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

AB-7632

JOSEFINA DE LOZA MARTINEZ dba El Alteno Bar
10213 Inglewood Avenue, Lennox, CA 90304,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 40-80764 Reg: 99047797

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: August 17, 2001
Los Angeles, CA

ISSUED OCTOBER 16, 2001

This is an appeal by Josefina De Loza Martinez, doing business as El Alteno Bar (appellant), from a decision of the Department of Alcoholic Beverage Control[1] which suspended her license for ten days for her waitress, Guadalupe Miguel Rodriguez, having served an alcoholic beverage (beer) to Victor Velasquez, who was then 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).

Appearances on appeal include appellant Josefina De Loza Martinez, appearing through her counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

---

[1]The decision of the Department, dated April 20, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on October 15, 1979. An accusation charging a violation of Business and Professions Code §25602, subdivision (a), was filed on November 24, 1999, and an administrative hearing on the charge of the accusation was held on March 17, 2000. At that hearing, testimony was presented by Department investigators Frank Robles and Salvador Zavala, and by Victor Velasquez, the patron in question.

Subsequent to the hearing, the Department issued its decision sustaining the charge of the accusation, and this appeal followed.

In her appeal, appellant raises the following issues: (1) there was not substantial evidence to sustain the accusation; and (2) there are no findings to support the credibility determination.

DISCUSSION

I

Appellant contends that there is not substantial evidence to sustain the accusation.

“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].) The Appeals Board is not permitted to make its own findings from the evidence.

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 Administrative Law Judge found a "sharp conflict" in the evidence between the testimony of the Department investigators and the testimony of Velasquez as to what took place. On the basis of the investigators' testimony, which, although reviewed with caution because of their limited experience, he found "replete with detailed recollection of events which was internally consistent, persuasive and convincing," he found that Velasquez displayed the following, classic, symptoms of intoxication: Velasquez was observed sitting in a slouched position, opening and closing his eyes periodically; his head was bobbing back and forth; he was observed walking unsteadily toward the juke box, and he staggered and swayed side to side; his eyes were watery, and he was opening and closing his eyes as if attempting to focus them; he was observed to be unsteady on his feet, staggering, and using a pool table and a wall for support while on his way to and from the restroom.

Appellant makes much of the fact that neither investigator testified that they believed Velasquez to be obviously intoxicated. However, as appellant herself acknowledges, that is a conclusion for the trier of fact to reach, as the ALJ did here. Similarly, Velasquez's denials that he was intoxicated are not conclusive, and were rejected by the ALJ.

In Schaffield v. Abboud (1993) 15 Cal.App.4th 1133, 1140-1141 [19 Cal.Rptr.2d

205], the court reiterated the test for obvious intoxication set forth in People v. Johnson (1947) 81 Cal.App.2d Supp. 973, 975-976 [185 P.2d 105], overruled on other grounds in Paez v. Alcoholic Beverage Control Appeals Board (1990) 222 Cal.App. 3d 1025, 1027 [272 Cal.Rptr. 272]:

> "'The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known *outward* manifestations which are 'plain' and 'easily seen or discovered.' If such outward manifestations exist and the seller still serves the customer so affected, he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent.'" [Italics in original.]

We do not believe the testimony of the investigators can be disregarded simply because of their limited experience. Their observations were of behavior and appearance so classically associated with intoxication that even a novice would be able to comprehend them.

II

Appellant contends that the ALJ erred in failing to make specific findings to support his determination that Velasquez's testimony was not credible. Appellant cites an opinion of a federal appellate court in Holohan v. Massanari (April, 2001) 246 F.3d 1195 (9th Cir.) for the proposition that the ALJ must specifically identify the testimony he or she finds not to be credible and must explain what evidence undermines the testimony.

The rule in Holohan v. Massanari appears to be one peculiarly directed at a claimant's testimony in Social Security disability cases, and appellant has not directed our attention to any California decision adopting that rule.

In any event, we think the ALJ made clear, in that part of the finding omitted from appellant's brief, what it was that led him to reject Velasquez's claim that he was not

intoxicated:

> "According to salient parts of the testimony of Victor Velasquez, on the day in question, he had consumed three to four beers between 7:15 p.m. and 9:30 p.m. at his brother's house and had not eaten anything all day. He had arrived at the licensed premises sometime before 9:50 p.m. and was observed at the booth consuming yet another beer at that time. Evidently, Velasquez was feeling the full effects of his drinking as established by his objective symptoms of obvious intoxication.
>
> "In short, the testimony of Velasquez denying any intoxication is lacking in credibility." [Finding of Fact 12.]

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[2] 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.