

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

AB-7671

File: 41-337214 Reg: 00048256

LUZVIMINDA LIWANAG TUATA dba Mindas Restaurant
2227 Pacific Avenue, Long Beach, CA 90806,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: June 7, 2001
Los Angeles, CA

ISSUED SEPTEMBER 27, 2001

Luzviminda Liwanag Tuata, doing business as Mindas Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended her license for 30 days, with 15 days thereof stayed for a probationary period of one year, for having violated a condition on her license restricting the hours during which alcoholic beverages may be sold, served, or consumed, 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 §23804.

Appearances on appeal include appellant Luzviminda Liwanag Tuata, appearing through her counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the

¹The decision of the Department, dated July 6, 2000, is set forth in the appendix.

Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on March 4, 1998. Thereafter, the Department instituted an accusation against appellant charging that on December 17, 1999, at 11:40 p.m., a waitress in appellant's employ accepted an order from, and served beer to, two Department investigators, despite the fact that a condition on appellant's license restricted the sale, service and consumption of alcoholic beverages to no later than 11:00 p.m.

An administrative hearing was held on May 24, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigators Will Salao and Jesus Mejia.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation. Appellant thereafter filed a timely notice of appeal, in which she raises the following issues: (1) The existence of the condition was not established; and (2) the uncertain testimony of the Department investigator was insufficient to establish the Department's burden of proof.

DISCUSSION

I

Appellant contends that the Department failed to prove the existence of the license condition claimed to have been violated.

Appellant's objection to the admission into evidence of the Petition for

Conditional License (Exhibit 2) when it was first offered, reiterated an earlier objection expressed as “foundation on certification authenticity.” Later, elaborating on her objection, appellant questioned whether the petition had any current viability.²

Appellant lists a number of what she considers voids in the record regarding the Petition for Conditional License - there was no testimony appellant signed the petition, that it was the only petition in the file, or that it had not been superceded. She offered no evidence to suggest any of these alleged “voids” had substance.

Salao testified he was told by appellant that she was aware of the conditions on her license. While she did not make specific reference to the condition in question, her explanation that an exception to a limitation upon hours of operation had been made because a Christmas party was in progress amounts to an admission of her awareness of the condition, and serves to authenticate the petition itself.

We would assume that if appellant’s license did not reflect the existence of conditions, this case would not be here. We think that the Administrative Law Judge was entitled to draw an inference from all the evidence, in the absence of any evidence to the contrary, that Exhibit 2, certified as an official record of the Department and referring to appellant and her business establishment, was an authentic copy of the Petition for Conditional License governing appellant’s operation.

² The Administrative Law Judge suggested to appellant’s counsel that his objection to the Petition for Conditional License might have consequences beyond the bounds of this case, the implication being that if the petition in question was not the foundation for appellant’s license, the existence of the license itself could be in jeopardy.

II

Department investigator Will Salao testified that he was permitted to order, and was served, two beers at approximately 11:30 p.m.³ Appellant suggests, without apparent conviction, that Salao may have been mistaken as to the time, on the theory that he set his analog watch well before 11:00 p.m. Appellant directs her argument more at Salao's testimony concerning the date when the transaction occurred, asserting that Salao testified to a number of different dates as to when he visited the premises. Appellant seems to suggest that, since the accusation specified a precise date, and did not use the words "on or about" preceding the date of the alleged violation, it was incumbent upon the Department to prove that the transaction took place precisely on that date. Appellant further argues that Salao's apparent confusion as to the precise date has special importance because of the time-critical nature of the violation. Her argument, in substance, is that Salao's testimony as to the date was so uncertain that his testimony about the time is also unreliable.

There is no doubt that there were discrepancies in Salao's testimony. It could even be argued, as appellant has, that these discrepancies are substantial. By the same token, it can be argued with equal force that the discrepancies are so insignificant as to be ignored.

The Administrative Law Judge was well aware of the discrepancies, which had to do with the date Salao visited the premises, and not when he purchased the beer. The

³ The decision states that this occurred at 11:40 p.m. However, that was when Salao paid for the beers, which had been served approximately 10 minutes earlier. [RT 14, 16.]

Administrative Law Judge resolved these discrepancies in favor of the Department, and cannot be faulted for doing so.

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]; 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]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Salao was certain that he had only visited the premises once. His report gave the date of the visit as December 17, 1999, the date contained in the accusation. The bulk of his answers on cross-examination focused on December 17 as the correct date, despite the confusion resulting from erroneous date entries on the beer bottles seized at the time.⁴

We are inclined to agree with the Administrative Law Judge that, despite the discrepancies, there was sufficient credible evidence in the record to sustain the charge of the accusation.

⁴ Each of the entries on the bottles showed the day of the month as the 17th, but were mistaken as to the month. Since the report used the date December 17, it is reasonable to assume that was the date intended to have been placed on the bottles.

ORDER

The decision of the Department is affirmed.⁵

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

⁵ 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.