ISSUED MAY 19, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

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| BERNARDO TOCCHETTO ENTERPRISES, INC.<br>dba The Villa<br>3901 Montgomery Drive<br>Santa Rosa, CA 95405,<br>Appellant/Licensee,<br><br>v.<br><br>DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,<br>Respondent. | ) | AB-6668<br><br>File: 47-298682<br>Reg: 95034471<br><br>Administrative Law Judge at the Department Hearing:<br>Jeevan S. Ahuja<br><br>Date and Place of the Appeals Board Hearing:<br>March 5, 1997<br>San Francisco, CA |

Bernardo Tocchetto Enterprises, Inc., doing business as The Villa (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked appellant's license, staying the revocation for three years subject to several conditions, including a 45-day suspension, for appellant's employees serving alcoholic beverages to two minors and allowing one minor to remain on the premises when he was intoxicated and unable to exercise care for his own safety or the safety of others, being contrary to the universal and generic public welfare and morals provisions of the

[1]The decision of the Department, dated April 25, 1996, is set forth in the appendix.

California Constitution, article XX, §22, arising from violations of Business and Professions Code §§25658, subdivision (a), and 24200.

Appearances on appeal include appellant Bernardo Tocchetto Enterprises, Inc., appearing through its counsel, Joseph L. Stogner; and the Department of Alcoholic Beverage Control, appearing through its counsel Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on November 7, 1977. Thereafter, the Department instituted an accusation against appellant's license on October 18, 1995. Appellant requested an administrative hearing.

An administrative hearing was held on March 12 and 13, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the serving of alcoholic beverages to Stephanie Elston (hereinafter Elston) and Jeffrey Brown, both minors, on the evening of December 23, 1994, and the behavior of Jeffrey Brown which demonstrated his level of intoxication that evening.

Subsequent to the hearing, the Department issued its decision which ordered that appellant's license should be conditionally revoked with a probationary period of three years and an actual 45-day suspension.

Appellant thereafter filed a timely notice of appeal.

In its appeal, appellant raises the following issue: certain of the findings and determinations were not supported by substantial evidence in light of the whole record.

DISCUSSION

Appellant contends that Findings of Fact 9 and 11 and Determination of Issues 2, 3, and 5, to the extent they rely on Findings of Fact 9, 10, and 11, are not supported by substantial evidence in light of the whole record.[2]

A. Determination of Issues 3 and Findings of Fact 9 and 11 relate to Count 3 of the accusation, which alleges the sale or furnishing of beer to Brown by appellant's bartender, Moises Navarette.

Finding of Fact 9 states:

> "While in the bar, and before going into the dining room, Jeffrey Brown ordered and obtained a beer from Respondent's employee Moises Navarette. Mr. Navarette did not request any identification from Jeffrey Brown, and Jeffrey Brown did not show Mr. Navarette any identification."

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[2] It should be noted at the outset that, even if appellant is correct in every argument it makes, Counts 1 and 4 would still be extant. Since Jeffrey Brown died two days later as an unfortunate result of a fight with Andrew Pacheco which occurred later on the night of the 23rd, it is unlikely that the Department would consider revising its penalty.

In a case where some of the charges are not sustained, the matter will be remanded to the Department where there is "real doubt" that the Department would, after a proper review of the evidence, assess the same penalty as in the instant matter. (Miller v. Eisenhower Medical Center (1980) 27 Cal.3d 614 [166 Cal.Rptr. 826].)

Appellant contends that this finding is based on the testimony of Andrew Pacheco (Andrew), that his testimony was hearsay, was later recanted, and lacks credibility. None of these contentions has merit.

