

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

AB-9079

File: 47-417695 Reg: 08069199

TONY BEDALOV, INC., dba Johnny V
939 & 943-945 Garnet Avenue, San Diego, CA 92109,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 2, 2010
Los Angeles, CA

ISSUED OCTOBER 29, 2010

Tony Bedalov, Inc., doing business as Johnny V (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days, all of which were stayed subject to a one-year probationary period, for its bartender, Michael Alves, having served an alcoholic beverage to Tamara Michelle Argast, an obviously intoxicated patron, a violation of Business and Professions Code section 25602, subdivision (a).

Appearances on appeal include appellant Tony Bedalov, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

¹The decision of the Department, dated November 19, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on June 22, 2006. Thereafter, the Department instituted an accusation against appellant charging that its bartender served an alcoholic beverage to an obviously intoxicated patron.

An administrative hearing was held on May 13 and September 9, 2009, at which time documentary evidence was received and testimony concerning the violation charged was presented by Department investigators Vic Duong and Matthew Hydar. Raegan Carter testified concerning the alcoholic content of the drink in question. Michael Alves and Michael Rosenberger testified on behalf of appellant.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proved.

Appellant filed a timely notice of appeal in which it contends that the administrative law judge (ALJ) failed to consider the entire record in making his credibility determinations.

DISCUSSION

Two Department Investigators stood behind Tamara Argast while she and a female companion were standing in front of the fixed bar, facing Michael Alves, appellant's bartender. Argast and the bartender were about three feet apart, and he was looking at her while they were talking. Investigator Vic Duong testified that Argast was swaying from side to side, appeared to have trouble standing still, and used the bar fixture to prop herself up. Duong could not see her face until she turned around, and when she did, she had an unkempt appearance, droopy eyelids, and appeared about to fall asleep. Investigator Hydar's testimony was essentially the same. Both concluded she was intoxicated. While observing Argast for several minutes, they also observed

the bartender serve Argast and her companion a glass of wine each. A minute or two later, the bartender returned and removed the two glasses of wine. According to both Department witnesses, when later asked why he removed the glasses of wine, the bartender said that after he had served the two women, he concluded they were too intoxicated.

Appellant's bartender denied saying that, and denied that any such symptoms had been exhibited at the time he served her the drink; its doorman also denied seeing such signs. Alves testified that he decided to remove glasses of wine he had provided to the two women after observing police standing behind them, but denied doing so because he thought the women were intoxicated.

The administrative law judge chose to accept the testimony of the Department investigators as credible, and rejected the bartender's testimony (Finding of Fact III-C-3):

There was a conflict in the evidence as to whether Argast [the patron] was exhibiting symptoms of intoxication while in the premises especially when she was ordering wine from Alves [appellant's bartender] and as to what Alves told the investigators after the investigators contacted Alves regarding the fact that he had served an alcoholic beverage to Argast. After evaluating the credibility of the witnesses pursuant to the factors set forth in Evidence Code Section 780, including their demeanor, their capacity to recollect, the existence or non-existence of a bias or motive and inconsistencies in the testimony of Alves, greater weight was given to the testimony of Investigators Duong and Hydar than to that of the Respondent's bartender and doorman in resolving the conflict in the evidence.

This case turns on witness credibility and it is the ALJ's role in resolving conflicts in the evidence that is determinative. The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

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]; *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].)

Thus, it is not our function to decide whether Alves testified truthfully when he denied observing signs of intoxication on the part of the two women, or whether the officers were truthful when they said Alves admitted that he retrieved their drinks because he thought they were intoxicated. But, given Alves' testimony [RT 186-189], we cannot say the ALJ was unreasonable in resolving the conflict in testimony as he did:

Ms. Wortham: Q. Did you provide Ms. Argast with a glass of wine?

A. I made the wine and put it on the bar, yes.

Q. What do you mean when you say, "I made the wine"?

A. I put wine into a wine glass and put it on the bar.

Q. You poured the wine into the glass?

A. Yes.

Q. And you placed it in front of Ms. Argast?

A. Yes.

Q. I see. What bottle did you pour it from?

A. I don't know.

Q. Do you recall the label that was on the wine bottle?

A. No, I don't.

Q. One of the investigators asked you why you served her wine; is that correct? And we're referring to Ms. Argast, again. He asked you - - let me rephrase that.

Do you recall that one of the officers asked you why you served the wine to Ms. Argast, then turned around and retrieved it.?

Ms. Ekland: Judge, that misstates the testimony. The testimony was that he retrieved it and why he retrieved it.

Ms. Wortham: This is a separate question. I'm asking him if he recalls that the officer asked him.

Judge Echeverria: That's a yes-or-no question.

A. Yes.

Q. You recall that he asked you that. And do you recall that you told him that you retrieved it because she had too much to drink?

A. No.

Q. Isn't it true that you told the officer that you felt Ms. Argast had too much to drink because her eyes were glossy, she had a staggered gait when she spoke, and that she was using the bar to support herself?

A. The only thing I recall saying is that she was leaning up against the bar as she was having a conversation with her friend.

Q. When she was leaning against the bar, do you recall that she was swaying from side to side or front to back?

A. No.

Q. You noticed that she was leaning on the bar when you were taking her order; Isn't that correct?

A. Yes.

Q. ... You said you noticed the police officers who were standing near Ms. Argast after you had taken their order and their credit card; is that correct?

A. Yes.

Q. That's why you went back to retrieve the bottles or glasses of wine that you had already served them?

A. Yes.

Q. You said you told the girls, "I'm sorry, I can't serve you. There's a group of police officers here"?

A. Yes.

Q. And you also alerted the other bartenders that there were police officers inside of the bar?

A. Yes.

Q. Had you served alcoholic beverages to any of the other customers who were sitting around the bar or standing around the bar that evening?

A. Yes

Q. Did you also return to them to retrieve the alcohol from them?

A. I tried to clear as much of the bar off as possible.

Q. Isn't it true that you only retrieved the alcohol from Ms. Argast and her friend, and not from any of the other customers inside the bar at that time?

A. Yes.

Q. So why Ms. Argast and her friend? Why were they the only ones that you chose to retrieve the alcohol from?

A. Because it looked as if they were being approached by the police.

Appellant makes much of the fact that Alves was not cited. The investigator explained that this was his way of crediting Alves' action in retrieving the glasses of wine before either of the two women had consumed any of their content. We must assume that this was one of the factors considered by the ALJ in choosing whether to believe Alves or the investigators. That we might question the investigator's decision is immaterial.

The appeal lacks merit.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.