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

AB-9142
File: 47-347090 Reg: 10072493

WALT DISNEY PARKS and RESORTS US, INC., dba Grand Californian Hotel
1600 South Disneyland Drive, Anaheim, CA 92802,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 3, 2011
Los Angeles, CA

ISSUED DECEMBER 2, 2011

Walt Disney Parks and Resorts US, Inc., doing business as Grand Californian Hotel (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 20 days for its employees furnishing an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Walt Disney Parks and Resorts US, Inc., appearing through its counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated October 25, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on November 29, 2000. On February 10, 2010, the Department filed an accusation charging that appellant's employees, Gregorio Sandoval Valenzuela[2] and Briane Lamont Crosson, furnished an alcoholic beverage to 19-year-old Elizabeth Gonzalez on August 21, 2009. Although not noted in the accusation, Gonzalez was working as a minor decoy for the Anaheim Police Department at the time.

At the administrative hearing held on August 31, 2010, documentary evidence was received and testimony concerning the sale was presented by Gonzalez (the decoy), by Valenzuela (the bar-back), by Crosson (the bartender) and by Brian James Paqua,[3] an investigator with the Anaheim Police Department.

The evidence established that on August 21, 2009, Paqua (the investigator) entered the premises with three other undercover police officers, and sat at a table where he could observe the bar. The decoy then entered the premises and took a seat at the bar. The bar-back asked the decoy what she would like to drink, and she ordered a Bud Light. The bar-back repeated that information to the bartender, who was getting something else out of the refrigerator at the time, and he grabbed a bottle of Bud Light beer. The investigator then moved to stand directly behind the decoy. The bartender opened the beer and placed it on the counter. It was undisputed that the decoy did not touch the beer.

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[2]We have used the spelling used in the accusation, the Department's decision and in appellant's brief, but note that the witness spelled his name Valenzula at the administrative hearing. [RT 54.]

[3]The investigator's last name is incorrectly referred to as "Pagua" in the Department's decision.

The testimony about the remaining sequence of events is in dispute. The bartender [at RT 83] and bar-back [at RT 64] each testified separately that the bartender next asked the decoy for identification, after which the investigator identified himself as a police officer. The investigator, however, testified that he identified himself as a police officer before the bartender asked the decoy for identification. [RT 18.]

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

Appellant filed an appeal contending that rule 141(a)[4] was violated by the investigator's premature intervention into the transaction, prior to any actual furnishing of alcohol to a minor.

DISCUSSION

Appellant contends that this decoy operation was not conducted in a fashion that promotes fairness, as required by rule 141(a), because the investigator did not give the bartender a reasonable opportunity to ask for identification before interrupting and charging that a violation had occurred. (App. Op. Br. at p. 9.) Appellant alleges that this interruption occurred prior to an actual "furnishing" of alcohol to the decoy by the bartender. (*Id.* at p. 10.) We agree.

The Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence. The standard of review is as follows:

> 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]

[4]References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

> §§ 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*).)

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

The administrative law judge (ALJ) took note of the conflicts in testimony in Findings of Fact (FF) II-B:

> B. There was a conflict in the evidence as to whether Crosson [the bartender] asked the decoy for identification before or after Officer Pagua identified himself as a police officer to Crosson and as to whether Crosson had taken his hand off the beer bottle before Pagua identified himself to Crosson. After evaluating the credibility of the witnesses pursuant to the factors set forth in Evidence code Section 780 including the demeanor and manner of the witnesses, the existence of bias or other motive, their capacity to recollect and other statements of the witnesses which were consistent or inconsistent with the testimony, greater weight was given to the testimony of the decoy and Officer Pagua than to that of Respondent's witnesses.

The ALJ resolved these conflicts in favor of the testimony of the decoy and the investigator, finding the order of events to be as follows: the investigator had come to stand behind the decoy by the time the bartender placed the beer on the counter; the bartender took his hand off the bottle of beer; the investigator "paused a moment after [the bartender] took his hand off the beer bottle" (FF II C); the investigator identified himself; and the bartender asked the decoy for identification. Undisputed testimony established that the bartender heard the bar-back relay the decoy's order and then procured a bottle of beer, setting it on the edge of the counter nearest to himself, about 2 to 3 feet [RT 91] from the decoy. [RT 62, 82.] All witnesses agreed that the decoy never touched the beer. [RT at 20, 23, 32, 51.] The ALJ made no findings on the

proximity of the beer to either the bartender or the decoy, or who had possession and control of the beer.

Given that sequence of events, the legal question to be answered is whether alcohol was actually "furnished" to the decoy. The ALJ *assumed* that a furnishing had occurred without articulating any standard for making that assumption, and his proposed decision is factually deficient on this point, by failing to make any findings on the proximity of the beer to the bartender versus the decoy, or, to state it another way, by failing to make findings on who had possession and control of the beer.

Whether the beer was furnished is a question of law; thus, the Board is not bound by the ALJ's assumption, but considers the question *de novo.*

> "It is well settled that the interpretation and application of a statutory scheme to an undisputed set of facts is a question of law [citation] which is subject to de novo review on appeal. [Citation.] Accordingly, we are not bound by the trial court's interpretation. [Citation.]" (*Rudd v. California Casualty Gen. Ins. Co*. (1990) 219 Cal.App.3d 948, 951-952 [268 Cal.Rptr. 624].) An appellate court is free to draw its own conclusions of law from the undisputed facts presented on appeal.

(*Pueblos Del Rio South v. City of San Diego* (1989) 209 Cal.App.3d 893, 899 [257 Cal.Rptr. 578].)

The meaning of "furnish" has been discussed in a number of cases. For example:

> In order to violate section 25658, there must be some affirmative act of furnishing alcohol. "The word 'furnish' implies some type of affirmative action on the part of the furnisher . . . ." (*Bennett v. Letterly* (1977) 74 Cal.App.3d 901, 905 [141 Cal.Rptr. 682].) Among other things, it means to supply, to give, or to provide. (*Id*., at pp. 904-905.) [¶] . . . [¶] In order to furnish an alcoholic beverage . . . it is sufficient if, having control of the alcohol, the defendant takes some affirmative step to supply it to the drinker.

(*Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1157-1158 [221 Cal.Rptr. 675].)

> As used in a similar context the word "furnish" has been said to mean: "'To supply; to offer for use, to give, to hand.'" (*People v. Joe Joy*, 30 Cal.App. 36, 38 [157 P. 507].) It has also been said the word "furnish" is synonymous with the words "supply" or "provide." (*People v. Epperson*, 38 Cal.App. 486, 488 [176 P. 702].) In relation to a physical object or substance, the word "furnish" connotes possession or control over the thing furnished by the one who furnishes it. (*Southern Exp. Co. v. State* (Ga. 1899) 33 S.E. 637, 638.)

(*Bennett v. Letterly, supra* at pp. 904-905.)

An examination of prior Appeals Board decisions reveals no case in which alcohol was found to have been "furnished" to a minor, prior to that minor actually receiving possession and control of it. See, for example, *Bernardo Tocchetto Enterprises* (1997) AB-6668, where the Board held that the placement of a tray of drinks on a table where adults and minors were sitting, without the server determining who the drinks were for, did not constitute "supplying" or "providing" alcohol to a minor, because no minor took possession or control of any alcohol. In *1979 Union Street Corporation* (2003) AB-8047, the Board found a "furnishing" had occurred when the bartender lost track of a drink, which was later consumed by a minor, because even though the bartender did not set the drink in front of the minor, the minor took actual possession of it. Similarly, in *Inland Pacific Investments LLC* (2006) AB-8393, the Board found that alcohol was "furnished" by the bartender when a minor grabbed a shot glass in front of another patron and drank it because it was a nightclub where she should have been over the age of 21 and, again, she actually took possession and control of the alcohol.

The essential element of a furnishing is the relinquishment of control, and the evidence of that in the instant case is nonexistent. We believe the decoy was not yet "served" when the open bottle of beer was on the opposite side of the bar from her,

some 2 to 3 feet away, and she never touched it. The bartender still had apparent possession and control of it – not the decoy.

It is irrelevant whether or not the bartender still had his hand on the bottle, and whether the bartender asked the decoy for identification before, after, or at the same time as the investigator spoke. Even if the bartender took his hand off the bottle, that does not mean that he had relinquished control of it. The investigator did not say where on the bar the bottle was when the bartender took his hand from the bottle. Without evidence that the bottle was placed close enough to be within the control of the minor, it simply cannot be said there was a furnishing. Had the bartender turned and walked away after setting the beer down, this would be a different case entirely.

There is no dispute in the evidence that the bartender's first encounter with the decoy was when he was interrupted while otherwise engaged, in an activity away from the area where the minor was sitting, and that he then brought a bottle of beer with him to the counter. These actions certainly do not establish that he had relinquished control of the beer to the minor.

Additionally, there is no evidence that the decoy did take, or even could have taken, possession and control of the alcohol at that moment. We read the cases on point to say that "furnishing" requires, among other things, that possession and control of the item has actually been transferred. While we do not intend to define a hard and fast rule for what constitutes "furnishing," what happened in this case is not it. The beer was never furnished to the decoy, and on the facts presented, it cannot be assumed it would have been but for the investigator's intervention. This is not a case where there are conflicting reasonable inferences and the Department prevails. It is, instead, a case where there has been a failure of proof.

Appellant maintains, in addition, that the investigator violated the fairness requirement of rule 141(a) by moving to stand directly behind the decoy when he heard the bar-back tell the bartender to get a Bud Light, and then declaring a violation before the alcohol had actually been relinquished to the control of the decoy. We agree that there is an overall unfairness which taints this case.

This appears to be a case in which the investigator was too eager to pounce, and thus failed to allow time for the bartender to do the job he was thoroughly trained to do. How could the investigator know that the bartender was not about to ask for identification if he did not give him a chance to do so? We cannot assume, as the Department's decision does, that the bartender intended the decoy to have the beer prior to her identification being requested. That the investigator *prevented* a violation from occurring, by jumping in before the bartender relinquished possession and control of the beer to the decoy, is no more than speculation.

We agree with appellants that a decoy operation conducted in this fashion does not comport with the fairness requirement of rule 141(a) and that there was not a completed "furnishing" of alcohol to a minor in this case.[5]

[5]We note that if there is no furnishing, neither the bartender nor the bar-back can be found to have violated section 25658.

ORDER

The decision of the Department is reversed.[6]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[6]This 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.