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

AB-7859
File: 47-265609 Reg: 01050235

PETER HALAMANDARIS dba Flamingo Club
1233 East Charter Way, Stockton, CA 95205,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: March 13, 2003
San Francisco, CA

ISSUED MAY 1, 2003

Peter Halamandaris, doing business as Flamingo Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for five days for having permitted patrons to consume alcoholic beverages during hours in which it was unlawful to sell, deliver, or give any alcoholic beverage for consumption on the premises, in violation of Business and Professions Code section 25632.[2]

Appearances on appeal include appellant Peter Halamandaris, appearing through his counsel, Gregory R. Davenport, and the Department of Alcoholic Beverage

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[1]The decision of the Department, dated July 5, 2001, is set forth in the appendix.

[2] Section 25632 provides: "Any retail licensee, or agent or employee of such licensee, who permits any alcoholic beverage to be consumed by any person on the licensee's licensed premises during any hours in which it is unlawful to sell, give, or deliver any alcoholic beverage for consumption on the licensed premises is guilty of a misdemeanor." The hours in question, delineated in section 25631, are those between 2:00 a.m. and 6:00 a.m.

Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general bona fide eating place license was issued on November 1, 1999.[3] Thereafter, the Department instituted an accusation against appellant charging that he permitted patrons to consume alcoholic beverages during hours when such was prohibited.

An administrative hearing was held on May 3, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented by three Stockton police officers, who said they observed patrons consuming alcoholic beverages after 2:00 a.m., by employees and patrons who denied that appellant permitted after-hour consumption, and by appellant, who testified there was no one in the premises when the police arrived.

Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been established.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) there was no substantial evidence the beverage seen being consumed was an alcoholic beverage; and (2) appellant took all reasonable steps to prevent customers from drinking after 2:00 a.m.

The Department urges the Board to dismiss the appeal because the notice of appeal filed on behalf of appellant does not state a specific ground for appeal. We

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[3] The accusation alleged that the license was issued in 1999. Halamandaris testified that he had been licensed for 20 years. Department counsel apparently conceded that appellant had been licensed since at least 1991. The Administrative Law Judge accepted appellant's estimate, reflected in the short suspension.

decline to do so, for two reasons. First, we do not see how the Department has been prejudiced, or its burden of responding to the appeal any greater than if the notice of appeal had simply set forth the statutory grounds for appeal. Second, the Appeals Board has long accorded a liberal construction to notices of appeal. It did so, for example, many years ago, in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (1959) 169 Cal.App.2d 785, 53 [338 P.2d 50, 53], a case in which the court affirmed the Appeals Board's acceptance as a valid notice of appeal a letter which simply recited that a notice of appeal was enclosed, but the only enclosure was a petition for reconsideration that, in turn, recited that a notice of appeal was "filed herewith."

Citing a number of cases, the court quoted from a treatise to the effect that a notice of appeal is to be construed liberally, and noted: "[t]he policy of the law favors the preservation of the right of appeal and the hearing of appeals on their merits." (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board*, *supra*.) One of the cases the court cited, *Karell v. Watson* (1953) 116 Cal.App.2d 769, 772 [254 P.2d 651, 653], went so far as to declare "[t]he right of a litigant to have the record of his cause reviewed by an appellate court ... sacred." For these reasons, we reject the Department's attempt to avoid the merits of this appeal.

DISCUSSION

Appellant contends that there is no substantial evidence to support the findings that the contents of the drinks from which Flores and Deleon are said to have consumed were alcoholic beverages. The Administrative Law Judge concluded that, as

to each, the beverages were alcoholic in nature (Finding of Fact 3, third paragraph, and Finding of Fact IV):

> Officer Leonesio observed Juan Flores sip from his beverage. Leonesio told him to stop and based on his training on the smell of alcoholic beverages determined that Flores had just consumed an alcoholic beverage during restricted hours. Flores admitted to Leonesio that the drink contained brandy.
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> Police Officer Jonathan Kislinbury was one of the several officers who entered Respondent's premises after 2:00 a.m. on October 29, 2000. He noticed a man coming from the restroom take a drink from a cup he was holding. Kislnbury took the cup and smelled the contents. Based on his training regarding alcoholic beverages, he determined the cup contained an alcoholic beverage and with the assistance of a Spanish speaking police officer (Alicia Garcia) questioned the man (Jose Deleon). Deleon admitted the cup he had been holding contained whiskey and soda.

The ALJ also concluded that "a person who has tasted alcoholic beverages may testify as to the nature of a drink and such testimony is sufficient to support a finding of the alcoholic content thereof," citing *Oxman v. Department of Alcoholic Beverage Control* (1957) 153 Cal.App.2d 740 [315 P.2d 484]

The *Oxman* case, and the cases it cites,[4] all involved testimony from someone who actually tasted the drink in question. Here, the officers merely smelled the contents of the cups, and also relied upon what they were told. Both officers testified to

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[4] *People v. Deibert* (1953) 117 Cal.App.2d 410 [256 P.2d 355]; *People v. Mueller* (1914) 168 Cal.526 [143 P. 750]; *People v. Bassetti* (1922) 58 Cal.App. 390 [208 P. 696]. Interestingly, Department counsel represented to the ALJ that "there's case law that he can testify as to their opinion as to whether the drinks contained alcoholic or not." The ALJ indicated a lack of familiarity with such case law, and the Department has not favored the Board with any case citations on the point.

their familiarity with alcoholic beverages, based on their work experience and personal use. The issue is whether the officer's opinions, coupled with the hearsay statements by Flores and Deleon, amount to substantial evidence. We think not.

Officer Leonesio testified that the cup from which Flores was drinking "smelled like a whiskey and kind of a Bacardi." [RT 12.] Bacardi is a brand name for a rum. Flores' response to the officer's question about what was in the cup, a statement, admitted as administrative hearsay, was that the cup contained brandy.

Flores testified, and denied he had told the officer he was drinking. Flores said he was helping clean up, and had picked up some drinks. He said he told officer Kislinbury that, based upon his bartending experience, the content of the glass was brandy and coke.

Officer Kislinbury, in similar fashion, testified that the contents of the cup he seized from Deleon smelled like an alcoholic beverage. Deleon, when questioned, said the cup contained whiskey and soda. This was admitted over objection as an exception to the hearsay rule after Department counsel argued that it was an admission against interest and represented that Deleon had been issued a citation that evening. [RT 42.] There is nothing in the record to support that representation. Officer Kislinbury was not asked if he had issued a citation to Deleon.

Appellant Halamandaris testified that he had been licensed 20 years with no disciplinary action taken against him. [RT 71-72.] He testified that he did not serve drinks or allow consumption after 2:00 a.m.

Although the officers took samples from each of the containers in question, and the samples were placed in evidence by Department counsel, no chemical analysis was performed on either of them. The only explanation offered was from Officer Leonesio,

who said he hadn't been asked to have it done. Thus, evidence which would either corroborate or defeat the officers' opinion testimony, and which was available to the Department, was ignored and what could have been conclusive evidence as to the contents of the cups in favor of much weaker evidence - an officer's sense of smell and administrative hearsay - was offered. We can only wonder what the Department thought was the evidentiary value of two samples which had never been analyzed for alcoholic content.

Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

We think that the Department's evidence, viewed in light of the whole record, does not satisfy this test. The evidence that supports the Department's position - the officers' opinion testimony based on their sense of smell, plus the hearsay statements of Flores and Deleon - leaves too much to speculation. It is one thing to accept the testimony of someone who has tasted a mixed drink and tasted alcohol, but quite another to rely on a sense of smell when an easily obtained chemical analysis would either prove the Department's case or destroy it. In the absence of any better explanation than that given by officer Leonesio, that he was not asked, we can only assume the choice not to do so was deliberate.

We see no need to address appellant's remaining contention.

ORDER

The decision of the Department is reversed.[5] There is no substantial evidence to support the charges of the accusation.

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

[5] 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.