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

AB-8930
File: 09, 17, 20-423016 Reg: 08067668

MAURICE LEO WEDELL, dba Wedell Cellars
344 Equestrian Way, Arroyo Grande, CA 93420,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 3, 2009
Los Angeles, CA

ISSUED MARCH 17, 2010

Maurice Leo Wedell, doing business as Wedell Cellars (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his licenses for 15 days, 5 days of which were conditionally stayed for one year, for giving a thing of value, i.e., wine pouring services, to the holder of an on-sale beer and wine public premises license, a violation of Business and Professions Code section 25500, subdivision (a)(2).

Appearances on appeal include appellant Maurice Leo Wedell, in pro. per., and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated August 12, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's winemaker license was issued on June 20, 2005. Thereafter, the Department instituted a three-count accusation against appellant charging that he violated Business and Professions Code section 25500, subdivision (a)(2), by giving a thing of value, i.e., wine pouring services (count 1), and four bottles of Wedell Cellars wine (count 2), to a holder of an on-sale beer and wine public premises license, and section 25600 by giving gifts of free goods, four bottles of Wedell Cellars wine, in connection with the sale of alcoholic beverages, to that same licensee (count 3).

An administrative hearing was held on June 12, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented by Department investigator Nicholas Sartuche; Tracy Bogue, a Wedell Cellars wholesale distributor; and Doug Timewell, a friend and associate of appellant.

Subsequent to the hearing, the Department issued its decision which determined that the charge in count 1 of the accusation (the furnishing or giving of a thing of value, i.e., wine pouring services) had been established, but there had been a failure of proof with respect to count 2 (the giving of a thing of value, i.e., four bottles of Wedell Cellars wine), and count 3 (the giving of premiums, gifts or free goods, i.e., four bottles of Wedell Cellars wine).

Appellant filed a timely notice of appeal in which he raises the following issue: the decision is not supported by substantial evidence; there is no evidence that he was not compensated.

DISCUSSION

The essence of appellant's argument on appeal is that, under section 25500,

subdivision (a)(2),[2] the Department had the burden of proof that he was not compensated for the wine pouring services he provided, and there is no substantial evidence of that. In the alternative, appellant argues that even if there was evidence that he was not compensated for his wine pouring services, there was no violation of the statute, because wine pouring service is not a "good" within the meaning of the statute. In light of the result we reach, we do not need to address that argument.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When 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*

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[2] Business and Professions Code section 25500, subdivision (a)(2) provides:

> (a) No manufacturer, winegrower, manufacturer's agent, rectifier, California winegrower's agent, distiller, bottler, importer, or wholesaler, or any officer, director, or agent of any such person shall:
>
> [¶] ... [¶]
>
> (2) Furnish, give, or lend any money or other thing of value, directly or indirectly, to, or guarantee the repayment of any loan or the fulfillment of any financial obligation of, any person engaged in operating, owning, or maintaining any on-sale premises where alcoholic beverages are sold for consumption on the premises.

California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

"Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, §500; *see* 1 Witkin, Cal. Evidence (4th ed. 2000), Burden of Proof, §6, p. 159.) The Department does not deny that proof of the absence of any compensation was part of its burden of proof. Instead, it argues that since appellant produced evidence that he was paid for the wine, he could also have produced evidence that he was compensated for his wine pouring service, if that was the case. "It would seem that as Count 1 of the accusation clearly charged the licensee with providing free wine pouring services ..., the licensee could simply have addressed or explained that issue at the hearing just has [*sic*] he had directly addressed the issue of who paid for the wine." (Dept. Br., p.6.) This argument seems to say that, by offering evidence that counters one part of the Department's case, a party admits the truth of another part, relieving the Department of its burden of proof as to that part. We do not agree. Nor do we agree that appellant's statement to the Department investigators that "all of the proceeds went to the bar" is a substitute for evidence appellant was not compensated for his services. The record is silent on the issue.

The Department argued at the administrative hearing that "with [appellant] standing there, him being there, him talking to everybody, that is the whole point of wine tasting in general, and there is nothing wrong with that. At that time he is not providing them with a thing of value." [RT 83.] Theoretically, appellant could have held one of the bottles the subject of the tasting, explained the information on the label, extolled the quality and taste of the wine being offered, but if the patron asked to taste the wine, appellant would have had to interrupt his presentation, summon an employee of the

licensee to actually pour the wine, and then resume the conversation. This sounds to us unwieldy and overly technical, unnecessarily interfering with the tasting process.

The "tied-house" laws, of which section 25500 is one, were designed to prevent large firms from dominating local markets and from engaging in "overly aggressive marketing techniques." The statutory scheme established a three-tiered system designed to prevent manufacturers, wholesalers, and retailers from becoming horizontally or vertically integrated by keeping the three types of interests "distinct and apart." *(California Beer Wholesalers Assn, Inc. v. Alcoholic Bev. etc. Appeals Bd.* (1971) 5 Cal.3d 402, 407 [96 Cal.Rptr. 297].) "All levels of the alcoholic beverage industry were to remain segregated; firms operating at one level of distribution were to remain free from involvement in, or influence over, any other level." (*Id*. at p. 408.) We have significant doubt, absent a duly adopted Department rule to such effect, that the social act of pouring a few glasses of wine as an integral part of an otherwise proper wine tasting presentation, without more, could be considered "involvement in, or influence over" the licensee in whose premises the tasting takes place.

There is no evidence in this case that the wine tasting was more than a one-time event, with an expectation of future benefits to flow. (See *Brown Forman Corporation* (2003) AB-7730, where the contrary was true.) Appellant's presence at the wine tasting was undoubtedly of greater benefit to the licensee than the speculative savings from its employee not having to pour wine, yet the Department has no quarrel with his presence.

Appellant argued at the Board hearing that, in fact, he was paid for his appearance at the tasting, but did not feel it was his burden to prove payment. Since this is not a matter of record, we give it no weight. On the other hand, his claim that he

was compensated as a result of his wine being bought for the tasting is some evidence of compensation.

We will not stretch the reach of section 25500, subdivision (a)(2), to reach the facts of this case. The Department failed to meet its burden of proof under the statute, and produced no evidence that appellant's conduct posed any danger of the evils which were the target of the tied house laws.

ORDER

The decision of the Department is reversed.[3]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3] 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.