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

AB-8648
File: 21-406275 Reg: 05060942

SANG SOO CHOI, dba Gus Liquor
8659 Florence Ave., Downey, CA 90240,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: December 6, 2006
Los Angeles, CA

ISSUED MARCH 26, 2008

Sang Soo Choi, doing business as Gus Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for the sale or furnishing by appellant and his clerk of alcoholic beverages to three persons under the age of 21, violations of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Sang Soo Choi, appearing through his counsel, Rick Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated October 26, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on January 30, 2004. On October 26, 2005, the Department filed a four-count accusation against appellant charging that, on August 19, 2005, appellant (Choi) and his clerk, Cong Hyun Baek (Baek), sold or furnished alcoholic beverages to two persons under the age of 21. The accusation was subsequently amended to add two more counts. Counts 1 and 2 involved Peter Gutierrez (Gutierrez), counts 3 and 4 involved Antoinette Abelar (Abelar), count 5 involved Natalie Aragon (Aragon), and count 6 involved Nadia Lozano (Lozano).

At the administrative hearing held on August 22, 2006, documentary evidence was received, and testimony concerning the sale was presented by Abelar, Aragon, and Lozano, and by Enrique Alcala, a Department investigator.

The evidence showed that on August 19, 2005, Alcala and two other Department investigators saw a car with four young-looking individuals drive to the back of appellant's premises and park their car there. Two of the four, Gutierrez and Abelar, got out of the car and went into the store through the back door. Alcala saw Abelar pick out two cans of Sparks malt beverage and put them on the counter while Choi and Baek were standing behind the counter.

Alcala saw Abelar and Gutierrez walk back to the coolers with Choi. Choi began taking out beverages at the direction of Gutierrez and placing them in black plastic bags. While Choi finished bagging the alcoholic beverages, Gutierrez went to the front counter and paid for them. Choi, carrying the bags with alcoholic beverages, headed toward the back door, but after looking out the door, returned to the counter. He told Gutierrez to return to his car and drive it around to the front of the store.

While Gutierrez was at the coolers with Choi selecting alcoholic beverages, Abelar left the premises through the back door and returned to the car where Aragon and Lozano were waiting in the back seat. Gutierrez came out of the store, empty handed, and Alcala approached him. Gutierrez acknowledged that he was under the age of 21 and told Alcala that he had been instructed by Choi to drive around to the front and pick up the alcoholic beverages there. The investigators told Abelar, who was in the driver's seat, to drive to the front of the store.

While the investigators watched, Abelar drove to the front of the store. There Baek was waiting with several black plastic bags. Baek put the bags on the floor of the car on the passenger side where Gutierrez was sitting. Alcala then stepped forward, identified himself as a peace officer, and examined the bags Baek had placed in the car. Inside the bags were three cans of Sparks malt liquor, three 40-ounce bottles of Miller High Life beer, a 40-ounce bottle of Mickey's malt liquor, and a bottle of Smirnoff Ice.

Subsequent to the hearing, the Department issued its decision which dismissed counts 1 and 2, relating to Gutierrez, because he did not appear at the hearing. (See Bus. & Prof. Code, § 25666.) Counts 3 through 6, relating to Abelar, Aragon, and Lozano, were sustained, and the license was ordered revoked.

Appellant has filed an appeal making the following contentions: (1) Dismissal of counts 1 and 2 requires dismissal of all other counts; (2) counts 5 and 6 are not supported by the evidence; (3) Conclusions of Law 13 and 14 are not supported the evidence; and (4) the penalty is excessive. Contentions 1, 2, and 3 are essentially arguments that the evidence is insufficient to support the findings and conclusions of the decision, and will be discussed together.

DISCUSSION

I

Appellant contends that dismissal of the counts regarding Gutierrez means that none of the other counts can be sustained, because without Gutierrez at the hearing, the only evidence of his age is hearsay, which is not sufficient by itself to support a finding. According to appellant, if Gutierrez had been over the age of 21, no violation would have occurred when Baek brought the alcoholic beverages to the car and delivered them to Gutierrez. Appellant also argues that the ALJ erred in reaching conclusions that are not supported by evidence in the surveillance video.

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826];

Kruse v. Bank of America (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *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, 826-827 [40 Cal.Rptr. 666].)

Appellant may be correct that the only evidence of Gutierrez' age is hearsay.[2] Appellant errs, however, in assuming that there would have been no violation if Gutierrez had indeed been 21 years old.[3]

In *Circle K Stores, Inc*. (2004) AB-8209, a 21-year-old person purchased beer while accompanied and helped by several others who were not yet 21. The appellant argued that the ALJ had equated the presence of minors with furnishing to minors. The Board rejected that argument, saying:

> The clerk is the person in control of the sale. He or she must be alert to the substance of the transaction, and cannot ignore circumstances that ought to raise questions in the mind of a reasonably prudent person. When the transaction is in the nature of a group purchase, as the one in this case appeared to be, a clerk must establish that each of those who are involved in the transaction are 21 or over. It is not enough that the person who assembles the various selections and pays for them is 21. A clerk may not close his or her eyes to the reality of what is taking place. The critical fact in this case is not the mere presence of minors, it is their participation in the transaction, all of which took place in front of the clerk.
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> Business and Professions Code section 23001 declares that "the subject matter of this division involves in the highest degree the economic, social, and moral well-being and safety of the state and of all its people," and mandates that "all provisions of this division shall be liberally construed for the accomplishment of these purposes." It would be an unduly restrictive reading of the word "furnish" to accept appellant*s contention that there was no furnishing in this case.

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[2]Alcala testified that he asked Gutierrez if he were 21, and Gutierrez answered "No." [RT 33.] Alcala also testified that he "verified that [Gutierrez] wasn't over 21, eventually." (*Ibid*.)

[3]We note that appellant does not appear to assert that Gutierrez was, in fact, 21 years old.

While the facts in *Circle K Stores, Inc.*, *supra*, were different from those in the present appeal, they are sufficiently similar to provide appropriate guidance for disposing of appellant's argument. Even if we assumed, for the sake of argument, that Gutierrez was at least 21 years old, Abelar's presence with him, her participation in selecting some of the alcohol, and placing two cans of malt liquor on the counter behind which appellant and his clerk both stood, is sufficient to put a licensee and his clerk on notice that Abelar's age needed to be ascertained as well as that of Gutierrez. As to Abelar, there would still be a violation even if Gutierrez had been 21.

The decision, in Conclusions of Law 13, 14, and 16 clearly explains the basis for the result reached:

> 13. The store's surveillance video of this entire incident is the most persuasive evidence in this case. (See Exhibit 7.) In the video 17 year old Abelar can be seen removing the two cans of alcoholic beverages from the cooler and carrying them to the counter. She placed them on the counter while both Respondent Choi and clerk Baek were present. Choi can then be seen walking to the coolers with Gutierrez and Abelar. Choi can be seen removing the alcoholic beverages from the cooler and placing them in the bags as he squats down. Gutierrez then goes to the cash register and can be seen handing something to Baek, presumably payment. Choi then carries the bags and places them on the floor behind the counter. At this point in the video both Choi and Baek can be seen pointing toward the rear door and then the front door. Shortly thereafter Baek is seen picking up the bags from behind the counter and carrying them out the front door.
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> 14. Contrary to Respondent's contention, this is not a case of exemplary customer service. This is a case of a licensee and his clerk acting surreptitiously with the sole purpose of avoiding detection by any law enforcement authorities that may be watching. That is why Abelar did not remain inside the store. That is why Choi and Beck [*sic*] removed the items from the cooler, to avoid suspicion. That is also why Choi placed the bags on the floor behind the counter, out of public view. That is also why Choi had Baek carry the bags to the car, to avoid suspicion.
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> 16. [A]s the Department pointed out, this is not a typical case of a licensee or a clerk misreading an identification or making a mistake in calculating a minor's age. The preponderance of the evidence clearly

> establishes that this was an intentional act by Respondent Choi. He had no interest in complying with the law and insuring that alcoholic beverages were not furnished to minors. His only interest was in the profit ***and not getting caught in the process.***

The ALJ made inferences regarding motive and culpability on the part of the licensee that appellant challenges as unsupported by the surveillance video. While we cannot say that the inferences were unquestionably accurate, they clearly were reasonable based on what appears in the video. They do not become unreasonable simply because appellant disagrees with them. This Board is neither empowered nor inclined to draw contrary inferences.

