

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

AB-9084

File: 47-187121 Reg: 09071473

REIKO HASHIMOTO and MAYA YOHKI YAMATE, dba Dinner House M
1263 West Temple Street, Los Angeles, CA 90026,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

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

ISSUED APRIL 22, 2011

Reiko Hashimoto and Maya Yohki Yamate, doing business as Dinner House M (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for their employees or agents having sold, given or delivered alcoholic beverages to patrons between the hours of 2:00 a.m. and 6:00 a.m., and permitting alcoholic beverages to be consumed between those hours, violations of Business and Professions Code sections 25631 and 25632.

Appearances on appeal include appellants Reiko Hashimoto and Maya Yohki Yamate, appearing through their counsel, Rick A. Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated November 24, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general eating place license was issued on February 27, 1987. On July 14, 2009, the Department instituted an accusation against appellants charging that their employees or agents sold, gave or delivered alcoholic beverages to patrons between the hours of 2:00 a.m. and 6:00 a.m., and permitted alcoholic beverages to be consumed between those hours.

At the administrative hearing held on October 14, 2009, documentary evidence was received and testimony concerning the violations charged was presented by Vice Investigator Hiroshi Uehara and Sergeant John Jizmejian, both with the Los Angeles Police Department. Appellants presented no witnesses.

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

Appellants have filed a timely appeal making the following contentions: (1) The findings do not support the Decision, and (2) the penalty is excessive.

DISCUSSION

I

Appellants first contend that the findings do not support the Decision.

When findings are attacked as being unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department. (See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 245, pp. 4236-4238.)

(*Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 25 Cal.App.3d 331, 335

[101 Cal.Rptr. 815].)

Substantial evidence, of course, is not synonymous with "any" evidence, but is evidence which is of ponderable legal significance. It must be "reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51.) Thus, the focus is on the quality, not the quantity of the evidence. Very little solid evidence may be "substantial," while a lot of extremely weak evidence might be "insubstantial." (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

The administrative law judge (ALJ) made the following assessment of the facts in paragraphs 4 through 11 of his Findings of Fact:

4. On May 30, 2009, Los Angeles Police Officers Hiroshi Uehara and his partner Monica Lopez went to the premises to conduct an investigation to insure compliance with ABC laws, rules and regulations. They were posing as customers, in an undercover capacity.

5. Officers Uehara and Lopez entered the business at 12:30 a.m. They sat at the fixed bar. Each ordered and was served a bottle of Sapporo beer. Officer Uehara observed co-licensee Reiko Hashimoto present inside the business. Hashimoto was supervising the operation of the business. Officer Uehara noted four other employees working inside. They were subsequently identified as Emi Nakano, Akihoto Onuki, Kimiko Furukawa and Miyako Nomoto. There were approximately ten other customers at the premises when the officers arrived. There was also a live band playing music.

6. Beginning at 1:45 a.m., Officer Uehara noted an increase in the number of customers entering the business. Over the period of thirty minutes, between 1:45 a.m. and 2:15 a.m., approximately 45 additional customers entered the premises.

7. At 2:00 a.m. co-licensee Hashimoto approached Officers Uehara and Lopez who were still seated at the fixed bar and asked them if they

were police officers. Uehara told her "No". Co-licensee Hashimoto then asked the three patrons who were seated next to Uehara at the fixed bar if they were police officers. The three patrons told her that they were not police officers.

8. Officer Flores and Sgt. Jizmehian [*sic*] were part of the back up team outside the premises. At 2:31 a.m. Officer Flores requested a time check from LAPD communications. The officers were verbally advised that it was 2:31 a.m. That request and response was recorded on the computerized incident report that was generated about this incident. (See Exhibit 5.) Sgt. Jizmehian [*sic*] then sent a text message to Officer Uehara advising him that it was now 2:31 a.m.

9. After receiving this time confirmation Officer Uehara ordered two Sapporo beers from bartender Emi Nakano. Nakano served Uehara and Lopez each a 12 ounce bottle of Sapporo beer. Uehara paid for the beers. Uehara and Lopez then partially consumed the beers.

