

ISSUED MAY 6, 1997

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

ALFONSO S. & MARTHA H. LARA	)	AB-6692
dba Alfonso's Restaurant)	
2375 Lawrence Street	)	File: 47-48141
Ceres, California 95307,	)	Reg: 96035352
Appellants/Licensees,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Jeevan S. Ahuja
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	March 5, 1997
	)	San Francisco, CA
)	

Alfonso S. and Martha H. Lara, doing business as Alfonso's Restaurant (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which ordered their on-sale general public eating place license suspended for ten days, with five days thereof stayed for a probationary period of one year for their bartender having sold an alcoholic beverage (beer) to two minor decoys, 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

¹The decision of the Department dated June 27, 1996, is set forth in the appendix.

Professions Code §25658, subdivision (a).

Appearances on appeal include appellants Alfonso S. and Martha H. Lara; and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public eating place license was issued January 18, 1979. Thereafter, the Department instituted an accusation alleging that on June 7, 1995, appellants' agent and/or employee sold alcoholic beverages (beer) to two minor decoys, aged 19 and 18.

An administrative hearing was held on May 14, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the circumstances surrounding the sale of beer by appellants' bartender on June 7, 1995, to two minor decoys working with the police of the City of Ceres, California. Subsequent to the hearing, the Department issued its decision which determined that appellants' bartender, despite having been shown California drivers' licenses which clearly set forth the respective ages of the two minors, nevertheless sold each of them a bottle of beer.

Appellants thereafter filed a timely notice of appeal.

In their appeal, appellants raise the following issues: (1) the police decoys attempted to deceive the bartender; (2) appellants did all they could to prevent sales to minors; and (3) there should be no fine or suspension.

DISCUSSION

I

Appellants contend that the police decoys attempted to deceive the bartender by evading her question whether they had just come from a "4th Street Bar." They argue that had the decoys answered honestly, the bartender's suspicions would have been aroused, and she would have asked them more questions before selling them the beer.

Apparently, other patrons of the restaurant had seen the two minors earlier in the evening, and may have learned they were participating in a decoy program. It was the other patrons' comments to the bartender that evoked her question to the minors as to whether they had just come from the other bar [RT 18, 24]. One of the minors, instead of answering the question, asked why the bartender wanted to know, and the other, professing not to have heard, answered "what, Modesto" [RT 15-16]. He later explained that he understood the bartender to be asking about his identification [RT 27-28].

Each of the minors produced a California driver's license in response to the bartender's request for identification [RT 10]. The female decoy's license [Exhibit 2] bore the legend "AGE 21 IN 1997." A similar legend on the male decoy's license [exhibit 4] indicated he would not be 21 until 1996. After examining the licenses, the bartender sold the minors two bottles of beer, and gave them \$1.50 change from a five-dollar bill. The minors "grabbed" the bottles and moved to a

table away from the bar [RT 11].

After the two decoys were seated, the bartender, apparently in response to additional patron comments suggesting that the two might be police decoys, went to their table and asked the male decoy for his identification [RT 18, 24]. Upon seeing it for the second time, she said "Sorry, you're not 21," and attempted to retrieve the beers [18]. By this time, police officer Sullivan was already on the way into the restaurant bar, having been alerted that the sale had been made by the male decoy, who was wearing a concealed radio transmitter [RT 12, 40].

The bartender did not testify, so there is no admissible evidence as to whether, or to what degree, if any, the minors' responses to her questions may have distracted her. However, the evidence did show that, when asked, both minors produced their California drivers' licenses which showed the true age of each: the female decoy was 18, the male 19 [see exhibits 2 and 4].

We have difficulty seeing how the non-responses to the bartender's question misled her in any way given the presentation to her of drivers' licenses showing on their face that both decoys were underage. The fact they might have been in another bar earlier in the evening does not change the fact that the bartender was shown drivers' licenses stating the true age of each minor. We think it more likely she simply assumed that, if someone presented a license to her, they were old enough to buy liquor, and did not bother to examine the licenses.

We do not give any weight to appellants' claim that the bartender was

shown other, false, evidence of age. Each of the minors denied having done so [RT 15, 25], and the bartender did not testify. Appellants' claim that the bartender was shown other identification is hearsay.

Appellants contend that the police officer prevented the bartender from retrieving the beers from the minors and undoing the sale transaction. However, the violation occurred when the sale was made. The attempt to retrieve the beer, prompted, no doubt, by the admonitions of other patrons that the young man and woman were part of a sting operation, was at most an element of mitigation.

II

Appellants contend that they did all they could to discourage and prevent sales to minors. Their manager, Sarah Lara, testified that she instructed another employee, Julie Maxwell, to make sure that the bartender checked the two minors' identification, since to her they "didn't look 21 or it was iffy" [RT 49], and Maxwell assured her that this was being done.

Despite their protestations, the law holds appellants responsible for the bartender's apparent carelessness. A licensee is vicariously responsible for the unlawful on-premises acts of his or her employees. Such vicarious responsibility is well settled by case law. (Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; and Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2

Cal.Rptr. 629, 633].)

III

Appellants contend that there should be no suspension or fine.² To a large extent, appellants' arguments against a suspension are the same as their arguments that there was no violation. They point to their efforts to prevent and discourage sales to minors, and reiterate their contention that the sales would not have occurred had the bartender not been misled. Appellants also point to their long history of being licensed and never having been the subject of any disciplinary action.

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].)

Appellants are to be commended for their vigilant and exemplary, at least prior to this incident, exercise of the privileges of their license. We accept as

² Appellants' concern regarding a fine is apparently a reference to Business and Professions Code §23095, since the suspension ordered is within the limits contained in that code section.

sincere, but mistaken, their protests of innocence. At the same time, we note that the suspension imposed by the Administrative Law Judge (ALJ), in apparent response to appellants' entreaties, was substantially more lenient than the penalty initially recommended by the Department, and the Department thereafter acquiesced in the ALJ's proposed decision. Since there was a clear violation of the law, we can hardly say that the relatively mild discipline imposed by the Department was an abuse of its discretion.

CONCLUSION

The decision of the Department is affirmed.³

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

DISSENT TO FOLLOW

³ This final order is filed as provided in Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.

DISSENTING OPINION OF JOHN B. TSU

I dissent. In my view, the police officer prevented the bartender from correcting her mistake. Had he not done so, she would have been able to recover the beer and nullify the transaction. The evidence demonstrates that appellants were attempting to comply with the law.

JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD