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

AB-7692
File: 48-354733 Reg: 00048567

KENJAM ENTERPRISES, LLC dba Paladino's
6101 Reseda Boulevard, Reseda, CA 91335,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: October 4, 2001
Los Angeles, CA

ISSUED NOVEMBER 29, 2001

Kenjam Enterprises, LLC, doing business as Paladino's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 20 days for its bartender having served an alcoholic beverage to an obviously intoxicated patron, 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 Kenjam Enterprises, LLC, appearing through its counsel, Andrew Muzi, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale public premises license was issued on September 20, 1999. Thereafter, the Department instituted an accusation against appellant charging that, on

[1]The decision of the Department, dated August 31, 2000, is set forth in the appendix.

January 1, 2000, appellant's bartender, Rhonda Marie Wood, sold, furnished, or gave an alcoholic beverage (beer) to Michael Cobb-Adams, an obviously intoxicated person, in violation of Business and Professions Code §25602, subdivision (a).

An administrative hearing was held on July 13, 2000, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the findings are not supported by the evidence viewed in the light of the whole record; (2) the case should be remanded to the Department on the ground there is relevant evidence which in the exercise of reasonable diligence could not have been produced. We will address these issues in reverse order.

DISCUSSION

I

Business and Professions Code §23085 empowers the Appeals Board to enter an order remanding a matter to the Department when it finds that there is relevant evidence which in the exercise of reasonable diligence could not have been produced at the hearing.

Invoking this provision, appellant represents that, but for a breakdown in communication between it and its counsel, it would have presented the testimony of Randy Boudro, a witness who observed the patron in question, to the effect that the patron did not exhibit symptoms of intoxication. Appellant asserts that the witness in question is the only neutral person in a position to provide evidence on the issue of intoxication.

Appellant must satisfy two requirements. The first, relevance, would appear clearly to be satisfied if, as appellant represents, Boudro actually observed the patron in question for the period of time stated.

The second requirement is whether Boudro's testimony could not have been produced even in the exercise of reasonable diligence. More specifically, could it be said that appellant, and its counsel, exercised reasonable diligence in their attempt to secure the testimony of Boudro's presence at the hearing?

Appellant's counsel states in a declaration that he was advised by Ken Paladino that a potential witness named "Randy" could provide relevant evidence. Randy's full name, unknown to counsel, was Randy Boudro. Knowing only a first name, appellant's counsel thought Boudro could not be located. He nonetheless advised Paladino to bring Boudro to the hearing if he located him. He did not make clear to Paladino that Paladino should have Boudro contact his attorney. Paladino did locate Boudro, and invited him to the hearing. However, Paladino did not advise his attorney Boudro had been located. According to appellant's counsel, Boudro arrived at the hearing 30 minutes after it was to have commenced. Then, peering through a window into the hearing room, Boudro waved to officer Nakamura, who gestured in return. Boudro purportedly understood Nakamura's gesture to mean he was too late to testify, because the hearing was already in progress, so went home. Paladino later learned Boudro had been at the hearing, but left, but did not notify his attorney until after receipt of the decision, when he was asked if there was anything new.

We find it difficult to accept the notion that appellant and his attorney could be said to have acted with reasonable diligence, given the scenario outlined in counsel's

declaration. Although not stated in counsel's declaration, we must assume that both Paladino and his attorney had some awareness of Boudro's potential testimony, and its significance to the issues in the case. Yet their failure to follow up on information known to both is inexcusable neglect. There is no reference in the hearing transcript to Boudro. Not until after the case is decided does his name surface.

We are not told precisely when Boudro was located, but, as a regular customer of the bar, finding him should not have been a difficult task. The incident in question took place on January 1, 2000. The accusation was filed March 28, 2000, and appellant filed its Notice of Defense on April 5, 2000. The hearing took place more than three months later. Yet, counsel's declaration indicates that, during this entire six and one-half month period, only a single conversation took place between Paladino and his attorney concerning what we are now told was a critical witness, supposedly the only objective observer of the behavior of Cobb-Adams on the night in question. While it may well be that counsel was not retained immediately, we do feel that the task of identifying and locating a key witnesses, especially once on notice of his existence, is high on any schedule of preparation, and deserving of far more than the casual approach displayed in this case.

II

Appellant argues, in substance, that the Administrative Law Judge erred in basing his decision on the testimony of officer Nakamura that Cobb-Adams displayed sufficient symptoms of intoxication such that appellant's bartender should not have served him. It contends, instead, the ALJ should have relied upon the testimony of appellant's witnesses to the effect that any of the things observed by the police officer

could only have been natural characteristics of Cobb-Adams' persona, and not the products of intoxication.

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.[2]

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

---

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

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].)

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].) Officer Nakamura's testimony, if believed, established that Cobb-Adams was obviously intoxicated, and his intoxication should have been apparent to the bartender.

This Board is not in a position to substitute its judgment for that of the Administrative Law Judge, who was able to observe the witnesses as they testified, and was in a far superior position to this Board in weighing their credibility.

Indeed, we might ask appellant why it did not call Cobb-Adams as a witness, so that the Administrative Law Judge could see for himself that, as they contended, Cobb-Adams, sober, would display a hound dog expression and droopy, watery eyes, walk in a slouch, and drag or shuffle his feet as he walked. Cobb-Adams was a regular customer of the bar, and a long-time acquaintance of the Paladinos, so it would have been relatively easy to contact him and bring him to the hearing.

For all these reasons, we think appellant's contention must be rejected.

ORDER

The decision of the Department is affirmed.[3]

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

---

[3] 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.