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

AB-8430
File: 48-338134 Reg: 04057575

SALVATORE A. CONSTANZO, dba Sidelines Sports Bar
732 Ninth Street, Arcata, CA 95521,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Arnold Greenberg

Appeals Board Hearing: January 5, 2006
San Francisco, CA

ISSUED MAY 4, 2006

Salvatore A. Constanzo, doing business as Sidelines Sports Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 45 days, with 15 days stayed on the condition that appellant operate discipline-free for one year, for appellant's bartender serving alcoholic beverages to obviously intoxicated patrons and for permitting patrons to remain in the premises while intoxicated and unable to care for their own safety or the safety of others, violations of Business and Professions Code sections 24200, subdivision (a); 25602, subdivision (a); and Penal Code section 647, subdivision (f).

Appearances on appeal include appellant Salvatore A. Constanzo, appearing through his counsel, Victor M. Ferro, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

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[1]The decision of the Department, dated April 14, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on May 12, 1998. On June 30, 2004, the Department filed a two-count accusation against appellant charging that his bartender, Scott Mauroff, sold or furnished alcoholic beverages to two patrons, Christopher Grignon and Christopher Walters, who were obviously intoxicated, in violation of Business and Professions Code section 25602, subdivision (a) (count I), and that appellant permitted four patrons – Grignon, Walters, Gregory Lowe, and Luke Higgins – to remain in the premises when they were intoxicated and unable to care for the safety of themselves or others, in violation of Penal Code section 647, subdivision (f) (count II).

At the administrative hearing held on February 15, 2005, documentary evidence was received and testimony concerning the violations charged was presented by Humboldt State University police officers Melissa Hansen and Tara Douglas; by Department investigator Anthony Carrancho; and by the bartender, Mauroff.

The Department's decision determined that the violations charged were proved. Appellant filed an appeal contending that the decision is not supported by the findings; hearsay evidence was improperly admitted; and the administrative law judge (ALJ) showed bias against him.

DISCUSSION

I

Appellant contends that the findings do not support the decision as to subcounts 3 and 4 of count 2, which charged that Gregory Lowe and Luke Higgins were permitted to remain in appellant's licensed premises while intoxicated and unable to exercise care for their own safety or that of others.

Paragraphs B and C of Finding of Fact IV address these subcounts:

(B) Count II, Subcount 3
At approximately 11:50 p.m. on April 16, 2004, while inside the premises, both Officers Hansen and Douglas had their attention drawn to Lowe, Respondent's patron. They observed him for about ten to fifteen minutes. Hansen observed Lowe noticeably stagger and sway to the bar. She saw that Lowe had red, bloodshot eyes. While swaying back and forth, Lowe was resting his weight on another patron, Higgins. Lowe told Hansen that Lowe knew that he had had a lot to drink but that it was his birthday. In order to test Lowe's blood alcohol content, Hansen administered a preliminary alcohol screening test that revealed Lowe's blood alcohol content to be .172. Hansen prepared her report concerning her observations on April 20, 2004 (Exhibit 2).

(C) Count II, Subcount 4
From approximately midnight to 1:30 a.m. on April 17, 2004, Douglas noticed Higgins stumbling around the subject premises and being loud and boisterous. Higgins, who appeared to be unsteady on his feet, leaned on Lowe to get more stability. Douglas heard Higgins tell a friend that he didn't want to be arrested again for being drunk in public. Douglas noticed that Higgins heavily slurred his words.

Higgins admitted to Douglas that he knew he was drunk and that he was inside the above premises, as well as inside the premises of an adjoining licensee, "Toby and Jack's." Higgins cooperated with Douglas and agreed to Douglas' administration of a preliminary alcohol-screening device. The reading revealed that Higgins had a .283 blood alcohol level. On April 17, 2004, Douglas prepared her report regarding her observation of Higgins (Exhibit 2).

Appellant points out that there is a back door in the bar and a number of other bars along the street, in one of which Lowe and Higgins were later arrested. Because of the back door and proximity to other bars, appellant suggests, Lowe and Higgins may have become intoxicated elsewhere.

While appellant's speculation about Lowe and Higgins drinking elsewhere may be accurate, it is irrelevant. Appellant was charged with permitting the two men to remain in the premises when they were in violation of Penal Code section 647, subdivision (f), that is, while they were intoxicated and unable to exercise care for their own safety or that of others. Where they became intoxicated makes no difference.

The Appeals Board is authorized to review a Department decision to determine if the findings are supported by substantial evidence, and if the findings support the decision. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) The Board "must indulge in all legitimate inferences in support of the Department's determination." (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

While the findings are not overwhelming in their support of a determination that Lowe and Higgins were in violation of Penal Code section 647, subdivision (f), appellant has not contested the findings that they were intoxicated or that they were unable to care for their own safety or that of others. Under the circumstances, the findings are sufficient to support the contested determinations.

