ISSUED SEPTEMBER 11, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

SCORPION ENTERPRISES, INC. dba Captain's Cabin 11665 Victory Boulevard North Hollywood, CA 91606, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6765 File: 48-182846 Reg: 95034563 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: July 2, 1997 Los Angeles, CA

Scorpion Enterprises, Inc., doing business as Captain's Cabin (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered its on-sale general public premises license suspended for 30 days, with enforcement of 10 days thereof stayed for a probationary period of two years, for its bartender having sold and served alcoholic beverages to patrons who were 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 of Business and Professions Code §25602, subdivision (a).

[1] The decision of the Department dated October 24, 1996, is set forth in the appendix.

Appearances on appeal include appellant Scorpion Enterprises, Inc., appearing through its counsel, Joshua Kaplan; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on February 27, 1986. Thereafter, the Department instituted an accusation alleging that on October 21, 1995, appellant's bartender sold and/or served alcoholic beverages of various types to five persons who were then obviously intoxicated.

An administrative hearing was held on September 5, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the events of October 21, 1995.

Juan Gonzalez, an officer with the Los Angeles Police Department, testified that in the course of his undercover assignment, he visited appellant's bar late in the evening of October 21, accompanied by another police officer. While in the premises he observed five individuals in the bar that, in his opinion, based upon his visual observations, were obviously intoxicated.

The first of these, Randy Vaught, was observed to be rocking back and forth on his stool, his body swaying [RT 13], which became more obvious when he stood [RT 14]. Vaught's face was red, his speech was loud and slurred, he leaned with both hands on the fixed bar for support, and ordered, and was served, an alcoholic drink

consisting of a mixture of beer and 7-Up [RT 13-17]. Officer Gonzalez concluded that Vaught was obviously intoxicated on the basis of his rocking back and forth, his bright red face, his slurred speech and his loudness [RT 16].

Officer Gonzalez saw Louis Porcaro enter the bar [RT 18]. Porcaro walked slowly, with an unsteady gait [RT 18]. Porcaro's eyes were red and watery, but it did not appear they were irritated by smoke [RT 19-20]. Gonzalez concluded he was obviously intoxicated because of these factors and his rocking back and forth on the bar stool [RT 22]. Porcaro ordered and was served a white Russian [RT 21], a mixture of vodka, Kahlua and milk [RT 71].

Carlos Aguado and Jesus Rodriguez then entered the bar together [RT 23]. Both were very loud; Aguado screamed, jumped around and danced, and then stood by the bar [RT 24]. He appeared to be happy [RT 24]. His speech was loud, thick and slurred, although understandable [RT 26]. Aguado carried on a conversation with the bartender, during which he ordered and was served beer for himself and Rodriguez, and a second beer for himself [RT 26-27, 29-30]. Officer Gonzalez concluded Aguado was obviously intoxicated on the basis of his loud, thick speech and the manner in which he behaved [RT 28].

Rodriguez was more silent, his eyes were red and watery, and his speech was slow [RT 24]. Officer Gonzalez concluded Rodriguez was obviously intoxicated from the fact that he appeared to be swaying back and forth, his speech was slow and thick, his

eyes were red and watery, and he appeared not to be paying attention to his companion or anyone else [RT 29].

LaVere Schmidt was seated at the bar eight or ten feet from Officer Gonzalez [RT 31. Schmidt's face was bright red. He was swaying back and forth while arguing with his friend and while playing darts [RT 31]. His speech was loud and boisterous while he was arguing with the bartender and yelling a beer order [RT 31-33]. Officer Gonzalez concluded Schmidt was obviously intoxicated on the basis of his swaying back and forth and his loud and boisterous manner while arguing with the bartender and with a friend seated next to him [RT 33-34].

Officer Gonzalez testified that he had received training in how to determine whether a person was obviously intoxicated, and had extensive field experience while working as an undercover vice officer and as a patrol officer [RT 7-9,35]. He acknowledged that such a determination could not be made on the basis of a single factor, but required a series of symptoms.

Lynn Schar, the bartender, testified on behalf of appellant. She has been a bartender at Captain's cabin for two years, and has been a bartender approximately 23 years [RT 49]. She testified that when she believes a person is intoxicated, she will insist that they leave [RT 49], She looks at a number of things in making such a determination, including the way they walk into the bar, whether they are staggering, the way they hold their head, their reaction time in their speech, the way they carry

themselves, how they walk to the bar stool, and how they look at her [RT 50-52].

She testified that because of the presence of a pool table, dart games, a juke box, a pinball machine and a video game, the atmosphere in the Captain's Cabin tends to be loud, and patrons "always" speak in a loud tone of voice [RT 54-56].

According to Ms. Schar, Randy Vaught was a regular patron, and there had been times when she refused him service when she felt he was intoxicated. She testified that on the evening of October 21 she had concluded that Vaught was intoxicated, took his drink from him, and escorted Vaught and three others out the door [RT 59-61]. She denied that he ever returned to the bar that evening.

