

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

MIHWA JA KWON and	)	AB-6653
SANG SOON KWON)	
dba Qik Market	)	File: 21-227910
7601 Vineland Avenue	)	Reg: 95034433
Sun Valley, CA 91352,)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Sonny Lo
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	November 6, 1996
	)	Los Angeles, CA
)	

Mihwa Ja Kwon and Sang Soon Kwon, doing business as Qik Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their off-sale general license for 20 days, with no portion thereof stayed, for appellants' daughter having sold an alcoholic beverage (beer) to a person who was obviously intoxicated, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation

¹The decision of the Department, dated April 4, 1996, is set forth in the appendix.

of Business and Professions Code §25602, subdivision (a).

Appearances on appeal include Mihwa Ja Kwon and Sang Soon Kwon, appearing through their counsel, Stephen W. Solomon; and the Department of Alcoholic Beverage Control, appearing through its counsel, David Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellants' license was issued in August 1985. Thereafter, the Department instituted an accusation against appellants on November 21, 1995. Appellants requested a hearing.

An administrative hearing was held on February 27, 1996, at which time oral and documentary evidence was received. At that hearing, it was determined that appellants' daughter sold a 12-pack of beer to a customer named Cervantes, whose eyes were red and watery, his walk unsteady, his speech slurred, and he had an odor of alcohol on his breath. When he paid for the beer, he leaned on the counter with both of his forearms in order to support himself.

Subsequent to the hearing, the Department issued its decision which suspended appellants' license for 20 days, with no portion thereof stayed. Appellants filed a timely appeal.

In their appeal, appellants raise the following issue: the evidence is insufficient to support the findings, the determination of issues, and the order.

DISCUSSION

Appellants contend that the evidence is insufficient to support the findings, determination of issues, and the order. Appellants argue that the observations of the police officer, taken as uncontradicted and true, do not support a determination that a patron was served alcoholic beverages while in an obviously intoxicated condition. They contend that "in order to reach a factual determination that an individual was obviously intoxicated, the question of obvious must be determined in light of the observations to be made by the licensee or its employee," in this case appellants' daughter.

This case boils down to a conflict in the testimony of the arresting officer and appellants' employee (their daughter) over whether the customer exhibited symptoms of obvious intoxication. Appellants argue that the Board should make an allowance for the fact that the clerk does not have as long a time to observe the symptoms of obvious intoxication as does the police officer, and that in any event there were not enough symptoms shown to warrant the conclusion that the customer was intoxicated.

Appellant's daughter denied observing any symptoms that would have indicated to her that he was intoxicated [RT 34]. She admitted that if she saw a customer who exhibited red, watery, bloodshot eyes, or one who leaned on the counter in the manner Officer Barbosa described, or who spoke with a slurred voice, that might lead her to think that person was intoxicated [RT 36-37]. She, however, denied making such observations with respect to Cervantes [RT 37, 40].

Appellants argue that while "not all the objective symptoms" recited in Jones v.

Toyota Co., Ltd. (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611], need be demonstrated, "many of these subjective symptoms must be readily observable to the employee ... before the word 'obvious' can be implied. [Brief of appellant, p. 9]. Since the clerk did not observe these symptoms, they argue, they can not be charged with selling to an obviously intoxicated person.

The law demands that a licensee use substantial efforts in maintaining a lawfully conducted business. (Givens v. Department of Alcoholic Beverage Control (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446, 450].) Such efforts require that sellers be alert to symptoms of intoxication displayed by their customers.

The term "obviously" denotes circumstances "easily discovered ...; plain; evident" which places upon the seller of an alcoholic beverage the duty to see what is readily visible under the circumstances. (People v. Johnson (1947) 81 Cal.App.2d Supp. 973, 185 P.2d 105, 106].) 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 scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing a Department 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

Where 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. See, e.g., 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 license-applicant's position; Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 27]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

In this case, the Administrative Law Judge (ALJ) made a finding which reflected his acceptance of the testimony of Officer Barbosa (Finding of Fact II), and also a specific finding that the testimony of appellants' daughter that she did not notice the evidence of obvious intoxication was not credible. (Finding of Fact III.)

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (See 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].)

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].

The ALJ chose to believe the testimony of the police officer and to reject that of appellants' daughter. The Appeals Board may not substitute its view of the evidence in place of that of the ALJ who heard the testimony and was able to observe the demeanor of the witnesses as they testified.

CONCLUSION

The decision of the Department is affirmed.³

RAY T. BLAIR, JR., CHAIRMAN
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

DISSENTING OPINION FOLLOWS

³This 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.

DISSENT OF JOHN TSU, MEMBER

I respectfully dissent. In my opinion the evidence of obvious intoxication was insufficient. Cervantes, the alleged intoxicated patron, was before the appellants' clerk for a very short period of time [RT II] with very minimal conversation by Cervantes [RT 10]. I do not believe that intoxication in this matter was properly shown, nor was the responsibility of the clerk adequately proven.

JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD