

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

**AB-8145**

File: 48-371638 Reg: 02054128

SYZYGY LLC dba The Wet Spot  
8237 Canoga Avenue, Canoga Park, CA 91304,  
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

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

Appeals Board Hearing: February 19, 2004  
Los Angeles

**ISSUED MAY 12, 2004**

Syzygy LLC, doing business as The Wet Spot (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended its license for 15 days for its bartender, Allyson Yumas, having sold a distilled spirit (Southern Comfort) to, and permitting its consumption by, Daniel Dickerson, a person then 19 years of age, and for having permitted Dickerson to enter and remain in the premises without lawful business therein, violations of Business and Professions Code sections 25658, subdivision (a), and 25665.

Appearances on appeal include appellant Syzygy LLC, appearing through its counsel, Roger J. Rosen and Robert I. Manuwal, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

**FACTS AND PROCEDURAL HISTORY**

Appellant's on-sale general public premises license was issued on January 22,

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<sup>1</sup>The decision of the Department, dated May 8, 2003, is set forth in the appendix.

2001. Thereafter, the Department instituted an accusation against appellant charging the sale to and consumption of an alcoholic beverage by a minor, and permitting the minor to enter and remain in the premises without lawful business therein.

An administrative hearing was held on March 20, 2003, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violations alleged had been proven, and that appellant had failed to establish any defense to the charges.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises a number of issues in support of its basic contention that a defense was established under Business and Professions Code section 25660.<sup>2</sup>

#### DISCUSSION

The thrust of appellant's position on this appeal is that the minor was served two drinks by appellant's bartender, Allyson Yumas; that he displayed false identification to Yumas and to a second bartender when served the first drink; and that Yumas reasonably relied on that identification when she served him the second drink, the one witnessed by the police officer. Appellant contends that the administrative law judge (ALJ) erred in finding (in Finding of Fact 7) that Yumas contradicted the minor by stating

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<sup>2</sup> Business and Professions Code section 25660 provides:

Bona fide evidence of majority and identity of the person is a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license or an identification card issued to a member of the Armed Forces, which contains the name, date of birth, description, and picture of the person. Proof that the defendant-licensee, or his employee or agent, demanded, was shown and acted in reliance upon such bona fide evidence in any transaction, employment, use or permission forbidden by Sections 25658, 25663 or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

in a police interview that she had never checked the minor's identification because she assumed he was of legal age because of his employment as a disk jockey at the Gentlemen's Club next door. Appellant claims there is no evidence to support that portion of the finding.

The Department asserts that there is such evidence, citing the testimony of Los Angeles police officer Joseph Kalyn. Appellant argues that Kalyn's testimony does not support the Department's position.

Kalyn testified as follows on direct examination:<sup>3</sup>

Q. ... Okay. During the course of the – during the course of the examination did she ever say or indicate to you, at any point in time, that – well, before I ask that question, did you indicate to her or point out the minor that she was said to have served him?

A. Yes. She had asked me who the minor was, and I advised her the minor was Daniel, the DJ that works in the location directly next door and who shares a common wall.

Q. When you informed her of that, how did she respond?

A. She was shocked. She's, like, "He's only 19?" And I said "Yes. He's only 19."

Q. All right. And during this part of the investigation did Allyson Yumas, the bartender, ever tell you or express to you or convey to you in any way that she had on many occasions examined some identification of Daniel's that indicated he was over 21?

A. No. I asked her that question. She said she never looked at his I.D. She was under the assumption that he was over 21 because he was working there.

The Court: ...She assumed what?

The Witness: She said she assumed that he was of age because he was working in the establishment.

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<sup>3</sup> Appellant asserted a number of hearsay objections to the officer's testimony of his conversation with Yumas. We think the objections were correctly overruled.

(RT 51-52.)

It is appellant's position that, on cross-examination, Kalyn conceded that Yumas did not say in so many words that she had not asked the minor for identification:

Q. Is it your testimony that Ms. Yumas stated to you she did not check I.D.?

A. Yes.

Q. Because you asked her that question directly?

A. I asked her – she asked me who the individual was, and I informed her “Daniel.” She said “Daniel?” I said “Yes. He’s only 19.” She was shocked. I asked her if there was any – if she saw I.D.

She said “You know, I thought he was 21 because he worked next door.” That was the end of that conversation.

Q. Let's be clear about this. You did not ask her specifically “Did you ask to see his I.D. before serving him?”

A. Specifically, no.

Q. You didn't ask that question?

A. No.

Q. You're just speculating as to whether or not she had asked for I.D.?

A. Based on her statement that she assumed he was of age.

Q. But you don't really know if she asked him for I.D. or not, do you, sir?

A. No.

Q. So if Daniel Dickerson, the minor, testified in here under oath and says “I was asked, and I furnished a false I.D.,” unbeknownst to her. You have no way to rebut that: correct?

A. No.

The resolution of conflicts in testimony and evidence is one of the many tasks assigned to the ALJ. Where there are such conflicts, 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 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Here the issue is not so clearly one of conflict as it is in interpreting testimony given in response to less than precise questioning. It seems clear that officer Kalyn inferred from her responses to him that Yumas had not asked the minor for identification. The natural response to the officer's questioning, had Yumas actually asked for and been shown identification purporting to show that the minor was 21 or older, would have been that she had been shown such identification. Her explanation that she believed the minor to be 21 or older because he worked in an adult entertainment establishment tends to suggest the contrary - that she had not made such a request.

Yumas did not testify. There is nothing in the record to indicate whether or not Yumas was still an employee of appellant, or, if not, whether she was available to testify.

There is an affirmative duty on a licensee to maintain and operate his or her premises in accordance with law, and section 25660, as an exception to the general prohibition against sales to minors, must be narrowly construed. (*Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734] (*Lacabanne*).) The statute provides an affirmative defense, and "[t]he

licensee has the burden of proving . . . that evidence of majority and identity was demanded, shown and acted on as prescribed by . . . section 25660." (*Ibid.*)

The ALJ found that the minor's testimony lacked internal consistency, and was inconsistent with the testimony of Sgt. Puente and the statement of the bartender to officer Kalyn. The minor's testimony that he had shown a false identification to Yumas earlier that day was contradicted by his statement to Sgt. Puente that he had lost the false identification weeks earlier, as well as the fact that he had only his own California driver's license in his possession when searched by Puente.

This Board may not substitute its views of witness credibility for those of the ALJ, who had the ability, which this Board lacks, of seeing the witness as he testified. It is quite apparent from the comments of the ALJ that he simply did not believe the minor's story.

We are satisfied that appellant failed to meet its burden under section 25660.

#### ORDER

The decision of the Department is affirmed.<sup>4</sup>

TED HUNT, CHAIRMAN  
KAREN GETMAN, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>4</sup> 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.