The only difficult part of this case is the two counts of furnishing to Aragon and Lozano, the young women who waited in the car while Gutierrez and Abelar went into the store. It seems to stretch the common definition to say Baek "furnished" alcoholic beverages to these two when the only connection they had with the transaction was being seated in the back seat of the car when Baek placed the bags of alcoholic beverages in the car. However, this Board has considered other appeals with similar, although not identical, facts, and has sustained findings of furnishing.

In *Acapulco Restaurants, Inc*. (1997) AB-6794, a 20-year-old woman drank from one of two mixed drinks her friend purchased at the bar from the bartender and brought back to their table. Acapulco argued that the bartender did not furnish the alcoholic beverage to the young woman because he performed no affirmative act of furnishing to her which *Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141 [221 Cal.Rptr. 675], held was essential in order to find furnishing. The Appeals Board rejected that argument, saying: "Given that a patron . . . was purchasing two drinks, the bartender's failure to make any attempt to check whether the intended recipient of the second drink was of legal age,

and permitting the drinks to leave the bar without having done so, is sufficiently affirmative in nature as to satisfy any such requirement which may be read into the statute."

In *1979 Union Street Corporation* (2003) AB-8047, 18-year-old Elizabeth Osborn was seen drinking one of the two "purple hooters" her friend had ordered from the bartender. Osborn's friend consumed one of the drinks, but the bartender said he did not know what happened to the other drink, which he said was still on the bar when he walked away to serve other customers. The Board said:

> [I]t seems clear that [the bartender] either furnished, or at the very least, caused to be furnished, an alcoholic beverage, in the form of a purple hooter, to Osborn.
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> "Furnish" means to provide or supply. [The bartender] poured purple hooters into shot glasses and Osborn consumed one of them. Whether or not [the bartender] intended, when he prepared the drinks, for Osborn to drink one of them, is irrelevant. He mixed it, put it in a glass, and it somehow got into Osborn's hand so she could drink it while standing there at the bar. Whether [the bartender] handed it to her directly, gave it to Barnecut who then gave it to Osborn, or simply set it on the bar counter where Osborn could pick it up, he furnished, provided, or supplied the drink to Osborn.

We believe there is substantial evidence to support the conclusion that Baek furnished the alcoholic beverages to Aragon and Lozano. The quantity of alcoholic beverages sold to Gutierrez, the disregard shown for Abelar's obviously underage appearance while in the store and the equally obvious underage appearance of Aragon and Lozano, and Baek's failure to make any inquiry regarding their ages, even though it was obvious that such inquiry was required, are sufficient to constitute the substantial evidence necessary to sustain these two counts.

II

Appellant contends that the penalty of revocation is excessive and the Department should have used one of the other options available to it to protect the public welfare and morals. Other penalties, appellant asserts "are just as appropriate and not financially punitive and disastrous to a licensee." (App. Br. at p. 6.)

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

"[T]he propriety of the penalty to be imposed rests solely within the discretion of the Department whose determination may not be disturbed in the absence of a showing of palpable abuse. [Citations.] The fact that unconditional revocation may appear too harsh a penalty does not entitle a reviewing agency or court to substitute its own judgment therein . . . ." (*Rice v. Alcoholic Beverage Control Appeals Board* (1979) 89 Cal.App.3d 30, 39 [152 Cal.Rptr. 285].)

This was appellant's third sale to minors in the 19 months since his license was issued. The Department has statutory authority to revoke a license in such a situation. (Bus. & Prof. Code, § 25658.1, subd. (b).) In addition, the ALJ found that this was a

knowing and intentional violation. Under the circumstances, we cannot say that the Department abused its discretion in revoking this license.

ORDER

The decision of the Department is affirmed.[4]

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

[4]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.