

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

CHRISTOPHER RAMSAY, TINA	)	AB-7045
MARIE RAMSAY, and DAVID LEE)	
SCOTT	)	File: 47-323223
dba Gasthaus	)	Reg: 97040400
1380 South Main Street)	
Milpitas, CA 95035,	)	Administrative Law Judge
Appellants/Licensees,	)	at the Dept. Hearing:
	)	John P. McCarthy
v.)	
	)	Date and Place of the
	)	Appeals Board Hearing:
DEPARTMENT OF ALCOHOLIC	)	September 2, 1998
BEVERAGE CONTROL,	)	San Francisco, CA
Respondent.)	

Christopher Ramsay, Tina Marie Ramsay, and David Lee Scott, doing business as Gasthaus (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 20 days, for co-licensee/appellant Christopher Ramsay having remained inside the licensed premises while in an intoxicated condition, unable to care for his own safety or the safety of others, 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 §24200, subdivisions (a) and (b), in conjunction with Penal Code §647, subdivision (f).

¹The decision of the Department, dated January 29, 1998, is set forth in the appendix.

Appearances on appeal include appellants Christopher Gerald Ramsay, Tina Marie Ramsay, and David Lee Scott, appearing through their counsel, Charles F. Oakley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert M. Murphy.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public eating place license was issued on October 22, 1996. Thereafter, on July 3, 1997, the Department instituted an accusation charging that, on or about March 8, 1997, co-licensee Christopher Ramsay remained in the premises while in an intoxicated condition, unable to care for his own safety or the safety of others, in violation of the Penal Code provision cited above.

An administrative hearing was held on December 9, 1997, at which time oral and documentary evidence was received.

Milpitas police officer Eric Emmanuele testified that he was called to the premises at 1:00 a.m. in response to a report that Christopher Ramsay was attempting to pick a fight with Thomas Spehar, and had kicked out the lights of Spehar's car. When he arrived on the scene, he observed a broken tail light on Spehar's car. At that time, he was also told by Christopher Ramsay's brother, Edward Ramsay, that Christopher had also tried to pick a fight with him.

When Emmanuele first observed Christopher Ramsay, he was opening the door of the restaurant, while holding a beer bottle. When Emmanuele called him over, Ramsay set the bottle down, and walked empty-handed toward Emmanuele, swaying in the process. When asked several times what was going on, Ramsay replied only "Huh." Emmanuele concluded that Ramsay was intoxicated, based upon his observations of the way Ramsay walked, the way he responded to Emmanuele's

questions, and the fact that his eyes were glassy and bloodshot and his breath emitted a strong odor of an alcoholic beverage.

Both Spehar and Edward Ramsay told officer Emmanuele that they did not want Christopher Ramsay prosecuted, blaming his behavior on his intoxication.

On cross-examination, Emmanuele acknowledged that Ramsay was not belligerent, complied when he was being handcuffed, and was not administered a field sobriety test. He also testified that the Gasthaus had given the Milpitas police fewer problems since the Ramsays became the owners.

Thomas Spehar testified that while in his car, following an argument in the restaurant with Edward Ramsay, he heard a noise and emerged from the car to find a tail light had been broken. The Ramsay brothers were standing there, and when Spehar asked what happened, Christopher said he had broken it. Spehar denied telling the police that Christopher's actions were the result of his being intoxicated.

On cross-examination, Spehar said he did not believe Ramsay was grossly intoxicated, or that he had acted emotionally. Spehar said he did not know who had called the police. In his opinion, Ramsay was not intoxicated.

Ramsay's wife, Tina, testified that, although her husband was drinking beer that evening, he was not intoxicated or belligerent. She said he had become emotional as a result of a surprise visit from his mother and some relatives of his deceased father. She did not observe anything occurring in the parking lot prior to the time she walked out and saw Ramsay being handcuffed.

Christopher Ramsay testified that he had loaned his brother \$300, and, being upset after being told he would not be repaid, followed his brother and Spehar to Spehar's car, and, while pushing against it, and telling them they were not leaving until

his money was returned, cracked one of the tail lights. He testified he apologized to Spehar, told him he would pay for the light, and went back into the restaurant.

When officer Emmanuele called him outside, he felt it was not in his interest to answer any questions, and acknowledged answering Emmanuele's questions with the word "huh." He denied being "strongly intoxicated," stating he had four or five beers between 9:15 p.m. and the time he came in contact with the police, and had eaten a good lunch and dinner.

Subsequent to the hearing, the Department issued its decision which determined that Ramsay was intoxicated when he sought to provoke a fight with Spehar, when he kicked out the tail light on Spehar's car, and when he responded to the police officer's command to come out of the restaurant, and was unable to care for the safety of others, as evidenced by his efforts to pick fights, or his own safety, as evidenced by his vandalism of Spehar's car.

This appeal followed, appellants contending that the record does not support the determination of issues, and that the penalty is excessive.

DISCUSSION

I

Appellants contend that there was no substantial evidence to support the finding that Ramsay remained in the premises while in an intoxicated condition and unable to exercise care for his own safety or that of others.

"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 [71 S.Ct. 456]; 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].)

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 Beverage Control Appeals Board (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 [248 Cal.Rptr. 271]; Lacabanne

Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Appellants argue that the statute requires proof of intoxicated behavior inside the premises, and the only testimony concerning observations of Ramsay inside the premises was that of officer Emmanuele, who observed him looking out the front door. They assert that Ramsay's presence of mind to discard the beer bottle before responding to the police officer's request to come to him is indicative of someone safely in control of his behavior, and not so intoxicated as to be a danger to himself or others.

The Administrative Law Judge (ALJ) chose to accord the greatest weight to the testimony of officer Emmanuele. He made specific findings that Spehar's attempt to minimize Ramsay's behavior and his state of intoxication, testimony inconsistent with his statements to officer Emmanuele at the time, were not credible, being motivated by a long-time friendship with Ramsay. The ALJ also rejected Ramsay's explanation that his eyes were red from emotional factors rather than from excessive consumption.

This is a clear case where the trier of fact has chosen to believe one version of the facts which was presented to him over another. It was his function to resolve the conflicts in the testimony, and there is no basis to say that he committed error in the process.

It would have been eminently reasonable to infer that Ramsay was in a continuous state of intoxication during the entire span of time beginning with the arguments inside the restaurant, continuing through the parking lot altercation, and his return to the restaurant, and then his return to the parking lot when commanded to do so by officer Emmanuele. This would support the determination that he remained in the restaurant while in an intoxicated state. His belligerence, as demonstrated by argument, attempts to provoke fights, and damage to Spehar's car, combined with his physical symptoms of intoxication, amply support the decision.

Appellants argue (at App.Br., p.9) that the testimony of Tina Ramsay, that "they told me to go back in or they would take me too", "clearly shows that the officers were not interested in knowing the facts, but were simply trying to make an arrest." The argument is unpersuasive. In fact, Christopher Ramsay testified [RT 57] that he was the person who gave her that warning.

Appellants' argument that there were others at the restaurant who could have cared for him, or driven him home, is of marginal relevance, if at all.

II

Appellants contend that the penalty - a 20-day suspension - is excessive, suggesting only that, at most, a reprimand would suffice.

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].)

Appellant has not explained why the 20-day suspension is an abuse of discretion, and we are not aware of any obvious reason why it might be. Under the circumstances, this is a typical situation where, in the absence of proof to the contrary, the Department must be presumed to have exercised its discretion in a reasonable manner.

ORDER

The decision of the Department is affirmed.²

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

² *This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of its filing, as provided by §23090.7 of said code.*

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