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

AB-9247
File: 47-501611 Reg: 11075499

IBRAHIM MUDAFAR MAMMO AND RANA MUDAFAR MAMMO,
dba Dublin's Irish Bar and Grill
9520 Reseda Blvd., Ste. #8, Northridge, CA 91324-5206,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: December 6, 2012
Sacramento, CA

ISSUED JANUARY 17, 2013

Ibrahim Mudafar Mammo and Rana Mudafar Mammo, doing business as Dublin's Irish Bar and Grill (appellant), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their on-sale general public eating place license for 20 days for appellants' bartender selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Ibrahim Mudafar Mammo and Rana Mudafar Mammo, appearing through their counsel, Ralph Barat Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

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[1]The decision of the Department, dated March 1, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public eating place license was issued on September 8, 2010. On July 26, 2011, the Department filed an accusation against appellants charging that, on June 11, 2011, appellants' clerk, Justina Avila, sold an alcoholic beverage to 18-year-old Alexis Briano. Although not noted in the accusation, Briano was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on December 21, 2011, documentary evidence was received, and testimony concerning the sale was presented by Alexis Briano (the decoy) and by Mario Avila and Christopher Glassford, Los Angeles police officers. Justina Avila testified on behalf of appellants.

Ms. Briano testified that she entered the licensed premises, sat at the fixed bar, and ordered a Bud Light from a woman who approached her. Briano testified that the woman pulled on a lever bearing the words "Bud Light," and a brownish colored liquor came out. She was served that liquid. Briano further testified that she was not asked for her identification, nor was she asked any age-related questions. The only question she was asked was whether she wished to run a tab. LAPD officer Mario Avila, who was seated a few seats away at the bar, testified that he heard Briano order a Bud Light, saw the bartender fill a glass from a tap labeled Bud Light, place the glass on the bar in front of Briano, accept Briano's $5 bill, and return some change.

Briano identified Avila as the person who sold her the Bud Light, and a citation was later issued.

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

Appellants have filed an appeal making the following contentions: (1) The

Department did not establish that the beverage in question was an alcoholic beverage; and (2) the Department failed to connect the raw evidence to the findings and the findings to the conclusion made regarding the penalty.

I

Appellants contend that the Department failed to establish the beverage served was an alcoholic beverage. They point to the fact that, although a sample of the beverage was taken by one of the police officers, the Department presented no evidence that the sample contained any alcohol at all.[2]

Appellants make much of the fact that the sample of the beverage served was not tested for alcoholic content. They contend that it is not enough to presume an alcoholic content; the Department must produce "foundational evidence to establish how they knew that purported fact." (App. Br. at p. 5.) We see many reasons why appellants' contention lacks merit.

The facts established that minor decoy Briano ordered a Bud Light. Bud Light is a nationally known brand of beer. The bartender went to a tap labeled "Bud Light," drew from the open tap, filled a glass, and served the glass and its contents to Briano.

Prior cases have recognized a presumption that the contents of a container are presumed to be what the label on the container says they are. (See *Mercurio v. Department of Alcoholic Beverage Control* (1956) 144 Cal.App.2d 626, 634-635 [301 P.2d 474] ("It is a reasonable inference that the liquid poured from a bottle labeled

[2]Appellants' counsel repeatedly claimed during oral argument that the sample was placed in evidence. It was not, but even had it been, the outcome of this case would be no different. It may well have been a decision of Department counsel that the strength of its case was such that there was no need to incur the cost, and possible delay, from having a chemical analysis of the sample conducted.

'vermouth' was in fact vermouth. In fact, it would have been an illegal act if the bottle was mislabeled."); *Wright v. Munro* (1956) 144 Cal.App.2d 843,847-848 [301 P.2d 997]; *Georgia* (1991) AB-6030.)

In this case, the liquid was drawn from a spigot labeled "Bud Light." There is no real legal difference when a liquid is drawn from an opened spigot labeled "Bud Light" or when poured from an opened bottle labeled "Bud Light."

Under Business and Professions Code section 25609, it is a misdemeanor to substitute a different brand, type, or character of alcoholic beverage for the brand, type, or character ordered without informing the purchaser of the difference. Not only that, section 25613 requires that an on-sale seller of draught beer must affix a label on the faucet, spigot, or outlet declaring the name of the brand name adopted by the manufacturer of the beer to be drawn, and section 25206 permits the Department to seize any draught beer displayed in violation of the statute. In this case, the name on the spigot was the same as the beer ordered by the decoy

Last, but not least, the bartender, called as a defense witness, acknowledged on cross-examination that the minor decoy ordered a Bud Light, and that she gave her a Bud Light. [RT 77]:

> Q. And the minor, when she – when you approached her and you said "What would you like?" What did she say?
>
> A. A Bud Light.
>
> Q. And you gave her a Bud Light; right?
>
> A. Yes.

II

Appellants challenge the penalty imposed by the Department, contending that it constitutes an abuse of discretion. They assert (App. Br. at p. 7) that the ALJ "failed to explain the basis for his conclusion that a 20-day suspension is appropriate in this matter."

We have said in many appeals pursued by appellants' counsel that it is unnecessary for an ALJ to explain his decision, so long as he or she makes findings and reaches a decision supported by those findings and by substantial evidence. But this case is different.

Department counsel argued for a 20-day suspension, "which is a tougher deviation from the standard 15-day suspension under rule 144." [RT 88.]; the ALJ characterized the request as one for "an aggravated 20-day suspension." The only reason he gave for the increase from the norm was that this was appellants' "second violation in the short nine months since the license issued. The previous offense was for an unrelated service-after-hours violation. (See Exhibit 2.)

The Department's penalty discussion is contained in a single paragraph:

> The Department requested an aggravated 20-day suspension on the basis that, although this was the Respondent's first sale-to-a-minor violation, it was their second violation in the short nine-month period since the license issued. The Respondents did not recommend a penalty in the event the accusation were sustained. The penalty recommended herein complies with rule 144.

We do not agree with the Department that the 20-day suspension complies with rule 144,[3] at least without findings that we doubt could be made. The Department's only justification for an aggravated penalty is that the violation was appellants' second

[3]Cal. Code Regs., tit. 4, §144.

in the short nine-month period since the license issued. This, we think, exceeds the power reserved in rule 144.

Rule 144 provides:

> In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act ... the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" ... which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines *that the facts of the particular case* warrant such a deviation - such as where facts in aggravation or mitigation exist. (Emphasis supplied.)

To the best of our knowledge, no previous case has addressed what the words "the facts of the particular case" are intended to mean. Nonetheless, it cannot reasonably be said that the outcome of an earlier proceeding is a fact of the particular case. How does the commission of an earlier offense not involving a minor bear on the particular facts of this case? Such an interpretation opens up a far wider latitude for the imposition of penalties under the rule 144 than we think the language quoted above must have intended. Stated another way, the Department did not act according to law.

ORDER

The decision of the Department is reversed, and this matter is remanded to the Department for reconsideration in light of our discussion above.[4]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4] 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.