

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

JANET and JOSE ESCOBOSA	)	AB-7300
dba Leaky Tiki)	
280-84 East La Habra Blvd.	)	File: 40-119779
La Habra, CA 90631,	)	Reg: 98043043
Appellants/Licensees,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	November 5, 1999
	)	Los Angeles, CA

Janet and Jose Escobosa, doing business as Leaky Tiki (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their on-sale beer license for their bartender having sold alcoholic beverages to each of two male patrons who, at the time of the purchase, were obviously intoxicated, 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 December 3, 1998, is set forth in the appendix.

Appearances on appeal include appellants Janet and Jose Escobosa, appearing through their counsel, George L. Baugh, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer license was issued on March 5, 1982. Thereafter, the Department instituted an accusation against appellants charging the sale of alcoholic beverages (beer) to Javier Francisco Galvan ("Galvan") and Ramon Hernandez Chavez ("Chavez") at a time when each was obviously intoxicated.

An administrative hearing was held on October 5, 1998, at which time oral and documentary evidence was received. At the hearing, Department investigator Robert Rodriguez testified about observations he made during a visit to appellants' bar which led him to conclude that patrons Galvan and Chavez were intoxicated at the time appellants' bartender sold them beer. Appellants presented four witnesses whose testimony disputed that of the Department investigator as to the symptoms exhibited by Galvan and Chavez and whether they were intoxicated when each was furnished a beer immediately following a brief skirmish between them which was broken up by the manager, Jesus Rodriguez.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation. In his review of the evidence, the Administrative Law Judge (ALJ) made findings that reflected his acceptance of the testimony of the Department investigator over that of the witnesses presented by appellants.

Appellants filed a timely notice of appeal, and now raise the following issues: (1) there is no substantial evidence to support the findings; (2) relevant evidence was improperly excluded; (3) the Department proceeded without, or in excess of, its jurisdiction; and (4) the Department failed to follow its own guidelines and case, statutory and constitutional law of California and the United States.² The issues appellant has raised regarding substantial evidence and the exclusion of relevant evidence overlap in material respect, and will be addressed as a single issue, that is, were appellants denied the opportunity to present evidence which would have resulted in the ALJ assessing credibility in a manner other than as he did?

DISCUSSION

Appellants contend there is no substantial evidence to support the findings of the Department. They argue that the witnesses presented by appellant were persons who worked at the bar, knew the patrons in question, knew that their activity was not out of the ordinary, and saw nothing in their behavior that indicated they were obviously intoxicated. On the other hand, appellants argue, investigator Rodriguez was distracted by his observation of activities associated with an unrelated investigation; failed even to notice the persons he had concluded were obviously intoxicated had been served several beers while he was there; failed to notice that the manager and the two patrons had left the bar, and was mistaken

² To the extent issues (3) and (4) are developed at all in appellants' briefs, they seem simply to be repetitious of their argument that evidence was improperly excluded.

in his identification of a waitress-employee with whom he danced in the course of his investigation. Appellants further assert that the testimony of their witnesses is rendered more credible because they admit that alcohol was served to the two patrons in question. This, they argue, supports their position that the two men already had their beers and were not served any additional beers after the skirmish that finally led investigator Rodriguez to conclude the two were intoxicated. Finally, appellants contend they were improperly precluded from conducting a full cross-examination of the Department investigator into areas relevant to a credibility determination.

The Department asserts that appellants are not really challenging the sufficiency of the evidence to support the findings, but are instead asking the Board to second-guess the ALJ on an issue of credibility and re-weigh the evidence.

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals

Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.³

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] (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].)

In the face of these long-standing principles of appellate review, appellants contend that the Board must nevertheless review the testimony of the Department's investigator, because, appellants assert, it is not sufficient to support the findings.

³The California Constitution, article XX, § 22; Business and Professions Code §§ 23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

The law demands that a licensee use substantial efforts in maintaining a lawfully-conducted business. (Givens v. Department of Alcoholic Beverage Control (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446, 450].)

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].) 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].)

