

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

EFRAIN C. SILVA	)	AB-7198
dba Reseda Club)	
18436 Saticoy Street	)	File: 42-324051
Reseda, CA 91335,	)	Reg: 97039924
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Arnold Greenberg
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	July 1, 1999
	)	Los Angeles, CA
)	

SUMMARY

Efrain C. Silva, doing business as Reseda Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his on-sale beer and wine public premises license for 55 days, for his bartender, Maria Perez, having sold an alcoholic beverage, beer, to Francisco Cortez, an obviously intoxicated patron, 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).

Appearances on appeal include appellant Efrain C. Silva, appearing through

¹The decision of the Department, dated August 13, 1998, is set forth in the appendix.

his counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on November 27, 1996. Thereafter, the Department instituted an accusation against appellant charging the unlawful sale or furnishing of an alcoholic beverage to an obviously intoxicated patron.

An administrative hearing was held on June 17, 1998, at which time documentary evidence was received and oral testimony presented.

Department investigator Raymond Gutierrez testified that he visited appellant's bar at approximately 12:40 a.m. on the morning of April 5, 1997. His attention was soon drawn to the behavior of a patron, Francisco Cortez, who was seated at the bar. According to Gutierrez, he initially formed a suspicion Cortez was intoxicated when he observed him slumped against the bar and saw his red and bloodshot eyes. He watched Cortez leave the bar stool on which he was seated, interact with other patrons, return to a different bar stool, drink from another patron's beer, and then do so a second time, all of which led him to conclude Cortez was, in fact, intoxicated, and that appellant's bartender should not have sold him an alcoholic beverage.

The first time Cortez left the bar stool, he walked about 15 feet in one direction, swaying from side to side and bumping into several patrons along the way, and then returned to the same stool [RT 20]. He left the stool a second time

after a female patron began dancing about two feet away from him [RT 23-24]. He approached the patron from behind, put his arms around her, tried to place his hands on her buttocks. She pushed him away, but then resumed dancing with him. After dancing for one song, Cortez returned to the bar, but seated himself at a different stool, three stools away from the one he had left [RT 25], and began drinking from a partially-consumed bottle of beer that was on the bar in front of that stool, belonging to another patron who was playing pool. No one did anything to stop him from doing this.

Cortez left the bar again, this time to approach the table where another female patron was seated. He attempted to grab her and remove her from the table, but was stopped by her male companion. Cortez then attempted, unsuccessfully, to pull the male companion from his chair and accompany him to the bar. He then returned to the bar alone, sat at still another bar stool, and drank from a third beer that was on the bar in front of that stool. Either just shortly before or just shortly after this, Cortez danced with the first female patron, in the process pretending he was a bull, by holding his fingers to his head and rushing at her. Then upon his return to the bar, he spoke to the bartender, and was served a bottle of Corona, for which he paid. Cortez then consumed part of the bottle of Corona, turned his head away from the bar, and vomited. Turning back to the bar, Cortez then resumed drinking the Corona.

Although, on cross-examination, Gutierrez conceded that Cortez had not used other patrons for support while he was moving between bar stools and

dancing, his testimony left little doubt that he had observed enough behavioral symptoms on the part of Cortez for him to form an opinion that Cortez was intoxicated, and was obviously so at the time he was served the beer by Perez.

Appellant's manager, Noe Ramirez Garcia, testified that Cortez had been in the bar earlier that evening, and that he, Garcia, had ejected him from the bar because, although he had not drunk anything during the 15 minutes he was there, he was very drunk [RT 84]. According to Garcia, Cortez returned to the bar five minutes after the arrival of the Department investigators; Gutierrez had testified Cortez was seated at the bar when the investigators entered. Garcia testified that he had seen Cortez hanging around outside the premises prior to entering the second time, and that he, Garcia had stood by the door to prevent him from entering. Cortez was, in Garcia's words, "quite a bit drunk" [RT 80]. Garcia claimed that Cortez then entered the bar, attempted to order a beer, was refused by the bartender pursuant to Garcia's instructions, and then, after playing the jukebox, returned to the bar, grabbed another patron's beer and drank from it. Garcia denied seeing Perez sell Cortez a beer. He said he attempted to persuade Cortez to leave, but the police arrived before he could do so. Garcia described these events as occurring between 9:30 and 10:00 p.m. - almost three hours earlier than the Department investigator placed them. Garcia also denied seeing Cortez vomit.

Maria Perez also testified that Cortez had earlier attempted to buy a beer but had been ejected from the bar. She placed the time at 6:00 p.m. She agreed with

Garcia that Cortez was very drunk at the time, but, initially, contradicted Garcia's testimony that he had told her not to serve Cortez, stating she made that decision on her own. According to Perez, after Garcia's initial attempts to persuade Cortez to leave were unsuccessful, he abandoned the effort.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and ordered the suspension from which the present appeal has been taken.

In his timely appeal, appellant contends that "the weak and disjointed testimony of Investigator Gutierrez cannot be the basis of a finding of a violation."

DISCUSSION

I

Appellant contends that the "weak and disjointed" testimony of Department investigator Gutierrez is incapable of supporting the finding of violation. Appellant argues that Gutierrez could not have recalled "with any degree of certainty" whether Cortez was served an alcoholic beverage, because he did not prepare his narrative report until five days after the incident, and had no contemporaneous field notes to assist him in preparing the report. In addition, appellant asserts, Gutierrez visited four or five other premises on the night in question, apparently suggesting by this that Gutierrez intermingled what he saw in those visits with what he may have seen at appellant's premises.

Appellant's argument is nothing more than an attack on the investigator's credibility. As the Board has often said, it is not its function to second-guess an

administrative law judge or the Department on the issue of credibility.

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].)

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]; 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].)

As the earlier portion of this summary indicates, we have reviewed the testimony of investigator Gutierrez. Given the somewhat bizarre behavior exhibited by Cortez while being observed by Gutierrez - and, given the extended period of time this activity continued, activity which would have been readily observable by appellant's manager and bartender - it is not surprising that Gutierrez would have remembered enough of what he saw to be able to write a report a few days later without the benefit of field notes.

Our review of the record leads us to conclude that appellant's characterization of Gutierrez's testimony as "weak and disjointed" is unwarranted.

Although Gutierrez acknowledged certain gaps in his recollection of events, and the omission of some details in his written report, overall it must be said that his testimony was amply sufficient to sustain the charge of the accusation.

II

We close this decision with comments which do not bear on the merits of this case, but which we feel must be made and communicated to the attorneys and representatives who appear before this Appeals Board. In this and several other cases which were heard by this Board at its July meeting, appellants' opening briefs were filed more than a month after the date they were due. This resulted in the inability of the Department to file timely its reply briefs, as well as any closing brief those appellants may have hoped to file. Such delinquent filing not only manifests disrespect for the briefing schedules set by this Board, it puts an added burden on the Board and its staff, who must review the records and transcripts without the aid of the parties' counsel or representatives.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, 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 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.