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

AB-9011
File: 47-132646 Reg: 08069114

STANLEY'S, dba Stanley's Restaurant & Bar
13817 Ventura Boulevard, Sherman Oaks, CA 91423,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 4, 2010
Los Angeles, CA

ISSUED MAY 12, 2010

Stanley's, doing business as Stanley's Restaurant & Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days for its bartender, Kirk Driscoll, having sold a bottle of Coors Lite beer, an alcoholic beverage, to Isaiah Gardner, a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Stanley's, appearing through its counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated March 3, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on February 4, 1983. Thereafter, the Department instituted an accusation against appellant charging the sale, on April 18, 2008, of an alcoholic beverage to a person under the age of 21. An administrative hearing was held on December 23, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented by Isaiah Gardner (the decoy) and Ryan Hourigan, a Los Angeles police officer. Michael Coady, a patron, testified for the defense, as did Gregory Sadofsky, co-owner of the licensee. Gardner testified that the bartender asked for his identification, and was handed Gardner's driver's license. The license (Exhibit 4) contained a blue stripe containing the words "PROVISIONAL UNTIL AGE 18 IN 2006" and a red stripe with the words "AGE 21 IN 2011." Gardner testified that the bartender examined the license, handed the license back to him, and said "Oh, what the hell." Gardner then ordered a Bud Light. In response, the bartender asked Gardner if a Coors Lite would be acceptable. Gardner gave his approval, and the bartender served him a bottle of Coors Lite beer and a glass. Undercover police officers intervened moments later. Michael Coady, a patron, testified that his 45-year-old companion observing the bartender examine Gardner's license volunteered, in obvious jest, "why did you ID him, you didn't ID me." Coady further testified that, although seated only three or four seats from the bartender, he did not hear the bartender say "Oh, what the hell." Gregory Sadofsky described the training provided to appellant's employees, the installation of a "clock" showing the exact date on which a person would be 21, and the suspension of the bartender for a period in excess of two weeks.

Subsequent to the hearing, the Department issued its decision which determined

that the violation had occurred as alleged, and ordered a 10-day suspension.

Appellant filed a timely notice of appeal in which it contends that the administrative law judge (ALJ) based his penalty decision on factors not in evidence.

DISCUSSION

Appellant argues that, in light of its long period of licensure (25 years) and a single sale to minor violation (by the same bartender) during that period, there was no valid basis for the imposition of an aggravated penalty. The penalty was a 10-day suspension.

Appellant argues that the Department lacked a reasonable basis for treating the bartender's statement, which he made after he had examined identification that showed the decoy to be younger than 21, as evidence the violation was intentional.

The Department argued just that, and sought a 20-day suspension, reflecting an additional five days added to the standard penalty of 15 days prescribed in Department Rule 144.

The ALJ's selection of a 10-day suspension no doubt disappointed the Department as it now does appellant, despite its counsel's arguments at the hearing that if any suspension was warranted, which he disputed, it should be 10 days, or 10 days, all stayed.

The ALJ's rationale was as follows (Conclusions of Law 7 and 8):

> CL7: Complainant requested a 20-day, aggravated, suspension, noting that he was not relying on the existence of the almost 10-year-old prior unlawful sale reported above in Findings of Fact, paragraph 3. Instead, Complainant focused on the statement made at the time of the ID check, "Oh, what the hell!" as establishing that the unlawful sale was intentionally made to this under age purchaser. Bartender Driscoll, looking at an ID that made the presenter not 21 years of age until the year 2011 and serving the beer to the decoy anyway along with that statement makes clear that Driscoll knew he was performing an unlawful act. Respondent argued first that based on the Coady testimony that he did not hear

Driscoll make any such statement the statement was not made. There was no reason for Driscoll to make such an intentional sale, since he lost two weeks' pay for that act.[3] Therefore, no basis for aggravation exists. Further, Respondent has been licensed since 1983 (Findings of Fact, ¶ 2) and had only one matter of prior Departmental discipline which occurred nearly 10 years before the within sale. (Findings of Fact, ¶ 3.) Though not argued, the prior discipline resulted in an all-stayed suspension obviously giving mitigation credit at that time for discipline-free service between 1983 and 1998. (*Id*.) Another nearly 10 years has passed, again with no other Department discipline. In addition, Respondent argued, any aggravation shown by Complainant should be overcome by the remedial measures Respondent has taken. All employees were sent to LEAD training and the date-of-birth clock was installed. Respondent suggested that an all-stayed 10-day suspension would be appropriate if any sanction is necessary at all.

[3] How bartender Driscoll would know in advance what such a sale would cost him was not explained.

CL8: The court is not persuaded by either the Coady testimony or the argument of counsel that the Driscoll statement was not made. It was made. (Findings of Fact, ¶ 7.) It was likely an under-the-breath statement made by Kirk Driscoll who was facing away from Coady. It does constitute evidence that Driscoll knew he was making an unlawful sale. On the other hand, Respondent has a meritorious record. Two unlawful sales in a period of over 25 years, though made by the same employee, is worthy of consideration in mitigation. Sending all employees to Department-provided LEAD training after the fact, while not as good as sending them earlier, does add to the mitigation. The court is not sure what benefit the added clock provides since most California identification documents require a seller to make no calculation whatever. If one only reads the document the proper conclusion is made for him. The recommendation that follows should serve to recognize the intentional sale and also to impress upon Respondent to keep up its good work.

The Department's brief comments appropriately upon the absence of any testimony from bartender Driscoll who, for all the evidence suggests, remains employed by appellant. Mr. Coady's testimony that he did not hear the comment is worth little when the absence of the person who is said to have made the statement, and could have denied making it, is unexplained. "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (Evid. Code, § 412.)

Appellant's quibbles with bits and pieces of the findings are unpersuasive. The ALJ's surmise as to why Coady may not have heard the comment, because he likely was facing the wrong direction, is not an essential part of the finding that the statement was made and that it reflected the intention of the bartender to sell beer to a person he believed to be under age. Instead, it could simply have been a way of saying that there could be any number of reasons why Coady would not have heard Driscoll's statement.

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 entire record.

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].) 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 argument is little more than a collateral attack on the finding, an effort to weaken its force by focusing on trivia. As the foregoing authorities teach, a finding is conclusive if there is substantial evidence to support it, and the Department could reasonably infer that the statement was an expression of Driscoll's intent to do something he knew he should not do. The inference that the sale was intentional was reasonable, if not compelling.

It should not be overlooked that the net effect of the Department's order was to mitigate the standard 15-day penalty of Rule 144, in spite of the fact the violation was determined to have been intentional. The Department has a great deal of discretion when it comes to the issue of penalty. We do not believe it abused that discretion in this case.

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 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.