

ISSUED MARCH 21, 1997

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

EDWARD E. KOLAKOWSKI, JR. and	)	AB-6691
VAN T. KOLAKOWSKI	)	
dba Tommy's Yacht Club	)	File: 48-259987
345 West Sixth Street	)	Reg: 95034086
San Pedro, California 90731,	)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Ronald M. Gruen
	)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	February 5, 1997
	)	Los Angeles, CA
	)	

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Edward E. and Van T. Kolakowski, doing business as Tommy's Yacht Club (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which ordered their on-sale public premises license suspended for 20 days for their bartender having sold an alcoholic beverage to an obviously intoxicated person, 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 Professions Code §25602, subdivision (a).

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<sup>1</sup> The decision of the Department dated July 3, 1996, is set forth in the appendix.

Appearances on appeal include appellants Edward E. and Van T. Kolakowski, appearing through their counsel, Ralph B. Saltsman; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

#### FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general license was issued on May 30, 1991. Thereafter, the Department instituted an accusation alleging that, on April 15, 1995, appellants' bartender sold an alcoholic beverage (beer) to Joseph Anthony Valenza, who at the time was an obviously intoxicated person.

An administrative hearing was held on January 2, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the circumstances of the sale which is in issue. Subsequent to the hearing, the Department issued its decision, which determined that appellants' bartender had, as charged, sold beer to Valenza at a time Valenza was obviously intoxicated. Appellants filed a timely notice of appeal.

In their appeal, appellants contend that the Department failed to meet its burden of proving that the licensee served an obviously intoxicated person.

#### DISCUSSION

Appellants assert that the testimony of the police officer who testified for the Department, and who arrested Valenza, demonstrated that Valenza was not obviously intoxicated at the time of service. Appellants' challenge to police officer Alaniz's testimony rests on two premises: first, appellants argue that Officer Alaniz did not conclude Valenza was obviously intoxicated until he monitored Valenza

after he had been served the drink and had started to consume it; and, second, that Officer Alaniz's testimony concerning his observations did not include the word "obvious." Appellants rely on the decision of the California Supreme Court in Coulter v. Superior Court of San Mateo County (1978) 21 Cal.3d 144 [145 Cal.Rptr. 534], arguing that the symptoms of intoxication must be obvious, and then subsequently there must be service of an alcoholic beverage to the person exhibiting such symptoms.

While appellants correctly quote Coulter, the conclusion they draw from it is opposite from that which this Board would draw. The language quoted from Coulter is as follows:

" ... [T]he use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known outward manifestations which are 'plain' and 'easily seen or discovered.' If such outward manifestations exist and the seller still serves the customer so affected he has violated the law, whether this was because he failed to observe what was plain and easily discovered, or because, having observed, he ignored that which was apparent." (21 Cal.3d at 155).

Appellants' focus on Officer Alaniz's testimony is too narrow. They ignore his testimony that, as Valenza was ordering "another one" from the bartender, he was observed to be swaying from side to side, his face was bloodshot and red, his speech was slurred [RT 10], and that this behavior occurred within view of the bartender. It is this testimony from which a trier of fact could conclude, as the Administrative Law Judge (ALJ) apparently did, that Valenza was obviously intoxicated when he asked for "another one."

We do not understand what is meant by the reference in appellants' brief to "both symptoms." (App.Br. 5). If appellants mean that "obvious" is a "symptom," we cannot agree. The symptoms are the physical characteristics that are "plain and easily seen;" in other words, obvious. "Obvious," then, is a conclusion that is drawn from an observation of those "plain and easily seen" symptoms.

Appellants' argument, in the last analysis, is an attempt to dilute the reasonable interpretation of Officer Alaniz's testimony which, as a whole, is sufficient to demonstrate that he observed beer being served to a person whose outward manifestations were those of an obviously intoxicated person. and would have been apparent to a server who was paying attention.

In a supplemental finding, the ALJ found that the bartender was extremely busy serving other patrons (the bar was crowded to capacity) and was distracted in failing to see the symptoms of intoxication exhibited by Valenza. This finding presumably was based on the testimony of the bartender that she did not remember serving Valenza, and the testimony of appellant Van Kolakowski that when the bar is crowded, the bartenders are "running around like chickens with no head" [RT 38].

Appellants are essentially asking this Board to reweigh the evidence and reach a result opposite to that of the Department. The Board lacks the jurisdiction to do so, even if we were so inclined, which we are not. 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.<sup>2</sup>

#### CONCLUSION

The decision of the Department is affirmed.<sup>3</sup>

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

#### DISSENTING OPINION FOLLOWS

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<sup>2</sup>The 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].

<sup>3</sup> 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.

## DISSENTING OPINION OF JOHN B. TSU

I respectfully dissent. There is a substantial question in my mind whether the testimony of the police officer is sufficient basis for concluding that Valenza's symptoms and behavior were such that the bartender was on reasonable notice that he was "obviously intoxicated." The fact that the police officer felt some need to continue to monitor Valenza after he had been given the beer leads me to believe that Valenza's condition was at least equivocal, and, therefore, not "obvious."

The Department's token defense of its decision at the oral hearing before this Board only convinced me further that its decision was in error.

JOHN B. TSU, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD