

ISSUED OCTOBER 1, 1998

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

| | | |
|-----------------------------|---|--------------------------|
| ARMANDO & GELACIO MONDRAGON |) | AB-7014 |
| dba King's Inn |) | |
| 3515 W. Fifth St. |) | File: 40-295399 |
| Santa Ana, CA 92703, |) | Reg: 97040487 |
| Appellants/Licensees, |) | |
| |) | Administrative Law Judge |
| v. |) | at the Dept. Hearing: |
| |) | Rodolfo Echeverria |
| |) | |
| DEPARTMENT OF ALCOHOLIC |) | Date and Place of the |
| BEVERAGE CONTROL, |) | Appeals Board Hearing: |
| Respondent. |) | August 12, 1998 |
| |) | Los Angeles, CA |
| _____ |) | |
| |) | |

Armando Mondragon and Gelacio Mondragon, doing business as King's Inn (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their on-sale beer license for 45 days for permitting an employee to solicit and accept a drink from a patron, and permitting the sale of an alcoholic beverage to a person under the age of 21 years, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivisions (a) and (b), arising from

¹The decision of the Department, dated December 31, 1997, is set forth in the appendix.

violations of Business and Professions Code §25658, subdivision (a), and 4 California Code of Regulations §143.

Appearances on appeal include appellants Armando Mondragon and Gelacio Mondragon, appearing through their counsel, Rick A. Blake; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer license was issued on January 6, 1995. Thereafter, the Department instituted an accusation against appellant charging violations of loitering on the premises for the solicitation of alcoholic beverages, solicitation and acceptance of a drink by an employee, and the sale of an alcoholic beverage to a person under the age of 21 years.

An administrative hearing was held on October 20, 1997, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of solicitation and acceptance of a drink by the employee and the sale of an alcoholic beverage to a minor were true. The loitering charge was found not to have been proven.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the record does not show a solicitation by the employee, but does show that the police officer induced the employee to accept a drink; (2) the record does not support a finding that an alcoholic beverage was sold and served to the minor under the age of 21 years; and (3) the penalty is excessive.

DISCUSSION

Appellants contend the record does not show a solicitation by the employee, but does show that the police officer induced the employee to accept a drink.

Alex Sanchez, a police officer with the Santa Ana police department, testified that he entered the premises in plain clothes. He ordered a beer and paid \$3. A waitress named Yvonne took the order, went behind the bar counter, and returned with a beer. The officer saw approximately 12 waitresses drinking beverages, and therefore the officer asked Yvonne why she was not drinking. Yvonne answered that: “yes, she is drinking, and would I [the officer] like it if I [the officer] bought her a drink” [RT 32-34, 36-37]. Receiving an affirmative answer, Yvonne returned with a beer for the officer and a smaller beer for herself, charging \$3 for the officer’s beer and \$4 for her beer [RT 37]. Yvonne drank from her beer from time to time, and when she was not at the table, she placed a napkin in the mouth of the bottle [RT 39-40]. The officer indicated that Yvonne left other bottles at other patrons’ tables, each having a napkin in them [RT 39-40].

We determine that the record, while not the best documented record concerning the direct examination of the officer, appears sufficient to sustain the fact that Yvonne solicited the officer for a drink.

II

Appellants contend the record does not support a finding that an alcoholic beverage was sold and served to a person under the age of 21 years.

Sergio Enriquez, a uniformed patrol officer for the Santa Ana police department, testified that he noticed Juan Chavez who looked under the age of 21 years, sitting within the premises. While Chavez initially answered untruthfully the questions by the

officer as to his age, Chavez later told the officer that he was 18 years old. A waitress, whom Chavez was trying to impress, was sitting with Chavez. On the table in front of Chavez was a bottle of beer [RT 6-11]. The waitress at the table denied the beer was her beer [RT 15]. The testimony of Chavez is convoluted at best, being made up of a variety of explanations as to the events of the evening.

However, the credibility of a witness is within the reasonable discretion of the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) The ALJ accepted the testimony of Chavez that he was drinking a beer at the premises, served to him by a bartender named Arellines [RT 11, 77].

Considering the apparent conflicts in the record, 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 Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (a case where the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

We determine that there is sufficient substantial evidence that Chavez was within the premises improperly, had a cold beer in front of him, and that the beer was served to him by a bartender.

II

Appellants contend the penalty of a 45-day suspension is excessive. The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The record shows that there are no prior violations of record, and that the present appeal concerns two violations:

- a. The sale and service of an alcoholic beverage to a person under the age of 21 years, in most prior similar decisions of the Appeals Board, involves a first time offense, resulting in a penalty of 15 days; and
- b. A solicitation of a drink by an employee, which in most prior similar decisions of the Appeals Board, involving a first time offense, results in a penalty of 30 days.

Appellants in their brief, argue that aggravation by the Administrative Law Judge (ALJ), was arbitrary:

“First, remember that this is a minor whose story changes. Even so, events subsequent to the occurrence of the violations are not properly considered as aggravation ... Matters of aggravation need to be considered with regard to factors surrounding the circumstances of the violation, such as comments of employees or management with regard to knowledge of the minor’s age ... exceedingly youthful appearance of a minor”

The Department is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the

Department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals.

We cannot say, considering the violations and the generally accepted penalties imposed in similar cases, that the Department has acted arbitrarily.

CONCLUSION

The decision of the Department is affirmed.²

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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 decision as provided by §23090.7 of said code.

Any party, before this final decision becomes effective, may apply to the appropriate 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.