

ISSUED JUNE 23, 1997

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

JERRY JAMES, INC.	)	AB-6729
dba The Bullet	)	
10522 Burbank Boulevard	)	File No. 48-135003
North Hollywood, CA 91601,	)	Reg. No. 96035560
Appellant/Licensee,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing
	)	Sonny Lo
DEPARTMENT OF ALCOHOLIC	)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing
	)	May 7, 1997
	)	Los Angeles, CA
_____	)	

Jerry James, Inc., doing business as The Bullet (appellant), appeals from a decision<sup>1</sup> of the Department of Alcohol Beverage Control which ordered appellant's on-sale general license suspended for 25 days, suspension of 10 days thereof stayed for a probationary period of two years, for appellant's bartender having served alcoholic beverages to two obviously intoxicated patrons, being contrary to the universal and generic public welfare and morals provisions of the California

<sup>1</sup> The decision of the Department, dated September 5, 1996, is set forth in the appendix.

Constitution, article XX, §22, arising from a violation of Business and Professions Code §25602, subdivision (a).<sup>2</sup>

Appearances on appeal include Jerry James, Inc., appearing through its counsel, Joshua Kaplan; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

#### FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general license was issued on February 24, 1983. Thereafter, the Department instituted an accusation alleging that appellant's bartender sold alcoholic beverages (beer) to two obviously intoxicated patrons, in violation of §25602, subdivision (a). An administrative hearing was conducted on July 29, 1996, at which time evidence was presented concerning the physical appearance and behavior of three bar patrons who were served alcoholic beverages by appellant's bartender, and who, in the judgment of the police officer who testified, were obviously intoxicated at the time they were served.

Los Angeles Police Officer Lorenzo Barbosa testified that while seated on a bar stool three stools away from bar patron Steven Motzco, he was able to observe that Motzco's eyes were extremely red, with a glazed and watery look, his speech was very thick, and slurred, and he emitted a strong odor of an alcoholic beverage [RT 9]. He also observed Motzco attempt to reach for his bottle of beer, and miss

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<sup>2</sup> All statutory citations are to the Business and Professions Code unless otherwise specified.

it entirely, behavior which officer Lorenzo believed displayed a lack of coordination [RT 10].

Officer Barbosa testified that he also observed bar patron Donald Treichler, who was seated to the right of Motzco. He described Treichler's drowsy appearance, his overall droopy, drowsy eyes and a drooping down in the face, "kind of weak and drowsy" [RT 12]. Treichler's eyes were red and watery, and he swayed from side to side. Treichler displayed a staggered, unsteady gait as he walked past officer Barbosa while on his way to the restroom: his steps were uneven, he wasn't walking a straight line, he was going from side to side, and he staggered when returning [RT 13-14].

According to Officer Barbosa, Motzco ordered beer from the bartender, and bottles of Miller's Light were placed before Motzco and Treichler after Treichler returned from the restroom [RT 11, 14]. Motzco paid for the beer [RT 49].

Officer Barbosa also observed a third patron, Robert Martinez, his attention being drawn to him by Martinez's "elevated tone of voice" [RT 15]. After Martinez swayed gently from side to side as he pushed himself away from the counter, Officer Barbosa walked up to Martinez to engage him in conversation. He observed that Martinez had red, watery eyes and an oily, sweaty facial appearance, conditions he associated with a person being obviously intoxicated [RT 15-16]. Martinez ordered and was served a Miller's Genuine Draft [RT 16].

Because Officer Barbosa was concerned that the three were unable to care for themselves, Motzco, Treichler and Martinez were taken into custody and then taken home. At some time that night, Treichler explained to Barbosa that he was taking medication for pain, following recent eye surgery [RT 38].

On cross-examination, Officer Barbosa testified that he observed Motzco about one minute before determining he was obviously intoxicated [RT 30-31].<sup>3</sup> Barbosa acknowledged that smoking was permitted in the premises, and that sometimes eyes can be made watery from smoke [RT 34]. He also acknowledged that although Motzco's voice was slurred, he was able to understand what he was saying [RT 35].

Officer Barbosa observed Treichler about five to ten minutes before he determined he was obviously intoxicated [RT 36]. Treichler was seated one bar stool to the right of Motzco, on the fourth stool to Barbosa's right [RT 36]. Barbosa observed Martinez, the third patron, about five minutes before concluding he was obviously intoxicated.

Roger Dennehy, a former employee of appellant, was one of the persons talking to Martinez when Martinez was taken into custody. Dennehy had been a bartender and bar manager for 14 years, with considerable experience in dealing

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<sup>3</sup> Barbosa testified on redirect examination that for a period of approximately 30 minutes, until he took the three into custody, he continued to observe the symptoms that led him to conclude that Motzco, Treichler and Martinez were obviously intoxicated.

with patrons he thought might be intoxicated [RT 54]. He denied observing in Martinez any of the symptoms his experience had taught him were symptoms of obvious intoxication [RT 56]. He further testified that, during the 30 minutes that he was in the bar, he did not observe anyone else he thought appeared to be intoxicated [RT 57]. Dennehy acknowledged that, based upon his own bartending experience, if he observed a patron reach for his beer and miss, or stagger while walking, those observations would concern him [RT 60-61].

The owner of the bar, Donald Small, testified that he holds monthly meetings with his employees at which the issue, among others, of serving alcoholic beverages to intoxicated patrons is discussed [RT 66].

