ISSUED SEPTEMBER 26, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ACAPULCO RESTAURANTS, INC. dba Acapulco 1109 Glendon Avenue Glendale, California, 90024 Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-6794 File: 47-182069 Reg: 96035604 Administrative Law Judge at the Dept. Hearing: John McCarthy Date and Place of the Appeals Board Hearing: August 6, 1997 Los Angeles, CA

Acapulco Restaurants, Inc., doing business as Acapulco (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered its license suspended for 15 days for having sold alcoholic beverages to, and permitted their consumption by, two 20-year-old minors, 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 §25658, subdivisions (a) and

[1] The decision of the Department dated December 19, 1996, is set forth in the appendix.

(b).

Appearances on appeal include appellant Acapulco Restaurants, Inc., appearing through its counsel, Stephen Warren Solomon; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on March 3, 1986. Thereafter, on March 22, 1996, the Department instituted an accusation alleging, in four counts, that appellant sold or furnished alcoholic beverages (mixed drinks containing tequila and Midori) to two minors, each 20 years old (counts I and III), and permitted the consumption of alcoholic beverages by the two while on appellant's premises (counts II and IV).

An administrative hearing was held on October 22, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented by a Department investigator and one of the minors with regard to the events on the night in question.

Department investigator David L. Raymond testified that he observed the two youthful-appearing minors and a male companion enter the restaurant and proceed to the bar area. After they were seated, one of the minors went up to the bar, and returned to the table with two mixed drinks. The two minors and their companion were then observed to sip from the drinks. Minutes later, Raymond and his partner approached the three, checked their identification, and confirmed each of the three was

under 21.

Alison Hawthorne testified that she was 20 years old on the night in question. She admitted sipping from the drink which was brought to her, but said she did not know what it was, having simply asked to be given the same drink her friend was having. Her companion, Kimberley Krejci, who purchased the drinks after displaying some form of identification to the bartender, did not appear at the hearing, although she was subpoenaed. The two counts of the accusation relating to Krejci were dismissed on motion of the Department.

Although the Department seized the drinks, and later submitted them for chemical analysis, the results of any such tests were excluded for lack of proper foundation. The Department based its case that the drinks consisted of alcoholic beverages on the testimony of the investigator that the bottles were labeled "tequila" and "Midori."

Appellant did not call any witnesses on its behalf.

Following the conclusion of the hearing, the Administrative Law Judge sustained the charges in counts II and IV of the accusation,[2] relying on the presumption that bottles of alcoholic beverages contain what they purport to contain and the testimony of investigator Raymond as to the labels on the bottles to establish that the drinks in

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[2] The accusation and the decision both referred to a violation of Business and Professions Code §25658, subdivision (b) with respect to licensee having permitted consumption on the premises by a minor. The correct reference should have been to subdivision (c) of the statute. This did not affect the merits of the case.

fact consisted of an alcoholic beverage. Appellant filed a timely notice of appeal.

In its appeal, appellant contends that the evidence fails to establish any affirmative conduct on the part of the bartender which would support a finding that he furnished an alcoholic beverage to Hawthorne, and that the Department failed to prove the drinks which were served contained an alcoholic beverage.

DISCUSSION

I

Appellant contends there is no evidence the bartender furnished an alcoholic beverage to the minor, claiming the Department made no attempt to demonstrate the bartender was in any position to know who Krejci was with when Krejci purchased the two drinks.

In its decision, the Department stated:

> "The evidence established that the bartender was shown some sort of identification by the purchaser, Krejci. It was not established what identification was seen by the bartender. Two Tequila-Midori drinks were purchased by Krejci. While the bartender did not sell either drink to Hawthorne, the bartender is liable for furnishing one of those drinks to Hawthorne, since the evidence did not establish that the bartender determined who is to be the recipient of the "extra" drink purchased by Krejci and since it was purchased for Hawthorne and ultimately consumed by Hawthorne in the licensed premises."

According to appellant, the Department, at the administrative hearing, cited and relied upon the case of Sagadin v. Ripper (1985) 175 Cal.App.3d 1141 [221 Cal.Rptr. 675] in support of its contention that the bartender furnished an alcoholic beverage to Hawthorne. In Sagadin, a social host was found liable for furnishing alcohol to party-

goers later injured in a motor vehicle crash on the basis of his statement to his son, who was giving a party for friends, that he expected any of his own beer consumed at the party to be replaced. The court held that the jury could have reasonably drawn an inference that this was permission for the beer to be furnished to the guests, thus constituting the requisite affirmative act as a matter of law.

Appellant cites Bennett v. Letterly (1977) 175 Cal.App.3d 901 [141 Cal.Rptr.682], a case where the court held that the mere contribution to a common fund raised to purchase an alcoholic beverage was not sufficient to render the donor liable for injuries caused by one of the minors consuming that beverage, where the donor neither purchased the alcohol himself nor exercised any control over it once purchased. Appellant also cites Hernandez v. Modesto Portuguese Pentecost Association (1995) 40 Cal.App.4th 1274 [48 Cal.Rptr.2d 229], where the court held a landlord who simply leased property to the sponsor of a dance at which alcoholic beverages were served was not liable for having caused an alcoholic beverage to be sold to a minor later involved in an automobile accident. Mere acquiescence in the liquor license application does not constitute the affirmative act required as a condition of liability. The statute [Business and Professions Code §25602.1] requires malfeasance, not acquiescence; mere inaction is insufficient. Hernandez, supra, 40 Cal.App.4th at 1282.

If, by citing these two cases, appellant intends to suggest that the bartender did no more than acquiesce to the furnishing of the alcoholic beverage to Hawthorne,

appellant misses the mark. The bartender was approximately 10 feet from the booth where Hawthorne was seated, and there were no obstructions which would have blocked his view into the booth [RT 21]. The investigator's attention was drawn to Hawthorne and her companions by their youthful appearance[3], which, assuming the bartender was maintaining the degree of vigilance reasonably expected of him, would have been apparent to him as well. Given that a patron who presumably ought to have been checked for proof of majority 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.

II

Appellant contends there is no evidence the drink which was furnished to Hawthorne contained an alcoholic beverage. Appellant cites the fact that no chemical analysis of the contents of the drinks was offered,[4] as well as the absence of any testimony from Hawthorne that her drink contained alcohol, and suggests the

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[3] Exhibit 3, a photo of Hawthorne taken that evening, depicts an appearance that would lead a reasonably conscientious server of alcoholic beverages to ask for some proof of age before serving her or permitting others to furnish her an alcoholic beverage, or permitting her to consume one, while in the premises.

[4] Although the Department initially attempted to develop such evidence, it became apparent that the requisite chain of custody was questionable, and the Department abandoned any reliance on such analysis.

investigator's testimony regarding the labels of the bottles is hearsay.

As to this latter contention, such testimony is not hearsay, since he is merely testifying what is on the label. Nonetheless, it is this evidence which entitles the Department to the benefit of the presumption that the bottles are presumed to contain what their labels say they contain, a presumption recognized in Mercurio v. Department of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626, 634 [301 P.2d 474] and Wright v. Munro (1956) 144 Cal.App.2d 843, 847 [301 P.2d 997].

Finally, appellant contends that there is no evidence that the drink the investigator saw mixed was ever poured from the glass in which it was mixed into the glass ultimately given to Hawthorne.

The testimony of the investigator refutes this contention. He testified he watched the bartender mix two drinks at the bar [RT 10, 17-18], which Krejci then took in hand and returned to the booth [RT 10]. He saw Krejci pay for the drinks [RT 36]. He observed the three minors "sip" from the drinks which they had received from the bartender [RT 20]. He drew samples from "the two glasses" the bartender filled [RT 34]. He saw all three individuals "consume" from the drinks that were carried from the bar to the booth [RT 35]. The two drinks, and only two, Krejci took back from the bar did not include the Coke the male companion was drinking [RT 35].

The import of this testimony is that it is enough to support a finding that the investigator watched the entire transaction, and there was no switching of glasses or sleight of hand that deluded him into seeing a different drink than the one destined to

be given to Hawthorne.[5]

Appellant's closing brief argues for a narrower definition of the term "furnish" than the one used by the Department. It is the context which gives content to the term, and here the bartender was in a position where reasonable diligence would have put him on notice that the drinks he had just mixed were to be consumed by two or three youthful-appearing customers, only one of whom had been asked for identification. Under these circumstances, we think the term is well-suited.

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[5] Appellant's closing brief accuses the Department of reading from a different transcript when it asserts in its reply brief that Hawthorne requested that an alcoholic beverage be purchased for her. We have reviewed the transcript, and are forced to disagree with appellant. Hawthorne testified she and her friend wanted to obtain alcoholic beverages at the restaurant [RT 10], and she left it up to her friend to choose [RT 11]. We do not think it unreasonable to infer that Hawthorne requested her friend to purchase an alcoholic beverage for her.

Appellant also quotes the statement in the Department's reply brief (at page 5) regarding Krejci having ordered two identical mixed drinks, alleging that it misrepresents the record. Appellant cites Hawthorne's testimony that she did not know what Krejci ordered, and argues (App.Cl.Br., p.9) that nowhere in the record did anyone testify there were two identical mixed drinks sold by the bartender. However, the Department investigator testified he saw the bartender mix two mixed drinks [RT 10], from two bottles, together in a glass [RT 18], one bottle labeled tequila, the other Midori [RT 19]. Overall, we think the investigator's testimony supports the Department's assertions in its reply brief.

CONCLUSION

The decision of the Department is affirmed.[6]

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[6] 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 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.