10. The three patrons seated next to Uehara at the fixed bar, subsequently identified as Crystal Downs, Michael Carey and Mouaz Alrayes, each ordered a mixed drink consisting of vodka and some other unknown mixer. Uehara distinctly remembers hearing the word "vodka" but was not able to identify the mixer ingredient. The bartender who took the order, Akihoto Onuki, then poured three mixed drinks. Each of the drinks contained vodka poured from a bottle of clear liquid marked vodka. Onuki served the three drinks. Downs, Carey and Alrayes then began to consume the drinks.

11. For approximately fifteen minutes all five patrons were permitted to consume their alcoholic beverages. Although not charged, Officer Uehara observed that there were other patrons in the premises being served and consuming alcoholic beverages.

The relevant statutes, California Business and Professions Code sections 25631 and 25632, provide:

25631. Any on- or off-sale licensee, or agent or employee of such licensee, who sells, gives, or delivers to any persons any alcoholic beverage or any person who knowingly purchases any alcoholic beverage between the hours of 2 o'clock a.m. and 6 o'clock a.m. of the same day, is guilty of a misdemeanor. For the purposes of this section, on the day that a time change occurs from Pacific Standard Time to Pacific Daylight

Time, or back again to Pacific Standard Time, "2 o'clock a.m." means two hours after 12 o'clock p.m. of the day preceding the day such change occurs.

25632. Any retail licensee, or agent or employee of such licensee, who permits any alcoholic beverage to be consumed by any person on the licensee's licensed premises during any hours in which it is unlawful to sell, give, or deliver any alcoholic beverage for consumption on the premises is guilty of a misdemeanor.

Appellants argue that there is insufficient evidence to support the conclusion that employees Furukawa and Nomoto "in any way participated in, observed, or were in a place to observe, to furthered [*sic*], or had any knowledge of any violations" (AOB at p. 2), even though they were observed to be working at the premises by Officer Uehara (FF 5). Appellants also contend that insufficient evidence supports the charge that co-licensee Hashimoto participated in or observed the activity of the alleged servers and that "for all we know" she may have gone home after asking the officers if they were police officers (AOB at p. 3). We disagree that these examples demonstrate insufficient evidence to support the Decision.

Appellants' apparent belief, that they must personally be charged with each violation before their license is subjected to discipline, is mistaken. It is well settled in Alcoholic Beverage Control Act case law that an employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. etc. Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377 [3 Cal.Rptr.2d 779]; *Kirby v. Alcoholic Bev. Etc. Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].)

Appellants are also mistaken in their belief that a dismissal of what they term

"questionable counts of the Accusation" (ACB at p.2) would have produced a different, and perhaps more favorable result. There is sufficient evidence in the record, with or without the specific counts which appellants find "questionable," to support a finding that sections 25631 and 25632 were violated, and that discipline against this license is warranted. Even if only a portion of the ten counts in the Accusation were found to be true, discipline would be in order.

The Appeals Board is powerless to substitute its own conclusions for those of the trier of fact when there is considerable proof of the essentials which the law requires - i.e. substantial evidence - as we believe there is here, to support the findings and the Decision.

II

Appellants contend secondly that the penalty of revocation is excessive. The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].)

In regard to abuse of discretion, in *Schaub's, Inc. v. Department of Alcoholic Beverage Control* (1957) 153 Cal.App.2d 858 [315 P.2d 459] the court said:

On many occasions the courts have attempted to define "abuse of discretion." In *Sharon v. Sharon*, 75 Cal. 1, 48 [16 P. 345], the court had this to say: "In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason, -- all the circumstances before it being considered." Bouvier's Law Dictionary, Volume I, page 94, defines "abuse of discretion" as "A discretion exercised to an end or purpose not justified by and clearly against reason and evidence."

The penalty in this case was influenced by three prior disciplinary actions for serving or permitting the consumption of alcoholic beverages after hours. (See Ex. 2, 3 and 4.) The most recent of these actions, on May 19, 2007, resulted in a penalty of revocation, stayed for a period of two years on the condition that no additional discipline was warranted. Appellants were clearly on notice that further violations would result in a severe penalty.

Appellants argue that the penalty of revocation in this case is excessive. However where, as here, a penalty of revocation has been imposed for serving or permitting the consumption of alcoholic beverages after hours - now for the fourth time - we cannot say it was unreasonable, or an abuse of discretion to impose such a penalty, when this is precisely the discipline contemplated by the most recent previous disciplinary matter involving this license.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
MICHAEL A. PROSIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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.