Subsequent to the hearing, the Administrative Law Judge (ALJ) entered his proposed decision in which he sustained the charges of the accusation as to patrons Motzco and Treichler, and dismissed the charge relating to Martinez. The Department adopted the proposed decision on September 5, 1996, following which, appellant filed its timely notice of appeal.

In its appeal, appellant raises the following issues: (1) the evidence is insufficient to support the findings and the decision; (2) the use of an ALJ employed by the Department violates appellant's constitutional rights to due process and equal protection of the law; and (3) the penalty is excessive.

## DISCUSSION

Appellant challenges the sufficiency of the evidence to support the findings and the decision, contending that the evidence does not meet the legal test for determining whether a person is obviously intoxicated, as explained in Schaffield v. Abboud (1993) 15 Cal.App.4th 1133. Appellant argues that Schaffield requires the Department to demonstrate that there are outward manifestations of a patron that are plain and easily discovered that would lead a reasonable man in a similar situation to determine that the patron is obviously intoxicated, and that there must be a series of symptoms consistent only with that one rational explanation. Building on this premise, appellant argues that, with respect to Motzco, the only objective "symptomology" was that his eyes were red while he was seated in an environment where other people were smoking. Appellant minimizes the slurring of Motzco's voice, since the police officer was able to understand him when he spoke, and characterizes the officer's testimony that he smelled the odor of alcohol on Motzco's breath as a "preposterous assertion" [RT 6]. Thus, appellant argues, none of these symptoms were plain and easily discoverable and "consistent only with the singular explanation of obvious intoxication" [RT 6].

Appellant makes a similar argument with respect to Treichler. Treichler's eye condition is explained, according to appellant, by the fact that he had recently undergone eye surgery, and was taking pain medication. Appellant acknowledges

that Treichler was swaying on his stool, and had an unsteady gait, but attributes these symptoms to the fact that music was playing.

Appellant has overstated the holding of the Schaffield decision. The Schaffield court did not say anything to the effect that there must be, as appellant has argued, "a series of symptoms consistent only with that one rational explanation." What the court did do was to cite People v. Johnson (1947) 81 Cal.App.2d Supp. 973, 975-976 [185 P.2d 105], overruled on other grounds, and Paez v. Alcoholic Beverage Control Appeals Board (1990) 222 Cal.App.3d 1025, 1027 [272 Cal.Rptr. 272], as setting forth the proper test for determining whether a patron is obviously intoxicated:

"The 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 seen or discovered, or because having observed, he ignored that which was apparent.'" (Emphasis in original).

(Schaffield v. Abboud, supra, 15 Cal.App.4th at 1140.)

In addition, appellant's argument that the symptoms to which Officer Barbosa testified would not be sufficient to compel the conclusion of obvious intoxication (see App.Br., p.6) is incorrect, in that there is no requirement that the evidence compel any conclusion. The test is whether there is substantial evidence to support the ALJ's finding -- in other words, could the ALJ, accepting Officer

Barbosa's testimony and opinions, reasonably conclude that bar patrons Motzco and Treichler sufficiently displayed symptoms of obvious intoxication that were plain and easily seen or discovered.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [ 71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "... resolve conflict[s] in the evidence, or between inferences reasonably deducible from the evidence ... ." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr. 658].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve them 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] (substantial evidence



supported both the Department's and the license-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]; Gore v. Harris (1964) 229 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The bartender did not testify. Therefore, the only eye-witness testimony came from Officer Barbosa and bar patron Dennehy. The ALJ apparently felt that Dennehy's testimony regarding Martinez was enough to swing the balance in Martinez's favor, but not as to Motzco or Treichler, who were on the other end of the bar from Dennehy.

Accepting Officer Barbosa's testimony, as the Board must, there is sufficient evidence to sustain the Department's decision. It is worth noting that in capsulizing in its brief the symptoms displayed by the two customers who were found to have been obviously intoxicated, appellant has overlooked the inability of Motzco to grasp his beer bottle, and Treichler's inability to walk in a steady manner, both of which are strong and readily observable indications of alcohol impairment.

Appellant contends that the employment by the Department of the ALJ who hears the evidence and issues a proposed decision denies appellant its rights to due process and equal protection under the United States and California constitutions. This Board, as an agency of the State of California, is precluded from holding a statute unconstitutional or refusing to enforce a statute on the ground it is unconstitutional, unless an appellate court has first held such statute unconstitutional. (Cal. Const., art. III, §3.5.) We therefore decline to address this issue.

### III

Appellant contends that the penalty imposed by the ALJ is excessive. 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].)

Appellant's brief sets forth only a general assertion that the penalty is unreasonable without making any attempt to relate the penalty imposed to the violations found. At the administrative hearing level, appellant argued that the

violation which occurred in 1987 was too remote to be taken into account. The ALJ appeared to accept this argument, noting in Finding of Fact I that appellant had a single violation within the preceding five years. While the Department had initially recommended a suspension of 35 days, with enforcement stayed as to 15 days thereof, the ALJ imposed a 25-day suspension, and stayed enforcement of 10 days of the suspension subject to a two-year probationary period.

Given the existence of a prior violation, and the fact that the Department's standard penalty for serving an obviously intoxicated person is 20 days, this Board is unable to say that the Department has abused its discretion in setting the period of suspension as it did.

#### CONCLUSION

The decision of the Department is affirmed.<sup>4</sup>

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

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<sup>4</sup> This final decision is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said Code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.