

ISSUED JULY 19, 1999

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

| | | |
|-----------------------------|---|-------------------------------|
| ANHEUSER BUSCH, INC. |) | AB-7202 |
| 3101 Busch Drive Fairfield, |) | |
| CA 94533, |) | File: 01/04/06/09/17/20-43512 |
| Appellant/Licensee, |) | Reg: 97039434 |
| |) | |
| v. |) | Administrative Law Judge |
| |) | at the Dept. Hearing: |
| |) | Jeevan S. Ahuja |
| DEPARTMENT OF ALCOHOLIC |) | |
| BEVERAGE CONTROL, |) | Date and Place of the Appeals |
| Respondent. |) | Board Hearing: |
| |) | May 20, 1999 |
| |) | San Francisco, CA |
| |) | |

Anheuser Busch, Inc. (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for five days, with all five days stayed, for giving shirts and other promotional merchandise to a retail licensee without payment, 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 Code² §§25600, subdivision (a)(1); and 25500, subdivision (a) (2); and Rule 106 (4 Cal.Code Regs., §106).

¹The decision of the Department, dated July 23, 1998, is set forth in the appendix.

² All further statutory references are to the Business and Professions Code unless otherwise noted.

Appearances on appeal include appellant Anheuser Busch, Inc., appearing through its counsel, James Seff, Daniel Davis, and Kevin Fong; and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Murphy.

FACTS AND PROCEDURAL HISTORY

Appellant holds types 01, 04, 06, 09, 17, and 20 licenses. On or about March 28, 1997, the Department instituted an accusation against appellant charging that it had violated the statutes and regulations prohibiting holders of licenses such as those held by appellant from furnishing any thing of value to the owner or operator of an on-sale premises, and prohibiting licensees from giving any free goods in connection with the sale or distribution of alcoholic beverages.

An administrative hearing was held on July 9, 1997, and March 18, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the transfer of the promotional goods and the Department's investigation.

Norman Dudum (Dudum) is the owner, and Joel Satovsky (Satovsky) is the manager, of Garibaldi Cafe in San Francisco. In March 1996, Satovsky discussed with Sanjay Lal (Lal), an employee of appellant, certain promotions that Satovsky wanted to conduct at the Garibaldi Cafe. They agreed that appellant would provide the Garibaldi Cafe items of wearing apparel (hats, T-shirts, sweatshirts with the Anheuser-Busch logo) to use in the promotion. It is undisputed that the parties intended that Garibaldi Cafe would pay appellant for the promotional items. The

items were delivered to Garibaldi Cafe at the end of April or the beginning of May, when the promotion was going on.

On May 31, 1996, Department investigators Jerry Meyer and David Wright went to Garibaldi Cafe and asked Dudum about the promotional activities at the premises. Dudum told them that Satovsky, who was not present, handled all the promotions for Garibaldi Cafe. Dudum was unable to locate an invoice or receipt for the promotional merchandise, but told the investigators that Satovsky was authorized to pay for such items and then be reimbursed by Garibaldi Cafe upon submission of a receipt. Dudum examined his records, but they showed no payment by or to Satovsky for the items.

Later that day, Dudum contacted Meyer and told him that Satovsky had paid for the items out of his own pocket, but had misplaced the invoice for the items, and would fax a copy to Meyer as soon as he found it. On June 3, 1996, Dudum faxed Meyer a copy of a receipt signed by Lal and Satovsky, marked "paid" and dated "4/22/96."

On June 25, 1996, the investigators met with Dudum and Satovsky. At first, Satovsky said that he had paid for the promotional items, but after a long and

"apparently heated discussion during which the investigators explained the potential negative consequences to the licensed premises and to Mr. Satovsky, Mr. Satovsky changed his version of the events and stated that the receipt, dated '4/22/96,' which had been faxed to the investigators, was a fake receipt in that it had been prepared after the investigators visited the premises on May 31, 1996. In addition, he stated that he had never paid for the baseball cap and shirts."

