

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

AB-8808

File: 47-308977 Reg: 07066680

KIMBERLY KAY WINTER, dba American Bar and Grill
4200 West Century Boulevard, Inglewood, CA 90304,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: December 4, 2008
Los Angeles, CA

ISSUED JUNE 2, 2009

Kimberly Kay Winter, doing business as American Bar and Grill (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended her license for 20 days for allowing the sale of alcoholic beverages in an unlicensed area of the premises on May 4 and May 24, 2007, violations of Business and Professions Code sections 23300 and 23355.

Appearances on appeal include appellant Kimberly Kay Winter, appearing through Frank Martini, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Cottrell.

¹The decision of the Department, dated January 23, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on September 20, 1995. On July 3, 2007, the Department instituted an accusation against appellant charging that her bartender sold alcoholic beverages in an unlicensed area of the premises on May 4 and May 24, 2007.²

At the administrative hearing held on November 30, 2007, documentary evidence was received and testimony concerning the violation charged was presented by Department investigator Raymond Box. Frank Martini, the manager of the licensed premises, testified regarding his understanding of the extent of the licensed premises.

The investigator testified that he purchased alcoholic beverages, beers and a margarita, on the two dates charged in the accusation from a bartender in the pool/patio area of the establishment. The drinks were served from a fixed bar located near the pool. He also testified that the area in which he purchased the alcoholic beverages was not included in the diagram of the licensed premises, and the diagram was entered into evidence as exhibit 1.

Box also testified that expansion of the premises to include the pool/patio area had been applied for at some time before May 2007, but the expansion was not approved as of the date of the hearing.

²This information is taken from the Department's decision. The record compiled by the Department, certified to be "true, correct and complete," does not contain copies of the accusation and the documents that ordinarily accompany it, such as the proof of service. The Department's decision appears to quote count two of the accusation, indicating the date of the second violation as May 4, 2007. We assume this is a clerical error because, based on other information in the hearing transcript and the decision, it appears that the correct date of the second violation was May 24, 2007. We have no knowledge of other errors in the two counts quoted in the decision, nor do we have knowledge of any other provisions in the accusation or accompanying documents. We are assuming, since no one challenged them, that the accusation and the notice of hearing were properly served on appellant, although we have no proof of that.

Martini stated that the area around the pool where the investigator purchased the drinks was part of the licensed premises, and had been since the license was issued, which he said was May 1, 1985. He did not dispute that alcoholic beverages were sold to the investigator from the fixed bar near the pool.

At the close of the hearing, the record was left open for the Department to provide copies of any documents in the licensee's file regarding conditions on the license and diagrams of the licensed premises. The Department sent documents to the administrative law judge (ALJ) and Martini on December 6, 2007. The documents were: Petition for Conditional License (July 25, 1995); ABC 257 Diagram of Licensed Premises (July 26, 1995); ABC 253 Supplemental Diagram (July 26, 1995); Letter to Department from Frank Martini requesting expansion of premises to include lounge and pool area (Feb. 17, 2005); and Letter to appellant from Department (Feb. 24, 2005). These documents were collectively entered into the record as exhibit 3. The record was closed and the case was submitted on December 7, 2007.

Subsequent to the hearing, the Department issued its decision which determined that the violations charged were proved. Appellant filed an appeal contending that the Department did not establish that the area in question was unlicensed.

DISCUSSION

Appellant contends the Department did not prove that the area in which the alcoholic beverages were served was unlicensed. The appeal brief filed by Frank Martini simply reiterates what Martini said at the hearing: that the documents submitted by the Department were false, misleading, and taken out of context; that the license was issued in 1985, not 1995 as stated by the Department; that in 1985 the entire hotel complex, including the guest rooms, the restaurant, the pool area, and the banquet and

meeting rooms, were included in a diagram showing the licensed premises. Martini asserts that the 1995 diagram used by the Department to show the extent of the licensed premises was part of a request to modify the conditions for the main bar.

The Appeals Board is strictly limited in its review of Department decisions:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.App.4th [1250,]1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*

(*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Martini presented no documentary evidence at the hearing to support his allegations. The Department documents may be incomplete, but they are the only documentary evidence in this case.³

The documents in exhibit 1 (ABC 257 diagram [same as in exhibit 3] and description of planned operation), exhibit 2 (prior accusation [Reg. No. 07064813, Nov.

³At oral argument before the Appeals Board, Martini brought a number of documents he said he had found in going through his old files. He asserted the documents showed the original licensing of the premises in 1985. The Appeals Board did not accept the documents, since it is not allowed to review documents other than those included in the administrative record. Appellant had the opportunity to present documentation of his claims at the hearing before the ALJ. He is not entitled to wait until appellate review to present evidence to support his contentions.

30, 2006]), exhibit 3 (Petition for Conditional License, ABC 257, and ABC 253), and appellant's exhibit A (prior accusation [Reg. No. 02053803, Sept. 20, 2002]), either show a license issue date of September 20, 1995, or are license application documents dated in September 1995. No documents indicate licensing before 1995.

The ABC 257 diagrams clearly show the restaurant and kitchen being licensed. The ABC 253 appears to be a pencil sketch indicating the adjacent streets, the parking area, the restaurant and bar, and a box labeled "4200 W Century Bl" and "Hotel," attached to the (much smaller) restaurant. No pool or patio area is indicated.

Appellant has not disputed the fact that alcoholic beverages were sold in the pool/patio area from a fixed bar. The uncontradicted evidence shows that area to be unlicensed. Therefore, the decision of the Department must be affirmed.

ORDER

The decision of the Department is affirmed.⁴

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

⁴This 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.