

ISSUED APRIL 15, 1999

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

SCHMITZ MEAT, INC.	)	AB-7097
dba Woody's)	
300 Sycamore Valley Road West	)	File: 41-281709
Danville, CA 94526,	)	Reg: 97041172
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Jeevan S. Ahuja
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	March 4, 1999
	)	Sacramento, CA
)	

Schmitz Meat, Inc., doing business as Woody's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its on-sale beer and wine public eating place license for 15 days, with 10 days thereof stayed for a probationary period of one year, for having permitted the removal of open containers of beer from the licensed premises (to an unlicensed parking lot adjacent to the licensed premises), being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §23300 and 23355.

Appearances on appeal include appellant Schmitz Meat, Inc., appearing through

¹*The decision of the Department, dated April 2, 1998, is set forth in the appendix.*

its owner, Paul Schmitz, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Murphy.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on March 12, 1993. Thereafter, the Department instituted an accusation against appellant charging that on July 4, 1997, appellant permitted the removal of open containers from the licensed premises, in violation of the above-cited code provisions.

An administrative hearing was held on February 24, 1998, in the course of which the Department presented four witnesses in support of the accusation: Danville Police Chief Christine Dean; Officer Jeffrey Hebel, a member of the Contra Costa County Sheriff's department, assigned to the Danville Police Department; John Wiggins, an environmental health specialist with the Contra Costa County Environmental Health Department; and Doris Pau, a licensing investigator employed by the Department. Paul Schmitz, appellant's owner, testified on its behalf, and presented two other witness in its defense: Tricia Schmitz, his wife; and Gary La Musga, a friend, both of whom were present when the events in question occurred.

Subsequent to the hearing, the Department issued its decision, sustaining the charge of the accusation and ordering a 15-day suspension, 10 days of which were stayed for a probationary period of one year.

Appellant has filed a timely notice of appeal, and now contends that the evidence does not support the findings.

DISCUSSION

Appellant contends that the decision of the Department is erroneous because "the testimony does not show beyond a reasonable doubt that beer being consumed in

the parking lot was purchased from Woody's and transported to the parking lot."

While appellant is in error in suggesting that the Department was required to prove its case beyond a reasonable doubt, that is not to say that his attack on the decision lacks merit. There is considerable confusion in the record regarding the parameters of the licensed premises, enough for us to believe there is not substantial evidence in support of the charges.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) Where, as here, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

We have carefully reviewed the record in support of the Department's findings, and find it difficult, if not impossible, to reconcile the testimony of the witnesses presented by the Department, upon whom the Administrative Law Judge relied for his critical finding, with the physical evidence regarding where the questioned drinking took place.

The relevant portions of the critical findings are these:

"Finding III: On July 4, 1997, Mr. John Wiggins arrived at the above-captioned

premises and observed that tables and chairs had been set up in the parking lot adjacent to the above-captioned premises. He observed that some persons seated at these tables were consuming food and beer. ... Lieutenant Dean stated that as she approached the premises, she had observed persons consuming beer in the parking lot adjacent to Woody's; that this beer had been obtained at Woody's. Officer Jeffrey Hebel also testified that he had observed persons purchase beer at Woody's and had observed them consume that beer in the parking lot adjacent to Woody's."

"Finding IV: When Lieutenant Dean approached Mr. Schmitz a second time at about 3:00 p.m. on July 4, 1997, and expressed concern about the beer being consumed by patrons who were carrying the beer off Woody's premises, Mr. Schmitz voluntarily closed down the sale of alcoholic beverages."

"Finding VI: Despite the conflict in the evidence, it is found that patrons obtained beer at the above-captioned premises and consumed the beer in the parking lot adjacent to the premises. This parking lot is not licensed by the Department."

Chief Dean testified that John Wiggins, a Contra Costa County health inspector, complained to her about how food was being prepared "in the parking lot" [RT 38]. While en route to investigate his complaint, Dean was approached by the event's chairperson, Nancy McCaffrey, who expressed concern about "open consumption of alcohol," and then by another licensee who wanted her to know his establishment was not the source of the alcohol supposedly contained in clear plastic glasses seen in the parking lot area [RT 39]. Dean said she could see where the people who had the clear plastic glasses were coming from, and when she asked them where they got the beer, was told "Woody's".² She then testified:

"Q. After you spoke with these three people, tell us what you did.

"A. Okay. Well, we kind of waded through the crowd and went and stood next to a register. Well, it was kind of like a temporary counter was built with some tables and a register was on it. And it was right outside one of the doors, the side door to Woody's on their patio ...

"Q. And tell us what you saw.

² *This is the only evidence linking the open containers in the parking lot to Woody's. However, it is hearsay evidence, insufficient to support a finding, and, in our opinion, not sufficiently explanatory of any other evidence as to support a finding based upon such other evidence.*

“A. Saw alcohol being sold by people.

“Q. Did you see any people when they purchased beer take it somewhere to consume it? In other words, walk away from the stand.

“A. Yes. It was just packed so tightly, you couldn’t walk too fast anywhere, but there is an alleyway that goes to another part of the shopping center. We did see some people walking that way, and then some people actually walked back toward me. We started talking to them, and they just walked behind me. They did not stay in front of the business.

“Q. Now, from where you were standing, could you see the parking lot area?

“A. Yes.

“Q. Were there tables and chairs out in that parking lot area?

“A. My best recollection is that there was probably 8 to 10 tables set parallel. There were no cars parked there. They were just in the parking lot with chairs around them and people were sitting eating food and drinking.”

Dean said [RT 44] that she was told by a second gentleman that he was helping Schmitz to keep purchasers of alcohol in the patio, but she told him that was ridiculous because there was no place for people to stay on the patio, which she described as very crowded.

Officer Hebel inferred that the persons he observed drinking in the parking lot area had purchased the alcoholic beverages at Woody’s [RT 80]. However, he consistently acknowledged that he did not see anyone removing open containers of beer from the licensed premises.³

“Q. (By Administrative Law Judge) Did you see anybody purchase beer from that beer bar and then walk away from the general area of Woody’s?

“A. I don’t recall that, no. [RT 79].

³ Officer Hebel’s testimony tends to corroborate that of appellant [at RT 134, 136] and Gary La Musga [at RT 97-98, 117-118, 120] that they and others guarded the perimeters of Woody’s patio to ensure that patrons did not leave while in possession of open containers of beer.

...

“Q. (By Mr. Schmitz): Previously, Officer, you stated earlier that you did not see anybody -- you saw people purchasing the beer but you didn’t see them walk directly over to the outside patio -- outside parking lot area near the tables. Is that true?”

“A. I think I said, my testimony is that I saw people purchase beer and go into the outside area drinking. I didn’t see anybody purchase beer and then just walk away from your establishment out to the other parts of the Town & Country area. I didn’t specifically witness that, that I recall. [RT 81].”

“Q. It’s still not clear to me. We established that you saw people purchasing beer from Woody’s. What I understand when you were first asked that question is that you did not see them take the beer from the place that they purchased it, walk out of Woody’s area into the parking lot. You saw them sitting down at the outside tables with beer in front of them. Is that true?”

“A. My testimony is that people purchased beer from your location there and then walked or stood around or congregated in that area right directly adjacent to your establishment there. I did not specifically see anybody purchase a beer from your establishment and then walk outside of your areas, but I did see them.⁴ Is that clear for you?” [RT 81-82].”

Thus, although it is clear from the testimony of Police Chief Dean as well as Officer Hebel that both believed they saw people in the parking lot drinking beer from clear plastic glasses, a comparison of their testimony to the physical evidence demonstrates that neither was able to distinguish between the area which was unlicensed parking lot and the area which was Woody’s licensed patio.

The physical evidence, consisting of photographs taken by a police officer, photographs offered by appellant, and a diagram of the licensed premises, strongly suggests that the patio area for which Woody’s was licensed was larger than any of the Department’s principal witnesses apparently understood it to be.

