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

AB-8307
File: 47-291814 Reg: 03056401

MAIN ST. CALIFORNIA, INC. dba TGI Fridays
2625 Eastland Circle, West Covina, CA,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: June 2, 2005
Los Angeles, CA

ISSUED AUGUST 17, 2005

Main St. California, Inc., doing business as TGI Fridays (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days, all of which were conditionally stayed for one year, for its server, Michael Choy, having furnished an alcoholic beverage to and permitted its consumption by Matthew Shubin, an 18-year-old minor, in violation of Business and Professions Code section 25658, subdivisions (a) and (b).

Appearances on appeal include appellant Main St. California, Inc., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on April 20, 1994. Thereafter, the Department instituted an accusation against appellant charging that appellant's employee, Michael Choy ("Choy"), furnished beer to, and permitted its

[1]The decision of the Department, dated June 24, 2004, is set forth in the appendix.

consumption by, Matthew Shubin ("Shubin"), an 18-year-old minor.

An administrative hearing was held on April 28, 2004, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Shubin, Choy, and Will Salao, a Department investigator.

Subsequent to the hearing, the Department issued its decision which determined that the violations alleged had been proven.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Count 2 of the accusation and decision are void because the count was improperly pled; (2) there is no evidence that appellant's employee furnished or permitted the consumption of an alcoholic beverage; (3) there is no proof that the beverage served was alcoholic.

DISCUSSION

I

Appellant claims that the accusation and decision are void because the accusation alleged a violation of Business and Professions Code section 25658, subdivision (b), a violation appellant claims can only be committed by a minor.

Section 25658, subdivision (b), is, as appellant argues, directed at conduct by a minor. However, the charge of the accusation, read as a whole, is that the permitting of the violation of section 25658, subdivision (b), was a ground for suspension of the license, as contrary to welfare and morals.

A very similar claim was raised and rejected in *Song* (2000) AB-7384, cited by appellant for its holding with respect to the issue of permitting.

We are satisfied that the accusation was properly pled.

II

Appellant claims there is no evidence to support the Department's determination

that Choy furnished beer to Shubin and permitted him to consume it.

"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 [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, as in the instant matter, the findings are attacked on the ground that there is a lack of 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 California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) 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, 51 [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].)

The record in this matter is replete with conflicts which, in largest part, were resolved in favor of the testimony presented by Department witnesses Salao and Shubin. Although the administrative law judge (ALJ) did not make any express determinations of credibility, it is readily apparent that he rejected Choy's testimony denying that Shubin ordered a beer, that he, Choy, placed the beer on the table close enough for Shubin to pick it up and sip from it, or that he saw Shubin do this and did

nothing to stop it.

Appellant argues that the ALJ's reliance on *Song* (2000) AB-7384 is misplaced. In *Song*, the Board found that the server, by furnishing two glasses with a pitcher of beer in a premises frequented by minors, assumed the risk that the beer could be shared with a minor. Appellant argues that Choy did nothing to create such a risk, blaming what happened on a "sudden criminal act" which was "completely unforseen and unforeseeable."

The ALJ saw things differently, stating (Determination of Issues, Count II):

> A "reasonably possible unlawful activity" in a restaurant is an adult ordering an alcoholic beverage which an adult gives to, or shares with, an underage customer. Respondent's employees, as servers in a restaurant, would almost surely know this. Yet, according to Respondent, within seconds of Choy putting a glass of beer in front of George, Shubin consumed some of it without Choy seeing it. In such a scenario, it cannot be said that Respondent, by its employee, was "diligent" in anticipation of the reasonably possible unlawful activity.

Appellant's brief contains a lengthy exposition of what appellant says are the facts of the case. Its brief asks the Board, in effect, to reweigh the evidence, and make its own findings of what the evidence established. The Board may not do this. As we observed earlier, we must resolve evidentiary conflicts in favor of the Department's decision, and give the Department the benefit of all inferences reasonably drawn from the evidence. There is evidence, if believed, that Shubin ordered a Bud Light, that a glass of Bud Light was brought to the table where Shubin was seated, and Shubin drank from the glass in the immediate presence of Choy. The ALJ chose to believe Shubin's testimony, and we are unable to say he was not permitted to do so.

III

Appellant contends that there is no evidence that the glass from which Shubin consumed contained an alcoholic beverage. Appellant points to the absence of any scientific or laboratory analysis of the contents of the glass, and challenges the

investigator's qualifications to render an opinion that the contents were beer based on smell and appearance.

Shubin testified that he ordered a Bud Light beer. Choy testified that George, one of those seated at the table with Shubin, ordered a Bud Light beer. Choy further testified that he placed an order at the bar for a Bud Light beer. Understandably, appellant never argued at the hearing that what was in the glass from which Shubin consumed was not beer.

It is well settled that when a specified beverage is ordered, there is a presumption that the beverage served was the beverage ordered. (See *Griswold v. Dept. of Alcoholic Bev. Control* (1956) 141 Cal.App.2d 807, 811 [297 P.2d 762].) In this case, the only dispute is over which person ordered the beer, not what was ordered or served.

ORDER

The decision of the Department is affirmed.[2]

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

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[2] 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.