

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

AB-8816

File: 47-391045 Reg: 06064094

SHANGRI LA HOLLYWOOD, INC., dba Shangri La Restaurant
1716-18 North Vine Street, Los Angeles, CA 90028,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED MARCH 20, 2009

Shangri La Hollywood, Inc., doing business as Shangri La Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its bartender having served an alcoholic beverage to an obviously intoxicated patron, a violation of Business and Professions Code section 25602, subdivision (a).

Appearances on appeal include appellant Shangri La Hollywood, Inc., appearing through its counsel, Rick A. Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general bona fide public eating place license was issued on September 30, 2002. On October 23, 2006, the Department instituted an accusation against appellant charging that its employee, David Schick, sold or furnished an alcoholic beverage (beer) to Tony Perez, an obviously intoxicated person, in violation of Business and Professions Code section 25602, subdivision (a).

An administrative hearing was held on November 14, 2007, at which time documentary evidence was received and testimony concerning the violation charged was presented by Los Angeles police officer Shawn Havican. Myles Leevy, appellant's manager at the time of the incident, Tony Perez, the patron in question, and David Schick all testified on behalf of appellant.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established. In his proposed decision, which the Department adopted without change, the administrative law judge (ALJ) found that although Schick had not been in a position to observe a number of symptoms displayed by Perez, symptoms which had been observed by Officer Havican, he was in a position to observe Perez with his head on the bar counter when he bought the drinks Perez had ordered, and had to state the price more than once to get Perez's attention. Schick was also in a position where he could observe Perez's red watery eyes, drooling, and stumbling. The ALJ concluded that while Schick did not see all of the symptoms of intoxication observed by Officer Havican, enough of the symptoms should have been obvious to Schick who was across the bar from Perez when Perez ordered the drinks.

Appellant filed a timely notice of appeal in which it contends that the evidence

does not support the findings.

DISCUSSION

The thrust of appellant's appeal is that Schick, the bartender, could not reasonably have been aware of the symptoms of intoxication displayed by the patron, Tony Perez, as described by Los Angeles police officer Shawn Havican.

Appellant (App. Br., p.2) and the Department (Finding of Fact 5) agree that the Schick would not reasonably have seen Perez stumbling and bumping into others as he approached the bar, as seen by Officer Havican, because of the crowded condition of the bar. They are in disagreement over whether Schick saw, or reasonably should have seen, other symptoms of intoxication described by the officer: the patron's red, watery, bloodshot eyes, saliva dripping from his mouth while speaking, resting his head on the bar counter as the bartender was getting the drinks he had ordered. The officer also testified that when Schick stated the price of the drinks, he had to do so more than once to capture Perez's attention.

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.

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, 826-827 [40 Cal.Rptr. 666].)

Appellant does not claim Officer Havican was mistaken in his testimony about the symptoms displayed by Perez, only that Schick would not have been in a position where he could see them. This argument flies in the face of the fact that Schick would have been looking at Perez when he took his drink order, and had to see Perez's face when he aroused him to pay for the drinks. We cannot say that the Department erred in concluding that Schick should reasonably have seen Perez's red, watery eyes and his slumping on the bar counter. Indeed, appellant concedes this latter symptom would have been apparent to Schick.

As this discussion shows, appellant is asking the Board to weigh the evidence and reach a conclusion opposite that reached by the Department. The Board may not do this:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends* [(2002)] 100 Cal.App.4th 1250 at 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].)

Appellant's appeal lacks merit.

ORDER

The decision of the Department is affirmed.²

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

² 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.