

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

AB-7962

File: 42-331808 Reg: 01051708

GARY EMIL SANDOVAL dba Gary's Sports Lounge
13647 Foothill Blvd, Sylmar, CA 91342,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 3, 2002
Los Angeles, CA

ISSUED FEBRUARY 5, 2003

Gary Emil Sandoval, doing business as Gary's Sports Lounge (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his on-sale beer and wine public premises license for 20 days for a violation of Business and Professions Code section 25602, subdivision (a), furnishing an alcoholic beverage to a patron exhibiting obvious signs of intoxication.

Appearances on appeal include appellant Gary Emil Sandoval, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on July 8, 1997. Thereafter, the Department instituted a two-count accusation against appellant charging the sale and furnishing of

¹The decision of the Department, dated April 11, 2002, is set forth in the appendix.

the alcoholic beverage to a person exhibiting obvious signs of intoxication, and a sale of an alcoholic beverage to a person under the age of 21 years, acting as a police decoy.

An administrative hearing was held on February 20, 2002, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the two sales. The charge of selling to a minor decoy was dismissed by the Administrative Law Judge (ALJ), ruling that the Department had not shown the minor decoy displayed the appearance which could generally be expected of a person under the age of 21 years. However, the ALJ found that the charge of selling to an obviously intoxicated person had been sufficiently proven.

Juan Campos, a Los Angeles City police officer, testified he observed a patron within the premises, sitting at a table apparently trying to support himself. Later, the patron was closely observed having droopy and bloodshot eyes, alcoholic breath, and slurred speech. On three occasions, the patron visited the restroom, walking in a slow and staggering gait [RT 11-12, 14-15, 21-22, 26-27]. The patron asked the officer to play pool. The officer observed the patron's playing to be slow with the patron having to hold on to the pool table for balance [RT 16-18].

The patron then proceeded to the bar counter, conversed with the bartender, who furnished the patron with a can of beer, which the patron opened. The officer was about one foot away from the patron during the ordering process and service of the alcoholic beverage [RT 19, 23].

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant questions whether the decision of the Department is supported sufficiently by the

record, or, essentially questioning whether the decision is supported by substantial evidence.

DISCUSSION

The Department of Alcoholic Beverage Control is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals. The Department's exercise of discretion "is not absolute but must be exercised in accordance with the law, and the provision that it may suspend or revoke a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare and morals." (Martin v. Alcoholic Beverage Control Appeals Board (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513] quoting from Weiss v. State Board of Equalization_(1953) 40 Cal.2d 772, 775.)

The scope of the Appeals Board's review of a decision of the Department 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 concept which the Appeals Board is mandated to use as a basis in review, is that of "substantial evidence," which is defined as 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 [95 L.Ed. 456, 71 S.Ct. 456] and 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].)

Appellate review by the Appeals Board 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 police officer's testimony before the Department was the only testimony upon which the Department could make a proper decision as there was no other testimony presented. The ALJ chose to believe the testimony of the officer. It is

²The 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].

fundamental law and applicable in this matter, that the credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact, in this case, the ALJ. (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].)

The officer testified to his observations of the patron's apparent intoxicated condition. The term "obviously," used in the accusation and in the course of the proceedings before the Department as well as the Appeals Board, denotes circumstances "easily discovered, plain, and evident" which places 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].)

The police officer's testimony, being a percipient witness to the signs of intoxication shown by the patron observed, was sufficient to meet the requirements of case law. (Jones v. Toyota Motor Co., supra.; In re William G. (1980) 107 Cal.App.3d 210 [165 Cal.Rptr. 587]; and People v. Murrietta (1967) 251 Cal.App.2d 1002 [60 Cal.Rptr. 56].)

We have reviewed the record before us, and considering the law and the police officer's testimony without factual rebuttal of any witness for appellant, we must find that

there is substantial evidence to support the Department's decision.

While appellant's arguments at the hearing before the Department suggested that the signs of intoxication could have been caused by other circumstances, such as fatigue or illness, there is no evidence, credible or otherwise, of such other circumstances. To the argument of appellant's witness that "... It could have been anything. You know, maybe the – the results would have come out in some kind of a test. You know, maybe he wasn't drunk. Maybe he was taking pills or something." [RT p. 79]. To this line of speculative argument, the ALJ replied:

"We'll never know because we don't have any evidence that he was not drunk. The evidence all points in the direction that he was intoxicated. And if you had some witnesses here to produce to support your argument that basically maybe it was an illness ... or maybe he was tired ... it might be the difference – no. Listen to me. Mr. Sandoval [appellant's father], I want to be clear to you ... that basically you [appellant] have a burden also, and that burden comes into play after Mr. Ainley [Department's lawyer] for the Department carries their burden of proof to establish a prima facie case. And then the argument becomes well, was he really intoxicated or not ... And at that point, after he [Ainley] carries his case, you have the burden of going forward to show that maybe it didn't have anything to do with intoxication. Perhaps it had something to do will illness, tiredness, but there's no evidence in the record. You didn't produce any" [RT 79-80]

ORDER

The decision of the Department is affirmed.³

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

³This 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.

APPEALS BOARD