The hearsay alleged by appellant is Andrew's testimony that he heard Jeffrey Brown order a beer from appellant's employee Moises Navarette. Andrew's testimony [at I RT 174-175] is not hearsay. As testimony offered to show that something was said or done, it is direct evidence. (People v. Henry (1948) 86 Cal.App.2d 785, 789, cited in Simon v. Steelman (1990) 224 Cal.App.3d 1005 [274 Cal.Rptr. 218, 220 fn. 3]; and see Moyer v. State Board of Equalization (1956) 140 Cal.App.2d 651 [295 P.2d 583].) That Brown said "I'd like a beer" is not hearsay if offered only to show that is what he said before being given the beer. If offered to prove, for example, that Brown liked beer, it would be hearsay, since it would be an out-of-court statement offered to prove the truth of the matter stated, and Brown could not be cross-examined as to whether he really did like beer. That is not the case here.

A fair reading of Andrew's testimony on this point in the transcript [I RT 174-175], as well as in response to later questioning by the Administrative Law Judge (ALJ) [I RT 237-238], does not support the contention that he recanted his testimony.

This Board is not inclined to substitute its judgment as to Andrew's credibility for that of the ALJ who observed him testify and chose to believe him. The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier

of fact. (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 ALJ was aware of the circumstances giving rise to the claim of bias or interest, and his determination as to the weight to which it was entitled cannot be said to be unreasonable.

Finding of Fact 11 states:

> "After the salads were served and before dinner was served, Jeffrey Brown went to the bar to smoke a cigarette. At that point he ordered and was served a beer at the bar by Respondent's employee Moises Navarette. Mr. Navarette did not request any identification from Jeffrey Brown, and Jeffrey Brown did not show Mr. Navarette any identification."

Appellant argues that, although Andrew testified that Jeffrey Brown came back to the table with a beer, there was no testimony as to how Brown got the beer. (App.Br. 19.) Appellant overlooks the testimony of Katrina Pacheco (Katrina), Andrew's wife, who testified that she observed the transaction in question [I RT 156-158].

It follows that appellant's contention that Determination of Issues 3 is not based on substantial evidence because it is based primarily on Findings of Fact 9 and 11, should be rejected. The testimony of Andrew and Katrina, accepted by the ALJ, is enough to support Determination 3, relating to Count 3 of the accusation.

B. Determination of Issues 2 concerns the furnishing of an alcoholic beverage to Elston by Colleen Masterson, alleged as Count 2 of the accusation. This Determination is based on Finding of Fact 10, which states, in relevant part:

> "Subsequently, Ms. Masterson brought four or five mudslides and placed them on the table; she did not set the drinks in front of any particular individual. At no time during the period that she served alcoholic beverages at that table did Ms. Masterson ask Jeffrey Brown or Stephanie Elston their age or ask to see their identifications."

Appellant argues that, even if Finding of Fact 10 is true, it does not support Determination of Issues 2, and, therefore, Count 2 of the accusation cannot be deemed to have been proven.

Appellant argues there is no evidence in the record that Elston ever took one of the drinks provided by Masterson, and that there were five adults at the table, in addition to the two minors, matching the number of drinks Masterson provided. The Department contends that there were only four people at the table, two adults and two minors with the implication that one of the alcoholic drinks was served to Elston.

The evidence indicates that, at least for a part of the time, seven people were seated together, sharing the booth and a table pulled up to the booth [I RT 95; 111; 139]. According to the testimony, people were frequently arriving at or leaving the table, so the count at any given time might be different. The ALJ found (Finding 10) that when the drinks were placed on the table, the two couples were seated in the booth and three more people sat at the table which had been pulled up close. This finding supports appellant's contentions.

The Department contends that the placement of alcoholic beverages on a table where adults and minors were sitting, without determining who the drinks were for,

constitutes "supplying" or"providing" under the statute. The Department's brief engages in a semantic exercise with respect to the relative meanings of the words "serve," "furnish," "supply," and "provide," and whether Elston "took" the drink that was placed on the table.

The problem with the Department's position is that it rests on the assumption that there were only the two couples at the table where the drinks were placed. Given the conflicting testimony about how many people were seated at the booth and table and the ALJ's finding as to the number seated, it is unreasonable to assume solely from the placement of a tray of drinks on the table that a drink was being furnished to Elston.