(Dept. Decision, Finding III.D.)

Lal testified that the receipt was prepared, along with two other originals, on April 22, 1996. He stated that he had received \$172.50 in cash from Satovsky, which he had given, along with one of the receipts, to Suslow, his supervisor.

The Administrative Law Judge (ALJ) concluded that Satovsky's testimony was credible, and that Garibaldi Cafe did not pay for the promotional items.

Subsequent to the hearing, the Department issued its decision which determined that the violations had occurred as charged, and a penalty was imposed of five days' suspension, with all stayed.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the determinations that §§25600 and 25500 were violated are not supported by the findings; (2) the finding that the items were not paid for was not supported by substantial evidence; and (3) the determination that it would be contrary to public welfare and morals to continue the license without suspension is not supported by the findings or by substantial evidence.

DISCUSSION

Appellant contends there was no violation of §25600, subdivision (a)(1), or of §25500, subdivision (a)(2), since appellant sold the items of apparel to Garibaldi Cafe and those sections do not prohibit the sale of apparel to a retail licensee.

The Department's decision is based on the conclusion that the promotional items delivered to Satovsky were gifts under §25500, subdivision (a)(2), and §25600, subdivision (a)(1), because neither the Garibaldi Cafe nor its agent paid for them.

The Department's decision found "It is undisputed that the parties intended that Garibaldi Cafe pay Anheuser-Busch for the baseball cap and shirts." (Finding III.A.; IV)

In Finding III.B., the Department found that “the baseball cap and shirts were delivered to Garibaldi Cafe”

Appellant argues the failure to pay in this case did not result in a gift; the intention to pay and the delivery of the goods to Garibaldi Cafe constituted a sale.

The distinction between a gift and a sale is that the former is a voluntary transfer of property made without consideration (Civ. Code, §1146; Gonzales & Co. v. Department of Alcoholic Bev. Control (1984) 151 Cal.App.3d 172, 175 [198 Cal.Rptr. 479]), while a sale is a transfer of title to property for consideration (Cal. U. Com. Code, §2106, subd. (1)).

The Department decision specifically found no dispute that Satovsky and Lal agreed that Lal would obtain for Satovsky certain articles of clothing with Budweiser or Anheuser-Busch logos and that Garibaldi Cafe would pay for the items. (Findings III.A., IV.) The intent and agreement of the parties to this transfer was for a sale to occur. They had, at that point, an agreement for sale.

When Lal delivered the items to Satovsky, who was Garibaldi Cafe's agent, title to the goods passed to Garibaldi Cafe, as their agreement had intended. When Satovsky accepted the items, Garibaldi Cafe's obligation to pay for the items arose and became enforceable by Anheuser-Busch. (Cal. U. Com. Code, §§2301, 2607.) Such a transaction is called a sale.

Whatever happened after the items were delivered, and the absolute obligation to pay for the items arose, did not unmake the sale. If, as the ALJ found, Satovsky did not pay cash at the time of delivery, the obligation to pay did not disappear. For purposes of determining whether or not a sale occurred, it does not matter whether a receipt was given or an invoice sent. There was never any indication that payment was

overtly waived by Anheuser-Busch, nor has the Department shown that an implicit waiver of payment can arise from failure to send an invoice. Even if such an implicit waiver were possible, it could not reasonably have arisen when less than two months had passed by May 31, when the Department investigators first inquired about the transaction.

The ALJ, in Finding III. F., found that “Garibaldi Cafe did not pay for the baseball cap and shirts received from Anheuser-Busch.” This finding is not determinative as to whether there was a sale. The determinative finding was that the parties intended for Garibaldi Cafe to pay for the items. This should have led to the conclusion that a sale occurred and that there was no violation of the statutes charged. The Department is bound by its own findings of fact regarding the intention of the parties and it cannot avoid the legal conclusion that a sale occurred.

Since we find that the Department decision requires a finding that there was no violation, the other issues raised do not need to be addressed.

ORDER

The decision of the Department is reversed.³

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

³This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.