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

AB-8056
File: 47-265609 Reg: 02052549

PETER HALAMANDARIS dba Flamingo Club
1233 East Charter Way, Stockton, CA 95205,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ann E. Sarli

Appeals Board Hearing: September 4, 2003
San Francisco, CA

ISSUED NOVEMBER 4, 2003

Peter Halamandaris, doing business as Flamingo Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 15 days for his bartender, Maria Slayter, having given an alcoholic beverage to a 19-year-old minor, a violation of Business and Professions Code section 25658, subdivision (a).[2]

Appearances on appeal include appellant Peter Halamandaris, appearing through his counsel, Gregory R. Davenport, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

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[1]The decision of the Department, dated December 5, 2002, is set forth in the appendix.

[2] Unless otherwise noted, all statutory references are to the Business and Professions Code.

Appellant's on-sale general public eating place license was issued on November 1, 1999. On March 14, 2002, the Department instituted an accusation against appellant charging the furnishing of an alcoholic beverage to a minor, in violation of section 25658, subdivision (a).

An administrative hearing was held on August 15, 2002, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Jonathan Kislingbury, the Stockton police office who witnessed the alleged violation; by Rudy Miller, the minor; and by appellant. Subsequent to the hearing, the Department issued its decision which determined that the offense had occurred as alleged.[3]

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) Evidence establishing the alcoholic content of the beverage in question was improperly admitted; consequently, the finding that the drink was alcoholic is based on insufficient evidence; and (2) the licensee took all reasonable steps to prevent alcohol from coming into the possession of the minor.

DISCUSSION

I

The administrative law judge (ALJ), in Finding of Fact 3, stated: "[The minor's] beverage was confiscated. It was tested at a laboratory at the California Department of Justice. It was determined to contain alcohol."

Appellant contends that the evidence of the alcoholic content of the drink in question was improperly admitted. As a consequence, asserts appellant, the finding

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[3] The facts relevant to the alleged offense will be addressed in part II, *infra*.

that the drink was alcoholic is based on insufficient evidence.

The evidence in question is a written alcohol analysis by an employee of the California Department of Justice. Although the report was dated June 6, 2001, Department counsel represented he had only received the analysis the morning of the hearing. This was later confirmed in officer Kislingbury's testimony. When appellant's counsel objected to the report as unreliable and lacking foundation,[4] and questioned the competency of the person who prepared the report, the following colloquy occurred (RT 8-10):

> Mr. Wieworka: *Just to preclude any arguments of prejudice, I think we should put the primary hearing on today and continue for any analysis or other evidence that they wish to present on the other side. In fact, we'll subpoena the person doing the analysis as well.*
>
> AJR Sarli: Counsel?
>
> Mr. Davenport: Well, again, we just received it today. I don't know whether or not they would be able to lay the foundation that would allow this to be admitted into evidence; so basically I'm asking it to be excluded. And that is my request.
>
> AJR Sarli: Well, I think Mr. Wieworka is saying that he can present the case without use of this evidence at this time and will leave the matter open to allow you time to have your physical examination done and then continue with the hearing on another date.
>
> Mr. Davenport: Well, as long as this in no way is entered into evidence today or considered by the court, I would be willing to do that.
>
> AJR Sarli: That is not your intention, Mr. Wieworka, to enter it today?
>
> Mr. Wieworka: *It would be hearsay. Just to have it on the record – it won't be admitted for the truth of the matter asserted – until we bring in the criminologist who did the analysis, that would be our position.*
>
> ALJ Sarli: All right. Mr. Wieworka's suggestion that we proceed today, take all

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[4] Appellant asserts in his brief that a hearsay objection was also made. We have been unable to find such an objection in the record.

> evidence except the evidence of this physical examination report, is a good one. I prefer we proceed in that way. We will not introduce the physical examination report today. I'm returning it to Mr. Wieworka. At the conclusion of the hearing we'll leave the record open, we'll determine a date by which we will continue the matter and during that time, if you choose, Mr. Davenport, you can have the materials tested yourself.

Only the italicized excerpts from this colloquy are set forth in appellant's brief. Appellant then asserts that Department counsel: "agreed that the report of Mr. Lynd was hearsay that lacked foundation and that the report would not be admitted for the truth of the matter asserted, i.e., that the beverage contained alcohol, until the State brought in the criminologist who did the analysis." (App.Br., page 2.)

Appellant's seemingly compelling argument relies on the ground rules that are discussed in the colloquy set forth at length above. However, later in the course of the hearing, the ground rules were changed, and appellant's argument loses its force.

After officer Kislingbury had begun to testify, the ALJ interrupted the examination, and suggested a different approach for dealing with the alcoholic beverage issue (RT 24-25):

> AJR Sarli: Excuse me, counsel. At this time I'd like to discuss something with both counsel.
>
> If Mr. Davenport chooses not to have the sample retested or if he retests it and it comes back positive for alcohol content, there would probably be no reason to reopen the case. Is that true?
>
> So, if we put on the evidence now of what the report states, subject to your cross-examination and your introduction of other documents which may rebut those reports, do you see any problems.
>
> What I'm getting at is if you find there is no reason to reopen because the tests confirm what we have here, or you don't want to challenge them, for whatever reason, we would have to reopen anyway to put this evidence in. We'd all have to reconvene again for the purpose of putting this evidence in. That seems to me to be a waste of time.
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> The alternative is to allow all this evidence now. If you wish to reopen for

> whatever reason, we will reopen. And then you can rebut that evidence with your own direct evidence and with any cross-examination that may have been triggered by your new results. I think I prefer to proceed that way.

Department counsel concurred in the ALJ's proposal, and suggested to her that she could make a determination of the need for a further hearing on a written offer of proof from appellant. She declined to pursue that approach, emphasizing appellant's "absolute right" to reopen the matter to bring in a witness and introduce evidence attacking the credibility of the person who prepared the report.

Appellant's counsel reiterated his opposition to the analysis, on two theories: the Department had not timely furnished the analysis during discovery, and it was unreliable, since "Mr. Lynd [the author of the report] is suspect with respect to his procedures and testing. ... The court is in a position to make a ruling, but I'm not going to stipulate to that evidence being admitted today or at any other time." (RT 27.)

After further discussion the ALJ declared the report admissible (RT 28-29), stating:

> Mr. Davenport's objection is he was prejudiced in some way by the failure to produce. I agree he was but the cure for that is to allow you to have the materials tested and to reopen for any evidence that you feel is appropriate. The cure for that is not to exclude this otherwise admissible evidence; so I'm going to allow it in. In the interest of efficiency, I'm going to allow it to be introduced in this proceeding, and give Mr. Davenport an absolute right to have a request to reopen granted.

The examination of officer Kislingbury resumed. He testified he first saw the report that morning, when he received a fax copy from the Department of Justice. The report was admitted into evidence, and appellant's counsel renewed his objections based upon lack of foundation and lack of reliability. Once again, he did not state a hearsay objection. The report stated that the beverage which was tested contained 6 percent alcohol by volume. Kislingbury was permitted to testify, over objection, that the

bartender had entered a plea of nolo contendere to a criminal charge of furnishing an alcoholic beverage to a minor.[5] At the conclusion of Kislingbury's testimony, he was instructed by the ALJ to maintain possession of the drink sample (Exhibit 3) so that it would be available to appellant's counsel for testing.

The subject came up for the final time after the minor and appellant himself had testified. Department counsel stated he might call rebuttal witnesses on the issue of foundation for the analysis report. The ALJ then suggested leaving the record open for the taking of additional evidence. She gave appellant until October 15 to notify Department counsel and OAH whether or not he was requesting that the matter be reopened. Appellant's counsel stated that if the results from his own tests were the same as in the report, he would not need to reopen the hearing. He did not make such a request, and the record was closed on October 15.

