

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

LEONARDO'S RESTAURANT dba Leonardo's
350 Pine Avenue, Long Beach, CA 90802,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
AB-7440

File: 47-290183 Reg: 98044516

Administrative Law Judge at the Dept. Hearing: E. Manders

Appeals Board Hearing: November 3, 2000
Los Angeles, CA

ISSUED JANUARY 18, 2001

Leonardo's Restaurant, doing business as Leonardo's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days, with 5 days thereof suspended for a probationary period of two years, for appellant's employee selling an alcoholic beverage to a 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 Leonardo's Restaurant, appearing through its counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Kim.

¹The decision of the Department, dated July 1, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on July 6, 1994. Thereafter, the Department instituted a two-count accusation against appellant charging that, on June 27, 1998, appellant's waitress, Elizabeth Elizondo, sold an alcoholic beverage to Jorge Cano, who was then 19 years of age (count 1), and permitted Jorge Cano to consume an alcoholic beverage (count 2).

An administrative hearing was held on February 18, 1999, at which time documentary evidence was received and testimony was presented by Long Beach police officer Robert Razo; Jorge Cano, the minor; and Elizabeth Elizondo, appellant's waitress.

Subsequent to the hearing, the Department issued its decision which determined that count 2 should be dismissed², that the charge of count 1 had been established, and that a defense under Business and Professions Code §25660 had not been established.

Appellant thereafter filed a timely appeal in which it raises the following issues: (1) there was not substantial evidence to support the finding that Elizondo sold or furnished an alcoholic beverage to a minor, and (2) the evidence established a defense

² The decision is confusing on this point. Finding III states that appellant permitted a minor to consume an alcoholic beverage in violation of Business and Professions Code §25658, subdivision (b). Determination of Issues V, however, states that §25658, subdivision (b), does not apply to licensees and therefore the ALJ was without jurisdiction to decide that issue. It concludes: "It may be that the Department intended to charge the licensee with a violation of Business and Professions Code Section 25658(d). However, the Department did not request to amend its Accusation. Count II is therefore dismissed." The order makes no mention of dismissing count 2. The parties do not mention count 2 in any of their arguments.

under §25660 and Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734]. These issues are related and will be discussed together.

DISCUSSION

Appellant initially states the issues as whether substantial evidence supports the Department's findings and whether the evidence established a §25660 defense. However, appellant's point of argument is really that "[t]he evidence supported the reasonable inference" appellant relied on some kind of false identification shown by the minor.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. 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.³

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456])

³The 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].

and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When the Department's findings are attacked on the ground that they are not supported by substantial evidence, the Appeals Board must consider the entire record to 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].)

When the Board reviews decisions of the Department, it does not exercise its own judgment to "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].) 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] (positions of the Department and the license-applicant were both 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]; Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

In addition, the Appeals Board does not make determinations of credibility. It is for the trier of fact, in the reasonable exercise of its discretion, to determine the credibility of a witness's testimony. (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].)

Appellant is really just re-arguing the evidence presented at the hearing and

asking the Appeals Board to reach a conclusion different from that of the ALJ. The ALJ specifically found the testimony of officer Razo to be credible; that of the minor, Cano, “not credible. . . , self-serving and not believable”; and that of the waitress, Elizondo, inconsistent. (Det. of Issues VII, ¶2.)

Razo testified that he saw Cano in the premises drinking beer with a companion, and believed him to be younger than 21. He saw Cano and Elizondo go to the front of the restaurant, but he did not see what happened there. A few minutes later, Cano returned to his table and Elizondo brought beers for Cano and his companion. Cano paid for the beers, drank part of his, and then left the premises, where Razo found out that Cano was 19 years old. Another officer issued a citation to Cano. The citation shows a “California identity number,” but Razo did not check for identification from Cano and did not know if the other officer saw any. (Finding IV - B, C.)

Elizondo told Razo when he questioned her that night that Cano’s identification had been checked when Cano entered the premises, and that the security guard had told her that it was okay for her to sell to Cano. Razo did not speak to the security guard. (Finding IV - D.)

Cano testified that his birthdate was September 14, 1978. He denied being asked for any identification or for his age that night, and denied ordering or paying for any beer. He also denied leaving his table with the waitress. Cano recalled speaking with and being issued a citation by a police officer on that night. He testified that the officer looked through his wallet, but did not ask him any questions. He stated that he did not have a California driver’s license or identity card, his only identification being his student ID. (Finding IV - F, G, H.)

Elizondo testified that she observed a patron on that night who appeared to be

under 21. She took him to security to have his age checked and was told she could legally serve him alcohol. However, she denied that the person she took to security was Cano. She denied ever serving alcohol to a minor. (Finding IV - I.)

Razo's testimony is substantial evidence supporting the finding that Elizondo served an alcoholic beverage to Cano, a person under the age of 21.

The ALJ addressed appellant's claimed §25660 defense at some length in the third paragraph of Determination of Issues VII:

"What is missing is any proof by [appellant] in support of its affirmative defense that the minor was using a false identification. . . . If [appellant] believed that a false identification was used by the minor, it was [appellant's] burden of proof to present the security officer or other employee who allowed the minor to enter and advised Elizondo that the minor could be served. Such evidence, if it exists, was available to [appellant]. Its failure to present it compels the adverse inference that there was no reliable proof of majority shown to any of its employees or relied on by any of its employees (Evidence Code Section 412). In order to apply the holding in LaCabanne, supra, [sic] the licensee has the burden of proving the defense that evidence of majority and identity was demanded, shown and acted on as prescribed by the provisions of Business and Professions Code Section 25660. This burden has not been met by [appellant] and accordingly there is no basis for dismissal of the Accusation."

We believe the ALJ explained the situation very well.

ORDER

The decision of the Department is affirmed.⁴

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This 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.