II

Appellant contends that count 1 and subcounts 3 and 4 of count 2 should be dismissed because the ALJ erroneously permitted hearsay evidence to be admitted into evidence. The police reports prepared by officers Douglas and Hansen (Ex. 2) and by investigator Carrancho (Ex. 3) should not have been admitted as administrative hearsay, according to appellant.

Exhibit 2, appellant argues, was prepared several days after the events, is inconsistent with exhibit 3, and contains hearsay statements of Higgins and Lowe. Exhibit 3 is not only hearsay itself, according to appellant, but contains multiple instances of double and triple hearsay, as well as unsubstantiated opinion testimony about the patrons' degree of intoxication. In addition, he argues, it was prepared two or

three days after the events, and the potential bias of Carrancho, the sources of information, and the method of preparation all render the report untrustworthy.

Hearsay testimony was also erroneously admitted, appellant contends. He asserts that both the testimony about what Grignon allegedly said to Carrancho and what the bouncers said regarding the drinking habits of Grignon and Walters should have been excluded.

Appellant objects to the Department's argument on appeal that the officers' reports were admissible as public records under Evidence Code section 1280 because, he asserts, the Department did not make that contention at the hearing, relying instead on having the reports admitted as administrative hearsay. From our reading of the transcript, however, it does not appear that the Department considered the reports to be administrative hearsay. Although the Department did not refer to the public records exception to the hearsay rule, the questions and answers about the preparation of the reports were clearly designed to establish that exception.

The ALJ's reason for admitting the reports into evidence is not clear. All we really know is that he overruled appellant's objections that the reports were administrative hearsay and contained double hearsay. However, the basis for the ALJ's ruling does not matter. The Board reviews the ruling or decision, not the reasoning. (*D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 18-19 [112 Cal.Rptr. 786, 520 P.2d 10]*; Forensis Group, Inc. v. Frantz, Townsend & Foldenauer* (2005) 130 Cal.App.4th 14, 24, fn. 2 [29 Cal.Rptr.3d 622].) "If a judgment rests on admissible evidence it will not be reversed because the trial court admitted that evidence upon a different theory, a mistaken theory, or one not raised below." (*People v. Brown* (2004) 33 Cal.4th 892 [94 P.3d 574; 16 Cal.Rptr.3d 447].)

Government Code section 11513, subdivision (d), provides:

> (d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.[2]

The police reports were admissible as exceptions to the hearsay rule, and the "double" and "triple hearsay" contained in the reports is admissible as administrative hearsay explaining or supporting the admissible evidence in the reports.

Even if the hearsay statements in the reports were not properly admitted, they are not necessary to the decision. If the administrative hearsay included in the findings were stricken, there is still substantial evidence supporting the findings. Therefore, admission of the statements was not be prejudicial to appellant and could not be a basis for reversal of the decision.

III

Appellant contends the ALJ exhibited bias against him at the hearing by acting as an advocate on behalf of the Department. He complains that the ALJ sustained every objection made by counsel for the Department, kept out evidence regarding the outcome of the criminal charges that resulted from this police investigation, and overruled objections made by appellant's counsel or asked questions following appellant's objections that laid a foundation for overruling the objections. In addition, appellant charges, the ALJ helped build the Department's case by asking questions that laid the foundation for the admission of evidence, such as the contents of a glass that

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[2]Appellant asserts that under this section, "administrative hearsay does not make admissible what would not be admissible in a civil case." As the plain language of the section makes clear, however, administrative hearsay *is* admissible even if it would not be admissible in a civil case; it is not sufficient by itself to support a finding, however, unless it would be admissible over objection in a civil action.

was spilled, the officers' experience in identifying when people were under the influence of alcohol, and several others. Appellant concludes that the ALJ prevented him from getting a fair hearing by acting as associate counsel for the Department.

Our review of the hearing transcript reveals that the ALJ was, indeed, a fairly active participant in the hearing. We cannot conclude, however, that he overstepped the bounds of his role as adjudicator. There is no misconduct in the ALJ questioning witnesses to clarify testimony or to elicit information he feels necessary for determining the case. (See *Brown v. Continental Grain Co.* (1961) 190 Cal.App.2d 804 [12 Cal.Rptr. 505].)

As for the ALJ's rulings on objections, appellant has not alleged that the ALJ ruled incorrectly and we see no obvious errors in his rulings. Most of the objections made by appellant had to do with hearsay evidence, and, as discussed above, the objections were properly overruled.

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.