly, gave it to Barnecut who then gave it to Osborn, or simply set it on the bar counter where Osborn could pick it up, he furnished, provided, or supplied the drink to Osborn. [Fn. Omitted.]

Although the facts are not exactly the same in the present appeal, we believe the two appeals just referred to provide appropriate guidance for deciding this appeal. Appellant takes a risk by admitting people under the age of 21 into what is essentially a nightclub, creating circumstances that are ripe for minors to gain access to alcoholic beverages. Having created that risk, appellant cannot simply shrug and ignore it, but must bear the responsibility to see that it does not sell or furnish alcoholic beverages to minors.

ORDER

The decision of the Department is affirmed.[2]

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

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[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.