In this case the investigator testified that he observed such symptoms. Both of the patrons, Galvan and Chavez, were described as having red and watery eyes, slurred speech, balance problems, and an unkempt appearance. Both were argumentative and combative, and actually became involved in a fight, ultimately broken up by the manager, who had ample opportunity to observe the condition of the two combatants before, during and immediately after their altercation, and the symptoms of intoxication described by investigator Rodriguez. Normally, such testimony, if believed by the trier of fact, as it apparently was here, would be sufficient, even in the face of contrary testimony from other witnesses.

Appellants argue, however, that this case is different, because here, the ALJ, while using the criteria of Evidence Code §780 as his guideposts in assessing credibility, unduly limited their cross-examination of the investigator, and thereby

prevented appellants from exploring matters that would show bias on the part of the investigator, which, in turn, would bear on his credibility. Appellants argue that they should have been permitted to show how much time the investigator spent pursuing a different investigation into possible B-girl activity.

The transcript reveals the following with respect to the limitation placed upon appellants' cross-examination of the investigator:

Q: Why were you there? Why were you in the bar that night?

A: To investigate any possible violations of B and B code.

Q: Did that include violations of the nature which you just described?

A: Yes.

Q: So while you were in the bar, you were investigating or you were there for the purposes of determining whether there were B-girl violations. What type of activity did you engage in pursuing that investigation?

THE COURT: You want to clarify that question, please.

MR. BAUGH: Sure.

THE COURT: Before or after? What time are you –

MR. BAUGH: From the time he was there and prior to the issuance of a citation.

...

THE COURT: I don't think it's relevant to go into details of any other investigation if it's not in the accusation. If the point you are trying to make is they were not able to get enough evidence to establish any other violation, that I'll allow. But going into the details, I don't think it's necessary because it's not relevant to this hearing today.

MR. BAUGH: Okay. Then I guess, Your Honor, the purpose was to determine – to address the credibility and accuracy of the observations that

he made of the other participants in the bar that are subject to this investigation; and if there was other activity he was observing, I would like to see if he is mixing or mismatching some of the people he observed and what they – I really don't care what he was doing, just the fact that he was doing something. That's what I want to find out.

THE COURT: If you ask specific questions, that I think will be relevant. You can ask them, but if you want to get into details of what observations he made of B-girl activity, it's not relevant as to the two counts of the accusation that deal with service to an obviously intoxicated person.

MR. BAUGH: The rest of my questions will be directed as to what he did and not necessarily what he observed as a result of his actions, but rather where he went with his focus of attention.

THE COURT: Just make your questions precise as to time and what you're talking about."

This was the only area in which appellants' counsel was in any way limited with respect to the questions he posed to the investigator. Appellants contend that this prevented them from developing inconsistencies in the investigator's testimony regarding the times when he made the critical observations regarding the intoxicated state of patrons Galvan and Chavez. Appellants argue that Investigator Rodriguez fabricated his testimony that he saw alcoholic beverages served to Galvan and Chavez after having spent two hours unsuccessfully attempting to develop evidence of B-girl activity.

The ALJ did not believe the investigator's testimony was fabricated. He was in a position to observe the investigator's demeanor as he testified, and compare what he said with what was said by appellants' witnesses, who, even among themselves were unable to present a factually consistent theory of defense.

Letitia Venegas, one of appellants' bartenders, testified that, over the course of three hours, she served three beers to Galvan and two to Chavez. [RT 86, 89]. She says she served the last beer to Galvan at 9:00 p.m. Similarly, the other bartender, Alicia Villegas, said she served Galvan one or two beers, and Chavez, one [RT 92-93]. Yet, Jesus Rodriguez, the manager, testified he never saw either Galvan or Chavez served any beer. This is significant, because Jesus Rodriguez testified that he arrived at the bar at the same time the investigator arrived [RT 78], which all seem to agree was shortly after 8:00 p.m.

This is just one example of the conflicts in testimony with which the ALJ was confronted. It was his responsibility to resolve those conflicts.

In the last analysis, appellants have failed to demonstrate how a search in greater detail into what Investigator Rodriguez did or might have done with respect to B-girl activity might have undercut his testimony about the furnishing of beer to the intoxicated patrons.

ORDER

The decision of the Department is affirmed.⁴

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER

⁴ 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 final 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.

ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD