ISSUED MAY 8, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

BEERNESS, INC. dba Beerness 1624 California Street San Francisco, CA 94109, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-7419 File: 48-299657 Reg: 99045385 Administrative Law Judge at the Dept. Hearing: Stewart A. Judson Date and Place of the Appeals Board Hearing: March 16, 2000 San Francisco, CA

Beerness, Inc., doing business as Beerness (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for appellant's agent selling an alcoholic beverage to person under the age of 21, 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 §25658, subdivision (a).

Appearances on appeal include appellant Beerness, Inc., appearing through its counsel, Joanne M. Reming, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

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[1]The decision of the Department, dated June 3, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on November 7, 1994. Thereafter, the Department instituted an accusation against appellant charging that, on September 23, 1998, Poema Smith, then a trainee bartender, sold a Miller Genuine Draft beer to Cristina Guard, who was then 18 years old.

An administrative hearing was held on March 16, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by San Francisco police officer Lynda Zmak; by Cristina Guard, who was working as a minor decoy; by Jonathan Seidenfeld, appellant's manager; by Richard Share, appellant's head bartender; by Poema Smith, the seller; by Mathew Nordwall, appellant's doorman; by Kelli Barkett, one of appellant's bartenders; and by Joseph Erlec, appellant's president.

Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged in the accusation and that Smith had ostensible authority when she sold the beer to Guard.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) appellant was not liable for the acts of Smith, and (2) there are not sufficient findings or substantial evidence of a face-to-face identification of the seller by the minor decoy.

DISCUSSION

I

Appellant contends there is not substantial evidence to support the finding that Smith was an actual or ostensible agent of appellant when she sold beer to Guard, the Department's decision misstates the holdings of cases it cites regarding

appellant's vicarious liability, and appellant was sufficiently diligent in preventing the possible unlawful conduct by Smith.

In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

When, as in the instant matter, 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].)

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 Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which 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

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[2]The California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

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].)

Smith was not an employee of appellant at the time she made the sale to the minor decoy, Guard, but was being trained as a bartender by Share, the head bartender. She was hired by appellant as a bartender the day after she sold beer to Guard.

Smith was authorized to "watch the bar" and "take orders" [RT 39-40], but not to serve alcoholic beverages to customers, take money from them, or use the cash registers. When Guard came in, Share was busy counting money from one of the registers and had his back to Smith, who proceeded not only to take Guard's order, but to serve her the beer, ring up the transaction at one of the registers, and give Guard her change.

"An agency is either actual or ostensible." (Civ. Code §2298.) "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (Civ. Code §2300; see also 2 Summary of California Law, Witkin, §§40, 93-95, and 125.)

In the matter of Shin (1994) AB-6320, the Appeals Board found an ostensible agency where a licensee's daughter, while visiting the premises, was told by the father/licensee not to sell anything, but to watch out for thieves while the father was busy with another patron. While at the counter near her father, the daughter sold an alcoholic beverage to a minor and accepted payment for the beverage, having access to the cash register.

In Houston (1996) AB-6594, Bauder, a person who frequented the premises, had at times cleared tables, stocked the bar area, and served beverages to patrons.

On the night in question, Bauder went behind the bar, obtained bottles of beer, served the beer to an obviously intoxicated patron, accepted payment for the beer, and returned change to the patron, in spite of the fact he had been told by the licensee not to work as a bartender. This Board held that an ostensible agency was created when the bartender in charge failed to control Bauder, allowing Bauder to do all the things done by employees of the premises.

In Abdu Ahmed Almahen (1999) AB-7278, the licensee allowed a guest to stand behind the counter at the premises and sell malt liquor, thereby clothing the guest with ostensible authority. Therefore, the guest was considered to be an agent of the licensee, for whose acts the licensee was vicariously liable.

In the present case, Smith was behind the bar, where a patron would expect appellant's bartender, and she was there by permission of appellant's head bartender. She was specifically authorized to watch the bar and to take orders, so she had *actual* authority to greet Guard and to take her order. She went beyond this actual authority when she served the beer, accepted money from Guard, and made change. However, she clearly had ostensible authority when she did so. She was allowed to act as if she were a regularly employed bartender, and any third party dealing with her would reasonably assume that she had authority to do so. This ostensible authority means that she is considered to have been an agent of appellant when she sold the beer to Guard.

The critical determination in the Department's decision is the final paragraph of Determination IV:

> "Having caused the apparent temporary voluntary employment of Smith by allowing the patent appearance of agency, [the licensee] cannot now repudiate Smith's conduct in its behalf or the sale to the minor decoy who bought the

> beer relying on the ostensible authority of Smith to sell it. (FASA Corp. V. Playmates Togs, Inc., N.D. Ill. [1995] 892 F. Supp. 1061)."

Appellant allowed Smith to appear to have authority to sell on its behalf. Guard justifiably relied on that ostensible authority when she bought the beer, believing she was buying it from appellant's bartender. Appellant is liable for the acts of Smith, its ostensible agent, and is estopped from denying responsibility. (Civ. Code §2334; Yanchor v. Kagan (1971) 99 Cal.Rptr. 367 [22 Cal.App. 3d 544].)

The ALJ reached the same result by an alternative analysis in Determinations V and VI. Share was appellant's employee and his failure to prevent the trainee, Smith, from serving the decoy, is imputed to appellant. Therefore, through Share, appellant permitted the furnishing of an alcoholic beverage to a minor.

The ALJ's use of the term "temporary or volunteer employee" is somewhat puzzling, but clearly refers to Smith's appearance as an employee, even though she was not actually employed by appellant and some of her actions went beyond the actual authority to take orders that appellant granted her. The terms "temporary employee," volunteer employee," "employee," or "ostensible agent," all refer to agents acting on behalf of a principal (here appellant) and the principal is, under the appropriate circumstance (such as those here), liable for their actions. The cases cited by the ALJ may not specifically state the propositions for which they are cited, but clearly imply these propositions.

The Department was correct in determining that appellant was liable for the acts of the trainee, Smith.

II

Appellant contends that the police did not comply with the requirement of Rule 141(b)(5) of a face-to-face identification of the seller by the minor.

There was conflicting evidence regarding the identification; the seller testified there was none, while the police officer and the decoy both testified that the identification was made.

The ALJ did not use the specific statutory term "face-to-face" when he stated in Finding V: "Guard also identified Smith as the seller." However, the decoy identified the seller when Guard was standing "right in front of" the officer and the decoy, across the bar from them [RT 16]. The record clearly shows that there was compliance with the identification requirement of Rule 141(b)(5).

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]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.