

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

AB-9074

File: 47/58/7-354152 Reg: 09070385

CREST MANAGEMENT, LLC, dba Bar of America
10040-42 Donner Pass Road, Truckee, CA 96161,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: July 1, 2010
San Francisco, CA

ISSUED AUGUST 12, 2010

Crest Management, LLC, doing business as Bar of America (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for seven days for appellant's bartender having sold an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Crest Management, LLC, appearing through its counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Heather Hoganson.

PROCEDURAL HISTORY

Appellant's type 47 on-sale general public eating place license was issued on July 23, 1999. On January 28, 2009, the Department filed an accusation against

¹The decision of the Department, dated October 5, 2009, is set forth in the appendix.

appellant charging that appellant's bartender, Jeffrey Gelinis (the bartender) sold an alcoholic beverage to 17-year-old Mikah Nicole Martinez on November 22, 2008.

Although not noted in the accusation, Martinez was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on August 20, 2009, documentary evidence was received and testimony concerning the violation charged was presented by Martinez (the decoy), two ABC Department investigators: Michael Wayne Houser and Ronnie Dale McCarty, and Edward Martin Coleman, one of the owners and managing member of Crest Management, LLC.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant filed a timely appeal raising a single issue: the identification of the bartender did not comply with Rule 141(b)(5).

DISCUSSION

Appellant contends that the Department did not prove compliance with rule 141(b)(5),² which provides that, following a sale, the decoy must make a face-to-face identification of the person who sold the alcoholic beverages, because this decoy operation did not strictly comply with rule 141(b)(5) as required by *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126].

²The rule states: "Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages."

Relying on the decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687 [1 Cal.Rptr.3d 339] (7-*Eleven*), appellant asserts that proof of strict compliance with the face-to-face identification requirement is lacking. The Department's Reply Brief alleges that this issue was waived because it was not raised at the administrative hearing, but goes on to address the issue, assuming *arguendo* that it was not waived.

The administrative law judge (ALJ) made the following finding with regard to the face-to-face identification (Finding of Fact 8): "Martinez pointed to Gelinas and identified him as the person who served her the Bud Light beer. McCarty then took a photograph of Gelinas and Martinez." Appellant is arguing, essentially, that this finding is not supported by substantial evidence.

"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, 94 [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. (Masani)* (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].)

Appellant bases its objection upon the direct examination of the decoy by the Department [RT 33-34]:

- Q Okay. Oh, one last question. The photograph, Exhibit 4.
 A Okay.
 Q That was not the face-to-face identification, correct?
 A Yes, it was. That's when they asked me who served you, and I pointed to him.
 Q Oh, okay. So this is an actual picture of the face-to-face identification?
 A Correct.

However, the decoy's statement that the photograph was the actual face-to-face identification is clarified a moment later when the ALJ asks [RT 34-35]:

- Q I got a little lost when we were describing that happened after you were served -- you said you were taken to the back?
 A I was.
 Q And what do you mean by that?
 A Well, we don't want to -- you don't really want to do the whole face-to-face in front of other people in the restaurant, so they took me to the back, I don't know what it was, it was kind of just an area where they had boxes and things like that. And that's where they asked me, you know, who was the person that served you? I pointed to the gentleman. They asked me if I -- asked for any identification and how old I was, no. They asked me -- they asked if I had showed him my identification, and I said no. And then I took the picture with him.
 Q Oh, I see. So the -- picture was a little after you pointed to him; is that correct?
 A Correct, yes.

Appellant would have us take the statement of the minor decoy, that the

photograph (Exhibit 4) was the actual face-to-face identification, as proof that no actual face-to-face identification took place. The ALJ found that rule 141(b)(5) was satisfied when the decoy pointed out the bartender in the back room, immediately before the photograph was taken, as he clarified in his direct questioning of the decoy, quoted above. Appellant's statement that "[t]here is nothing in the testimony of the witnesses presented by the Department that stands for the proposition that a lawfully recognized identification preceded the photograph" (App.Br. 9) is simply not true.

The finding that a face-to-face identification took place, as required by Rule 141(b)(5), is adequately supported by substantial evidence. It was appellant's burden to show the rule was violated, if indeed the issue was not waived, and they have not.

ORDER

The decision of the Department is affirmed.³

SOPHIE WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.