ISSUED JULY 18, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ROGER MONTALBANO and DOUGLAS ROBERTS dba Duffy's 337 Main Street Chico, CA 95928, Appellants/Licensees, v. THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-6602 File: 48-279176 Reg: 95032265 Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja Date and Place of the Appeals Board Hearing: June 5, 1996 Sacramento, CA

Roger Montalbano and Douglas Roberts, doing business as Duffy's (appellants), appealed from a decision of the Department of Alcoholic Beverage Control[1] which suspended their on-sale general public premises license for 30 days with 10 days stayed for a probationary period of one year, for appellants' bartender selling an alcoholic beverage to a patron who exhibited obvious signs of intoxication, 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

[1]The decision of the department dated November 2, 1995, is set forth in the appendix.

Professions Code §25602, subdivision (a).

Appearances on appeal included appellants Roger Montalbano and Douglas Roberts, appearing through their counsel, Kenneth P. Roye; and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on February 8, 1993. Thereafter, the department instituted an accusation[2] against appellants which charged them with a violation of Business and Professions Code §25602, subdivision (a), sale of an alcoholic beverage to an obviously intoxicated patron. Appellants thereafter requested a hearing.

An administrative hearing was held on September 13, 1995, at which time oral and documentary evidence was received. Subsequent to the hearing, the department issued its decision which determined that appellants' bartender, Renee Cashmere, sold and furnished beer, an alcoholic beverage, to Gerald Daly, a patron who showed obvious signs of intoxication, and ordered that appellants' license be suspended for 30 days, with 10 days stayed for a probationary period of one year. Appellants thereafter filed a timely notice of appeal.

In their appeal, appellants raised the following issues: (1) the crucial findings

[2]The accusation was dated September 26, 1995, an apparent clerical error, as the alleged offense occurred on August 26, 1994, and the department's administrative hearing was held on September 13, 1995.

were not supported by substantial evidence; (2) the facts surrounding the incidents charged and the subsequent filing of the accusation, were initiated in retaliation for appellants exercising their constitutional rights, and (3) the penalty was inappropriate.

DISCUSSION

Appellants contended that the crucial findings were not supported by substantial evidence.

Michael R. Brister, a department investigator, testified at the administrative hearing that he entered the premises on August 26, 1994, at approximately 10:35 p.m., and in the company of another department investigator. There were approximately 75 to 100 people in the premises. A few minutes after Brister had seated himself at the bar, a patron by the name of Gerald Daly entered the premises, came to the bar, and stood next to Brister. Daly began leaning against Brister, who observed no one on the opposite side of Daly. Brister began to exert pressure by leaning toward Daly in a manner that forced Daly into an upright position. However, Daly kept up the pressure against Brister, so Brister moved his body away from Daly, who then almost lost his balance [R. T. 15-18].

Brister observed that bartender Renee Cashmere had an unobstructed view of Daly. Brister observed that Daly's eyes were bloodshot and watery; his eyelids were droopy; and noted that Daly's speech was slurred. During these observations, the

bartender asked if Daly wanted a beer and thereafter furnished a draft beer to Daly.[3] Daly also attempted a "magic" trick, at which time Brister indicated to Daly that Daly was intoxicated, and to which Daly replied: "totally" [R.T. 19-22].

Daly left the bar and went to the restroom, walking in an unsteady and unsure manner. He walked with a staggering gait in a back-and-forth manner, as he bumped into seated patrons. Daly returned to the bar by walking in the same unsteady manner. Brister formed the opinion Daly was intoxicated. The bartender provided Daly with another beer [R.T. 24-26, 31-32, 87-88].

Appellant produced witnesses who testified concerning Daly. The bartender testified that Daly was not intoxicated that evening, was a regular customer, and that Daly had physical problems (back problems) which caused him to walk bowlegged [R. T. 123-124, 146, 157-158]. Kelly Meagher, having known Daly for 16 years as a friend, neighbor, and employer, testified that Daly had back problems and moved in a slow and deliberate manner [R.T. 155-158].

In reviewing a department's decision, the appeals board may not exercise its independent judgment on the effect or weight of the evidence, but 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

---

[3]Argument by appellants seems to suggest that it was not appellants' bartenders' service of alcoholic beverages which caused the intoxication of Daly, but some other establishment which created the intoxicated condition of Daly. It is not who created the intoxication by service, but who served Daly while he showed obvious signs of intoxication, be it one or many bartenders.

findings.[4] Where, as in the present matter, there are conflicts in the evidence, the appeals board is bound to resolve conflicts of evidence in favor of the department's decision, and must accept all reasonable inferences which support the department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]--a case where there was substantial evidence supporting the department's as well as the licensee/applicant's position; 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].)

Conflicts in the evidence invariably raise questions of credibility of a particular witness. The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644]; and Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812].)

The argument concerning the failure of Brister or the police to administer a sobriety test to Daly is irrelevant, as it is the obvious signs of intoxication of a patron that are the basis for charges being sustained, and not the actual sobriety as measured by the various types of breath or blood examinations which test for the level of alcohol in a patron's bloodstream.

---

[4]The California Constitution, Article XX, Section 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.

We determine that the findings of the department were supported by substantial evidence.