Exhibit A-1 is a photograph of Woody’s patio. Dean initialed this exhibit to show

⁴ *It is not clear what Hebel meant by his comment “but I did see them.” It may be that he was referring to having seen people seated at tables with open containers of beer. But even if this was what he intended, his evidence falls short of connecting those persons to Woody’s.*

where she was standing when she made her observations about persons leaving the premises with open containers. Exhibits 2-A and 2-D are photographs which, according to Chief Dean, show what she understood to be the parking lot between Woody's and another licensee.

According to Department investigator Doris Pau, an expansion of the licensed premises was approved by the Department near the end of 1995 or early in 1996 [RT 84-85]. Exhibit 3, the diagram which she stated shows the newly-expanded licensed area is much larger than the limited patio area which Chief Dean and Officer Hebel described in their testimony.

Investigator Pau testified that she had inspected the premises in February, 1996, after the expansion had been approved. She certified as correct a diagram of the licensed premises (Exhibit 3) as reflecting the 1995 expansion:

"Q. And what did this expansion encompass; in other words, what area was the licensed privileges expanded to?"

"A. It was expanded to the patio area directly in front of the entrance and then to the left, also."

As is apparent from exhibit 3, the area she and the exhibit describe appears to be much larger than that suggested in Chief Dean's testimony. With reference to the newly-licensed area, she explained:

"Because of the irregular shape of the premises expansion, the patio, and also having to use part of the landscape in order to show the enclosure of the patio area, we walked through together and I showed him the area we were going to license."

It is difficult from the record alone to identify with certainty the relationship of the expansion area to the location of Chief Dean and Officer Hebel when they made their observations regarding the conduct of Woody's patrons. The expansion area that

investigator Pau described as “directly in front of the entrance and then to the left also” is the opposite direction, and some distance from where the two said they were standing. (See Exhibit A-1). Additionally, investigator Pau’s testimony that the landscape was, to some extent, involved in the demarcation of the licensed area, indicates that it extended well beyond the area under the overhang referred to by Chief Dean.

Chief Dean, Officer Hebel, and the Administrative Law Judge (ALJ) as well, may all have been of the belief that the area Dean understood constituted Woody’s patio consisted of only the area under the overhanging eaves of the building. This is suggested by Chief Dean’s testimony, as well as statements by Mr. Schmitz, in response to questions from the ALJ [RT 61-64], and by an examination of Exhibit 3, a diagram of the licensed premises:

“ALJ: Could you actually observe people take the beer from there and then walk away in any particular direction?”

“A. Yes, sir. I knew that that was going to be a critical question that was going to be asked, and yes, I saw some persons that purchased and walked, sir, this way down the alley.

“ALJ: You are pointing to the right in the photograph, to the right.

“A. And then I also observed some people purchase beer and then actually pass me and walk out of the area.

“ALJ: And when you say ‘out of the area’” pointing again towards the right again?

“A. Yes.

...

“ALJ: Okay. Maybe I am not clear on that. Let me clarify that, Mr. Schmitz. This [referring to Exhibit 2-A] is an, as I understand this, this is the overhang and there is a patio area outside the Woody’s premises, is that correct?”

“Mr. Schmitz: Yeah, this is the patio area (indicating).

“The Witness: Well, Excuse me. I should qualify. I did not describe that as his patio area. I thought his patio area was what was covered in the overhang.

“ALJ: That’s what I have been referring to the patio area, Mr. Schmitz.

“The Witness: I thought this was a common area for the businesses.

“Mr. Schmitz: Well, in my lease this is my patio area. Under the ABC licenses, this is also licensed along with this in here.

“ALJ: We will have an ABC person testify as to exactly what is licensed. For the moment. I’m talking about the area under the overhang as being the patio area. When you get a chance to testify, Mr. Schmitz, you can explain and expand on that. ... I’m glad you pointed that out, because there was a term being used that different people have been giving different meaning to.

“The Witness: I meant by where the tables and chairs are when we go and eat there.

“ALJ: So the area under that overhang is the area you described as the patio area?

“The Witness: Yes, and I can’t remember if the area around the corner is covered by the patio, too. But see there is a sidewalk that goes around the corner of this building.

“ALJ: When you described some people who walked, and I think some people walked straight towards the alley, and I pointed to the right side, they were walking just under, as though they were walking under the overhang but not necessarily under the overhang, just outside the overhang.

“The Witness: They brushed shoulders with me and passed me.”

It thus appears that Chief Dean was of the belief that Woody’s patio area extended barely beyond the overhang which she referred to. This, of course, is inconsistent with Exhibit 3, and investigator Pau’s testimony, regarding the expanse licensed by the Department. Although this does not minimize her testimony that she saw people in the parking lot area with open containers of beer, or that she saw people

buy beer and then brush past her, her testimony does not establish the essential nexus between the purchase of the beer and its presence in the parking lot area.

Analysis of Officer Hebel's testimony with respect to Findings III and IV shows similar weakness.

Officer Hebel testified that, in the course of investigating John Wiggins' complaint, he saw 20 or 25 tables in the parking lot area, each with four to six chairs, and all "pretty much" occupied. A large percentage of the occupants appeared to be drinking beer. When he confronted the licensee, Schmitz acknowledged that he used the tables and chairs for his customers. According to Officer Hebel, the tables and chairs were in an area defined by hay bales.

On cross-examination, Hebel insisted he had seen 20 or 25 tables, but was not sure where they would have been. Hebel said that he saw the tables while he was speaking to Schmitz, and, with reference to Exhibit A-1, said he was standing near where Chief Dean indicated she had stood while talking to Schmitz.

As previously noted (see text, supra, pages 7-8), Hebel admitted that he did not recall seeing anyone purchase beer from Woody's and then walk away from the general area of Woody's. He did, however, see people purchase beer at Woody's and then sit at the tables he had observed [RT 80]. However, this still leaves unclear where those tables were in relation to the licensed area.

None of the photographs offered by the Department show anything like the 20 or 25 tables described by Hebel. At best, two, or possibly three, tables are visible. On the other hand, Exhibit 3, the diagram of the licensed premises, projects between 15 and 20 tables within the apparent confines of the licensed area.

Both Chief Dean and Deputy Hebel appear to have assumed that only the limited

patio area under or near the building overhang was included within the licensed premises. It appears from their testimony that neither Chief Dean nor Deputy Hebel was familiar with the true bounds of the licensed premises, and the colloquy involving the ALJ, Chief Dean and Mr. Schmitz recorded on pages 61-64 of the hearing transcript strongly suggests that even the ALJ lacked a true understanding of the problem.⁵

We believe that the testimony is too indefinite as to where the unlawful consumption was occurring, as well as the actual source of the beverages being consumed. Although there is some evidence that points to Woody's, the record as a whole demonstrates too much uncertainty as to the ability of the witnesses to differentiate between what was occurring inside the licensed premises and what was happening, and/or originating, elsewhere. No link was shown between the beer seen off the licensed premises and Woody's, and Chief Dean's testimony that people with beer walked to the right (in picture A-1) appears to mean only that they moved to more of the licensed premises, as depicted on Exhibit 3.

ORDER

⁵ *Earlier in the hearing, the ALJ asked Wiggins, referring to the photograph marked as Exhibit A-1*

"Now I can understand where the roof line ends that that's the portion of the overhang and that's the patio area that Mr. Murphy is referring to as being, or maybe Mr. Schmitz was suggesting that that is licensed. Are you suggesting that the licensed area extends all the way to the tree?"

In fact, as Department investigator Doris Pau later explained, and as shown by Exhibit 3, the diagram of licensed premises, the licensed area not only included the area around the tree shown in the photograph, it extended to an equally large area not shown in the photograph.

The decision of the Department is reversed.⁶

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

⁶ *This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.