There is testimony by Katrina [I RT 98-99] that the waitress placed drinks before Brown and Elston, but this testimony may be unreliable, since a few moments later in her testimony [I RT 107] she stated that Bruce Hageman supplied the two drinks. The Department has not relied on Katrina's testimony in support of its position.

The Department's position is weak as to this count, since the evidence is clear Elston never ordered a drink while at the table[3] and did not touch one of those left on the table by Masterson.

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[3] That Elston may later have ordered and been served a drink while seated at the bar does not bear on this issue.

Harris v. Alcoholic Beverage Control Appeals Board (1963) 212 Cal.App. 2d 106 [28 Cal.Rptr. 74, 78], holds that in determining whether the Department's findings are supported by substantial evidence, all conflicts in the evidence must be resolved in favor of the Department's decision and all legitimate and reasonable inferences to support it must be indulged. Considering all the circumstances, and being obedient to the rule stated in Harris, we nonetheless are of the belief that the Department's determination as to this count must be reversed.

C. Determination of Issues 5 addresses the Department's charge in Count 5 of the accusation that appellant permitted Brown to remain on the premises while in an intoxicated state unable to exercise care for his own safety and the safety of others. Appellant argues it is irrelevant that Findings of Fact 13, 14, and 15 are true, because there is no evidence showing that appellant's employees were aware of Brown's intoxication; that without proof of this awareness, Determination of Issues 5 and Count 5 of the Accusation are not supported by substantial evidence.

The Department argues that the ALJ applied the correct standard, i.e., the mere presence in the public bar of an intoxicated person constituted a violation of the law. Harris v. Alcoholic Beverage Controls Appeals Board, supra, the case relied upon by the ALJ and the Department, involved charges that the licensee maintained a disorderly house by permitting intoxicated persons to remain on the premises. The court held that

such behavior constituted grounds for suspension or revocation under Business and Professions Code §24200.

Appellant seeks to distinguish Harris, arguing that in Harris the fact that the person was actually arrested on the premises permitted the inference that the establishment's employees knew he was intoxicated. Here, given appellant's concession that the findings regarding Brown's obvious and extreme state of intoxication are supported by substantial evidence, it appears equally reasonable to infer that appellant's employees knew that he was intoxicated and did nothing about it.

The courts have said that "obviously intoxicated" denotes circumstances "easily discovered, plain, and evident" which place 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].) There is substantial evidence in the record upon which the ALJ could have relied establishing that Brown exhibited those symptoms for a considerable length of time before he was induced to leave the premises.

Appellant's employees uniformly denied observing that Brown was intoxicated. They also uniformly testified, when shown Brown's photo, that they would not have

served him, because of his youthful appearance. Yet, the evidence is strong that he was served alcoholic beverages.

Andrew testified that he found it necessary to "babysit" Brown because of Brown's drinking, and ultimately had to help remove him from the premises. Although his time estimates varied, it would appear that for as long as one-half hour, and possibly longer, Brown's condition was such that it should have been noticed by one or another of appellant's employees. In light of these circumstances, it cannot be said that the ALJ abused his discretion in finding as he did in Determination 5. It must be remembered that the large quantity of alcohol that Brown consumed, as shown by the evidence, ultimately came from the same employees who failed to observe his intoxication, and who uniformly agreed they would not have served him alcohol.

The law demands that a licensee use substantial efforts to maintain a lawfully conducted business. (Givens v. Department of Alcoholic Beverage Control (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446, 450].) We can only conclude that in this instance appellant failed to do so.

CONCLUSION.

We conclude that the decision of the Department should be reversed as to that portion of the decision relating to Count 2 of the accusation (Determination 2) and affirmed as to the remainder of the decision. We decline to remand this matter to the

Department for reconsideration of the penalty for the reasons stated in footnote 1, supra.[4]

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

DISSENT TO FOLLOW

[4] This final order is filed as provided in 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 B. TSU

Although I would be inclined to agree with the other members of the Board that there were violations, and that discipline would be appropriate, in my judgment the discipline which was imposed is excessive. I would remand this matter to the Department for reconsideration of the penalty.

JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD