

ISSUED JANUARY 7, 1999

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

| | | |
|--------------------------|---|--------------------------|
| EL GIRASOL CORPORATION |) | AB-6984 |
| dba El Girasol |) | |
| 13535 Van Nuys Boulevard |) | File: 41-285643 |
| Pacoima, CA 91331, |) | Reg: 97040233 |
| Appellant/Licensee, |) | |
| |) | Administrative Law Judge |
| v. |) | at the Dept. Hearing: |
| |) | Ronald Gruen |
| |) | |
| DEPARTMENT OF ALCOHOLIC |) | Date and Place of the |
| BEVERAGE CONTROL, |) | Appeals Board Hearing: |
| Respondent. |) | October 7, 1998 |
| |) | Los Angeles, CA |
| |) | |

El Girasol Corporation, doing business as El Girasol (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 30 days with 10 days stayed for a probationary period of two years for appellant's employee having sold beer to two obviously intoxicated patrons, 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 §25602, subdivision (a).

¹The decision of the Department, dated November 20, 1997, is set forth in the appendix.

Appearances on appeal include appellant El Girasol Corporation, appearing through its counsel, Jose Medina, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine license was issued on July 6, 1993. Thereafter, the Department instituted an accusation against appellant charging that appellant's employees had, on February 28, 1997, sold beer to three obviously intoxicated patrons, sold distilled spirits to a minor, and allowed a minor to consume distilled spirits in violation of Business and Professions Code §§25602, subdivision (a) and 25658, subdivisions (a) and (b).

An administrative hearing was held on September 16, 1997. At that hearing, testimony was presented concerning the alleged violations by LAPD officer Gutierrez, the minors involved, appellant's president, one of appellant's bartenders, and one of appellant's security guards.

Subsequent to the hearing, the Department issued its decision which determined that counts 1 and 3 of the accusation (two of the three counts alleging sale of beer to an obviously intoxicated patron) had been established, but that counts 2 (the third count alleging sale to an obviously intoxicated patron), 4, 5, and 6 (allegations of sale to, and consumption by, minors of distilled spirits) had not been established. The Department ordered the license suspended 30 days for each count found established, with the suspensions to run concurrently, and 10 days of

the suspensions stayed for a probationary period of two years.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant argues: 1) the findings of obvious intoxication were not supported by substantial evidence, and 2) the penalty is excessive.

DISCUSSION

I

Appellant argues that there was not substantial evidence of the obvious intoxication of two patrons, since the finding was based solely on the testimony of the citing officer.

Officer Gutierrez testified that a man identified as Juan Garcia nodded as if falling asleep while seated at a table, swayed in his chair, had difficulty grasping his drink, and staggered when he walked [RT 7-11, 44-47]. Another patron, identified as Fernando Diaz, staggered and swayed from side to side while walking, and, when seated nodded and closed his eyes as if falling asleep. [RT 20-28; 37-44; 48-49.] Appellant did not present any evidence contradicting this testimony.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, 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 substantial 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].)

The term "obviously" denotes circumstances "easily discovered, plain, and evident" which place upon the seller of an alcoholic beverage the duty to see what is easily visible under the circumstances. (People v. Johnson (1947) 81 Cal.App.2d Supp. 973 [185 P.2d 105], overruled on other grounds, Paez v. Alcoholic Beverage Control Appeals Board (1990) 222 Cal.App.3d 1025, 1026 [272 Cal.Rptr. 272].) Such signs of intoxication may include bloodshot or glassy eyes, flushed face, alcoholic breath, loud or boisterous conduct, slurred speech, unsteady walking, or an unkempt appearance. (Jones v. Toyota Motor Co. (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611].)

A determination of obvious intoxication may properly be made by the observation of objective symptoms by an officer trained to make such judgments, and the testimony of such an officer, adequately articulating the factual bases for his judgment, is sufficient to sustain a finding that the subject was obviously intoxicated. (In re William L.G. (1980) 107 Cal.App.3d 210,214 [165 Cal.Rptr.

587]; People v. Murrietta (1967) 251 Cal.App.2d 1002, 1004 [60 Cal.Rptr. 56].)

No physical sobriety test is necessary in determining "obvious intoxication" for purposes of Business and Professions Code §25602 and the lack of one here does not affect the findings that patrons were obviously intoxicated. (Jones v. Toyota Motor Company, Ltd., 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611, 614-615].)

II

Appellant contends that, in light of appellant's record of no discipline since 1993, no suspension should have been ordered, only probation or a fine. The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Although the penalty sounds severe initially -- 30 days suspension for each count established -- the suspensions run concurrently and 10 days of the concurrent suspensions are stayed. This results in an ultimate suspension of 20 days, which is not so excessive as to be an unreasonable exercise of the Department's discretion.

ORDER

The decision of the Department is affirmed.²

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

JOHN B. TSU, MEMBER, did not participate in the oral argument or decision in this appeal.

²This 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.