It is true, as appellant asserts, that Department counsel said the report was hearsay, and that the report would not be admitted for the truth of the matter. But those statements were made when the subject was first broached. It was not until after the ALJ interrupted officer Kislingbury's testimony with her suggestion that the matter be handled differently that the document was admitted into evidence, appellant's foundation and credibility objections notwithstanding. With this state of the record, the notion that the document was being given only limited admissibility seems to have gone by the wayside.

When appellant sought and was given until October 15 to state whether he

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[5] Later in the proceeding, the minor testified, without objection, that he had pled guilty to the criminal charge of minor in possession of an alcoholic beverage.

wished the hearing to resume in the event he wished to present his own evidence concerning the report, he did not say that he was also standing on his earlier objections to the report. By his acquiescence in the ALJ's plan for handling the issue, he may well have led the ALJ and Department counsel to think he had abandoned his earlier objections.

In any event, even if the report is ignored, there is other evidence in the record that established that the drink was alcoholic. There is the minor's affidavit (Exhibit 4), admitted into evidence without objection, in which the minor describes the drink as a strawberry daiquiri. His behavior in lowering the drink to his waist when he saw the police officer, the physical equivalent of a spontaneous utterance, confirms his belief he was holding an alcoholic beverage, as do his attempts to attribute ownership of the drink to his sister. Appellant, when asked if that was an alcoholic beverage, answered: "Depends. Any drink with alcohol." Webster's Third International Dictionary describes a daiquiri as "a cocktail made of rum, lime or sometimes lemon juice, and sugar." Fruit flavored daiquiris are commonplace.

Viewing the record as a whole, there is little doubt that the drink was alcoholic in nature.

II

Officer Kislingbury testified that he saw the bartender pour a drink from a blender and hand the drink in question to the minor. The minor continued his conversation with the woman sitting next to him, and stirred the drink with a straw that was in it. Kislingbury did not see the minor consume any of the drink. Kislingbury testified that the minor told him the drink was for his sister, but when confronted with Kislingbury's statement that he did not believe him, admitted the drink was his.

The minor denied admitting to the police officer that it was his drink, and insisted he had merely taken the drink from the bar where it had been placed by the bartender so he could hand it to his sister.

The ALJ found that the bartender "prepared a mixed drink in a blender, poured it into a glass, placed a straw in it, and handed it to Miller [the minor]."[6]

The ALJ found the minor's testimony that the drink was not for him but for his sister, that he was passing it to her, became scared when he saw a man looking at him, and did not recall seeing any police identification or the word "Police" on Kislingbury's clothing, "completely incredible." (Finding of Fact 5.)

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

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 Bev. Control App. Bd.* (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. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67

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[6] Finding of Fact 2. The finding also states, in part, that the minor placed the straw in his mouth and started to drink. This is incorrect. Kislingbury testified he did not see the minor place the straw in his mouth, or see him drink: "He started to bring the drink up to his mouth as if he was going to drink, and he looked directly at me, and at that point he put the drink down by his waist area." [RT 16.] (See also, RT 49.)

Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

It is readily apparent that the ALJ chose to believe the testimony of the officer. Although there were sharp conflicts between the two versions of what happened, the minor's explanation was undermined by a number of serious inconsistencies. His explanation of why the drink was placed to his right rather than in front of his sister, who, supposedly, was seated on the other side of the minor's girl friend, who was seated to his left, and the failure of his sister to come to his assistance, are only two of them. Additionally, the minor signed a "Minor Affidavit" seven months before the hearing in which he admitted having been furnished an alcoholic beverage known as a strawberry daiquiri by the bartender. As noted earlier, the affidavit (Exhibit 4) was admitted into evidence without objection.

Thus, appellant's contention that he took every reasonable step to prevent minors from access to alcoholic beverages was implicitly rejected by the ALJ when she found, as officer Kislingbury testified, that the drink was handed to the minor by the bartender.

ORDER

The decision of the Department is affirmed.[7]

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[7] 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

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

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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.