II

Appellants contended that the facts surrounding the incidents charged and the subsequent filing of the accusation were initiated in retaliation for appellants exercising their constitutional rights. Appellants argued that the department and the Chico Police Department were putting pressure on appellants to remove a picture of a nude female from the premises; that Daly recognized Brister as an undercover peace officer; and that Brister backdated the accusation.

A. Concerning the argument that the department and police placed undue pressure on appellants, the arguments are speculative as the record is void of evidence which would show that appellants were entitled to the defense of outrageous police conduct, which is, that the governmental entity involvement in the crime was extremely extensive. (United States v. Batres-Santolino (1981) 521 F.Supp. 744 (N.D. Cal. 1981); Hampton v. United States (1976) 425 U.S. 848 [96 S.Ct. 1646, 48 L.Ed.2d 113]; and United States v. Russell (1973) 411 U.S. 423 [93 S.Ct. 1637, 36 L.Ed.2d 366].)

We determine that there was no showing of outrageous police conduct.

B. Concerning the argument that Daly recognized Brister as an undercover officer, the testimony of David Dominquez, a police officer with the Chico Police Department, appears to refute that speculative argument. The officer testified to the

actions of Daly after the arrest (the department investigators needed a uniformed police officer to do the actual arresting and incarceration). The officer, who appeared quite neutral concerning the events, testified that Daly had a strong alcoholic breath, had glassy and bloodshot eyes, and was acting in an uncooperative manner at the premises location as well as at the police station [R.T. 107-110]. The officer held the opinion that Daly was intoxicated, at least at the time Daly was outside the premises [R.T. 111].

We therefore determine from a review of the entire record that there was no showing that the arrest of Daly was for any other cause than that alleged in the accusation.

C. Concerning the argument of possible duplicity evidenced by the incorrect date on the accusation, the record shows that the incident occurred on August 8, 1994; Brister signed the accusation which shows a date of September 26, 1995; a pre-accusation conference was held with appellants and Brister on September 26, 1994; on December 29, 1994, the Northern Division of the department received the accusation package and the report of the arrest; and on March 8, 1995, the accusation package arrived at the hearing and legal section of the main office of the department. The record is void of evidence concerning the department's procedures for the flow of matters from the district office, to the division office, and then to the main state office, where the final decision is made concerning a matter.

While appellants may well have hoped for more dispatch in the final filing of the accusation, the reality of governmental procedures which are designed to insure orderly

processes, is apparent in the present matter. There was no showing of conspiracy, lack of fairness, or other evil, as argued in the arguments of appellants.

III

Appellants contended that the penalty was inappropriate. The appeals board will not disturb the department's penalty orders in the absence of an abuse of the department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296]). However, where an appellant raises the issue of an excessive penalty, the appeals board will examine that issue. (Joseph's of Calif.

//

v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The decision of the department ordered a suspension of 30 days with 10 of those days stayed for a probationary period of one year. The department's procedure manual gives to each of the district offices the interpretations of various statutes and suggested penalties, apparently in the desire to have state-wide uniformity.[5]

The department's counsel in final arguments before the administrative law judge (ALJ) who heard the evidence in the present matter, recommended a 20-day suspension with 10 days stayed. The department made the recommendation through

[5]The department's Instructions, Interpretations and Procedures manual at page L228 states that a 20-day suspension is the penalty for the violation which occurred in this matter.

its counsel to the ALJ who presided at the hearing. While such proposal has been categorized as a recommendation only, an argument partly true, such recommendation also represents the best thinking of the department formulated we would infer, from a careful analysis of the matter prior to the hearing.

In a review of the discretion of the department in assessing a penalty, the appeals board must consider the entire record which includes the hearing proceedings, prior discipline matters, the department's guidelines, past matters of similar circumstances, to name a few, along with the "best thinking" of the department as exhibited by the recommendation. The ALJ's penalty (accepted by the department) clearly is an aggravation (or increase) from the norm.

In this matter, the appeals board is thwarted in its duty of inquiry, as the findings of the ALJ contain no analysis by the ALJ which should include the thinking processes that lead the ALJ to the penalty ordered. The decision is silent of any such necessary analysis of the decision. (7 California Procedure, Witkin, 3rd Edition, §§379-387.)

The court in Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board & Hutchins (1981) 122 Cal.App.3d 549, 555 [175 Cal.Rptr. 342], stated: "One crucial purpose of a requirement that an administrative agency make findings in connection with its decision is to expose the agency's mode of analysis to a reviewing court...Proper findings 'direct the reviewing court's attention to the analytic route the administrative agency traveled from evidence to action'...Findings are a prerequisite to our review of a department decision and we are directed to determine whether '[t]he decision of the department is supported by the findings.'"

(See also the case of Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 505 [113 Cal.Rptr. 836].) The use of the word "findings" in the portion of the decision quoted is not limited to a rehearsal of the facts only, but is directed to the unfortunate and prevalent issuance of decisions without the prerequisite analysis.

With a record that is silent as to a proper showing of "good cause" for aggravation of the penalty, and a decision that is silent as to the reasoning process in that area of discretion that must be openly available for appellate review, the decision is defective.

//

//

//

CONCLUSION

The decision of the department is affirmed, except as to the penalty order, which is reversed and remanded for reconsideration of the penalty in accordance with the views expressed in this decision.[6]

RAY T. BLAIR, JR.,CHAIRMAN

[6]This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.

JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD