

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

AB-8756

File: 48-382898 Reg: 06064619

KENNETH M. FOLEY, dba Red Brick Saloon
6 North Main Street, San Andreas, CA 95249,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: October 2, 2008
San Francisco, CA

ISSUED JANUARY 15, 2009

Kenneth M. Foley, doing business as Red Brick Saloon (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 10 days for having permitted a person under the age of 21 to enter and remain in the licensed premises without lawful business therein, a violation of Business and Professions Code section 25665.

Appearances on appeal include appellant Kenneth M. Foley, representing himself, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on April 19,

¹The decision of the Department, dated October 4, 2007, is set forth in the appendix.

2002. Thereafter, the Department instituted an accusation against appellant charging that he permitted a minor to remain in the premises without lawful business therein. An administrative hearing was held on August 29, 2007, at which time documentary evidence was received and testimony concerning the violation charged was presented by Blake Aaron, the minor, and Justin Cuto, a Calaveras County Deputy Sheriff. Mandy Garcia, appellant's bartender, testified on behalf of appellant. The ALJ concluded, from sharply conflicting evidence, that Aaron was present in the bar for a sufficient period of time for appellant's bartender to know or to reasonably have become aware of his presence and taken action to have him removed.

Appellant has filed a timely appeal, making the following contentions: (1) the testimony of the minor was not credible; (2) the licensee was diligent; (3) the licensee lacked actual or constructive knowledge that the minor was on the premises, so did not permit him to enter and remain. These contentions are interrelated and will be treated as a single issue.

DISCUSSION

A person under the age of 21 who, without lawful business therein, enters and remains in a premises holding an on-sale general public premises license, is guilty of a misdemeanor, as is the holder of such a license who permits that person to do so. (Bus. & Prof. Code, §25665.) Appellant claims in this appeal that his bartender had no way of knowing that Aaron was in the bar, and that he must have entered while she had been drawn away from the premises by police following up on a complaint she had filed with them earlier that evening. There had been an altercation involving a patron who had been ejected from the bar after trying to exit the bar with a pitcher of beer, and then returned and threatened to shoot the bartender. The patron was later arrested near the

bar, and the police removed the bartender from the bar in order to identify him.² Thus, appellant claims, she could not have known that Aaron had entered or remained in the bar, and he incurred no imputed liability under section 25665.

Aaron testified on direct examination that he was in the Red Brick Saloon for "a couple of hours" on the night in question, and had two or three beers while he was there. The bartender who was there did not ask him for any identification.

On cross-examination, Aaron admitted he was trying to make himself less noticeable, so that he would not be "carded for an ID." He admitted signing a declaration (Exhibit B) in which he stated he was allowed entry by a bouncer, but said he did not remember any bouncer. He denied he was lying in the declaration. Aaron admitted he was on probation after having been convicted for stealing alcohol. He also admitted having been in the premises on an earlier occasion, for lunch, but denied having any beer or other alcoholic beverage at that time.

He identified Mandy Garcia, who was present at the hearing, as the person who was the bartender that night, but said he had not gone to the bar to buy beer from her. Instead, his buddy, Mike, bought the beer and gave it to him. He knew Heather Camisa, the police officer who identified him that night, from trouble he had been in before. He was sitting on a bar stool when Camisa confronted him, and did not know if the bartender was in the bar at that moment.

² Calaveras County Sheriff's Deputy Justin Cuto testified that the patron, Josh Marlar, had been accused by the bartender of having threatened to shoot her. According to Cuto, Marlar was apprehended about ten to fifteen yards from the Red Brick Saloon. Cuto estimated the bartender was away from the premises ten to twenty minutes while in the process of identifying Marlar as the person who threatened her. It was when they returned to the bar that Cuto's partner, Camisa, saw Aaron sitting at the bar.

Aaron further admitted on cross-examination that he stated in his declaration that he had consumed two alcoholic beverages, one of which was still in his possession when he was apprehended. He further claimed he was aware police were in the bar, but decided to remain despite that.

On re-direct examination, Aaron claimed he had been sitting at the bar ten to twenty minutes, drinking from his second beer, when the bartender was taken out by the police. He had earlier been playing shuffleboard, and was trying not to be noticed. In further testimony, Aaron said that the beer he was drinking had been purchased by his buddy while the two were playing shuffleboard, and he had the beer with him when he moved to the bar.

Upon questioning by the administrative law judge (ALJ), Aaron said he arrived at the bar at approximately 8:00 p.m., and had his first beer about an hour later. Aaron was apprehended at 12:15 a.m., indicating he had been in the bar four hours.

Mandy Garcia, the bartender, testified that she never saw Aaron in the bar. She denied the premises had a bouncer, and said it was her responsibility to see who came into the bar. She insisted that if Aaron had been sitting at the bar where he claimed he had been sitting, she would have seen him. She said she never saw Aaron any time that evening.

The ALJ's Findings of Fact (FF) leave no doubt that he chose to believe enough of Aaron's testimony to satisfy himself that Aaron had been in the bar long enough to have been noticed had the bartender been vigilant in the performance of her duty to maintain a lawful establishment (FF II - V):

FF II: On July 9, 2006, Blake Aaron, who was then twenty years old, entered Respondent's bar and remained there for between two to four hours. (Mr. Aaron was not specific regarding how long he was at Respondent's bar.) While in the

bar, he consumed two or three beers, which a friend bought for him from Respondent's bartender. He stayed at the bar until approximately midnight, when he was arrested by a Calaveras County deputy sheriff for being "drunk in public".

FF III: On July 9, Mr. Aaron was on probation. He also was on probation in 2005 after being convicted, based on his guilty plea, of theft.

FF IV: One bartender was working at Respondent's bar on the evening of July 9. At or about 11:30 p.m., for reasons not connected to this case, deputy sheriffs escorted the bartender away from the bar for approximately twenty minutes. During those twenty minutes, no employee of Respondent's was at the bar.

FF V: Respondent's bartender denied ever seeing Mr. Aaron at the bar.

The conclusions the ALJ drew from these findings are consistent with his credibility determinations. He wrote (Legal Basis for Decision II (LBD) and Determination of Issues (DI I)):

LBD II: "A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly. Once a licensee knows of a particular violation of the law, that duty becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from recurring, once the licensee knows of it, is to 'permit' by a failure to take preventive action." *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 379.

DI I: A "reasonably possible unlawful activity " at a bar is an underage customer's entry into, and remaining in, the bar. The fact that Mr. Aaron was able to enter Respondent's bar, and remain there long enough to have two or three beers, is evidence that Respondent's bartender was not diligent in anticipation of this unlawful activity. In accordance with the reasoning provided in the Laube decision cited above, Respondent's bartender permitted Mr. Aaron to enter and remain in Respondent's bar without lawful business. This permitting is imputed to Respondent and constitutes cause for suspension of Respondent's license, in accordance with [Business and Professions Code sections 24200, subdivision (b), and 25665].

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but

is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.³

"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].) The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) This Board is not permitted to substitute its

³The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

judgment for that of the ALJ where there is substantial evidence in the record to support his findings, even if contradicted.

Applying these standards, we do not believe it can be said that the ALJ abused his discretion in accepting the testimony of Aaron that he had been in the bar long enough to have consumed two or three beers. His alternative would have been to accept the testimony of the bartender that Aaron somehow slipped into the bar very late in the evening just in time to take advantage of the bartender's twenty-minute absence.

The bartender could well have been testifying truthfully that she never saw Aaron in the bar. Whether she actually saw him is not the test; the test is whether she should have known from the length of time he was in the bar that he was there. Had she been alert and vigilant with respect to the possible presence of a youthful appearing customer, his presence among some twenty or thirty patrons over a lengthy period of time would surely have been discovered.

This case can be contrasted with the factual setting in *Ballesteros v. Alcoholic Beverage Control Appeals Bd.* (1965) 234 Cal.App.2d 694 [44 Cal.Rptr. 633], where an 18-year-old minor, accompanied by her husband and several adults, had been seated at a table in the crowded premises for only ten minutes when discovered by a police officer. Despite that relatively short period of time, the Court of Appeal upheld the charge of a minor unlawfully entering and remaining in the premises, concluding that the bartender had not been diligent in his duty to prevent minors from entering and remaining in the premises.

We can only conclude on the record before us that appellants' contentions must be rejected.

ORDER

The decision of the Department is affirmed.⁴

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

⁴ 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.