Porcaro's appearance, Schar testified, was his normal appearance, and she did not observe anything to lead her to think he was intoxicated [RT 64]. She did not notice that his eyes were red or his speech slow [RT 65].

Aguado did no more jumping around than usual [RT 66], and Schar saw nothing to cause her to believe he was intoxicated. Similarly, Rodriguez is usually quiet, and she did not observe that his eyes were red [RT 66-67].

Schar saw nothing about Schmidt to indicate he was intoxicated. Schmidt usually came to the bar at 10:00 on Friday and Saturday nights, and may have yelled when trying to get her attention [RT 68].

Schar testified she had refused Vaught drinks many times [RT 68], and Porcaro [RT 69] and Aguado each once [RT 69]. She had not had occasion to refuse to serve

Rodriguez, and she had refused to serve Schmidt "a couple of times."

Administrative Law Judge Lo concluded, on the basis of the testimony, that the allegations regarding Vaught, Porcaro and Rodriguez had been proven, but not as to Aguado and Schmidt. His proposed decision, which the Department adopted, ordered appellant's license suspended for 30 days, with 10 days stayed for a probationary period of two years.

Appellant filed its timely notice of appeal, and in its appeal raises the following issues: (1) the evidence is insufficient as a matter of law to permit the conclusion that the patrons were obviously intoxicated; and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends that the evidence is insufficient as a matter of law to permit the conclusion that bar patrons Vaught, Porcaro and Rodriguez were obviously intoxicated. Appellant contends that as to each of the three, the physical symptoms observed by Officer Gonzalez were insufficient to justify his determination, and the ALJ's acceptance of that determination, that the three individuals were obviously intoxicated.

Appellant stresses the testimony of the bartender, who had 23 years of experience, her guidelines for determining whether a patron should be refused further drinks, derived from her own long experience, and her personal awareness of the habits

and mannerisms of the three patrons, arguing that these considerations, when coupled with evidence of the atmosphere of the bar, make it impossible for a reasonable person to conclude the patrons were obviously intoxicated.

An attack on the sufficiency of the evidence necessarily implicates the rule that the administrative law judge's decision will be sustained if substantial evidence in the record, viewed in its entirety, supports that decision.

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 U.S. 474, 477 [71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 747].)

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 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].)

The term "obviously" 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].)

It is clear that Officer Gonzalez and bartender Schar draw very different conclusions from their observations of patrons Vaught, Porcaro and Rodriguez. The ALJ, who saw and heard the witnesses, agreed with Officer Gonzalez's

assessment of the state of intoxication of three of the five patrons initially listed in the accusation, but not as to the remaining two. His conclusions suggest that he carefully weighed the testimony and assessed the competing descriptions of the behavior of all five patrons before reaching his own conclusions.

Appellant argues the bartender's observations are of greater weight than the police officer's because of her prior familiarity with the patrons involved. This argument is substantially weakened by the apparent discrepancies in her testimony that she ejected Vaught from the bar because he was intoxicated. This testimony conflicts with that of Officer Gonzalez that he watched her serve Vaught a drink which he later learned was beer and 7-Up [RT 15]. Officer Gonzalez testified that Vaught was still in the bar when the arrests were made, and the ALJ specifically found that the bartender must have been mistaken about having escorted him out [Finding II-C].

It does not necessarily follow that one who is familiar with another's drinking habits and behavior when that person has consumed a substantial quantity of alcoholic beverages is the best person to judge whether that person has crossed the line to obvious intoxication. As stated above, the test is whether the symptoms would lead a reasonable person to reach such a conclusion. Without intending to impugn her, Ms. Schar's objectivity may have been colored by her prior acquaintance with the patrons involved, and her willingness to be forgiving when she should have refused to serve them.

The Board declines to substitute its judgment for that of the ALJ, whose findings, we believe, are supported by the record as a whole.

II

Appellant contends that the penalty is excessive.

Appellant launches a broadside attack on the penalty, ranging from a claim that it constitutes cruel and unusual punishment to a suggestion that it was retaliatory for appellant having insisted upon a hearing. However, the only argument possibly of merit involves the fact that the suspension ordered by the ALJ is, in substance, identical to the suspension recommended by Department counsel at the hearing, when the Department was contending five obviously intoxicated patrons had been sold or served alcoholic beverages.

Department counsel recommended a suspension of 40 days, with enforcement of 20 of those days stayed. The ALJ imposed a suspension of 30 days, but stayed enforcement of only 10 days. Thus, the effective suspension is 20 days, the same as it would have been based on the Department's recommendation, and, presumably, as it would have been had the ALJ found in favor of the Department on all five counts of the accusation.

Appellant had previously been disciplined for a violation of the same Business and Professions Code section less than a year earlier, a factor the ALJ and the Department were entitled to consider in determining appropriate discipline. That being

so, we are unable to say that the penalty imposed exceeded the bounds of discretion.

CONCLUSION

The decision of the Department is affirmed.[2]

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

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[2] 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.