ISSUED JANUARY 13, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

DANIEL J. CONNERS and TIMOTHY WILLIAMS, dba McCarthy's 1019 Court Street San Luis Obispo, CA 93401, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6822 File: 48-261808 Reg: 96036154 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: October 1, 1997 Los Angeles, CA

Daniel J. Conners and Timothy Williams, doing business as McCarthy's (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which ordered their on-sale general public premises license suspended for 20 days, with 5 days thereof stayed for a probationary period of one year, for appellants' bartender having served an alcoholic beverage consisting of distilled spirits 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

[1] The decision of the Department, dated February 20, 1997, is set forth in the appendix.

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

Appearances on appeal include appellants Daniel J. Conners and Timothy Williams, appearing through their counsel, Thomas G. McCormick; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on July 1, 1991. Thereafter, the Department instituted an accusation containing two counts, alleging in count 1 that on March 14, 1996, appellants permitted an 18-year-old minor to enter and remain in the premises, in violation of Business and Professions Code §25665, and in count 2 that appellants' bartender served an alcoholic beverage consisting of distilled spirits to an obviously intoxicated patron.

An administrative hearing was held on January 6, 1997, at which a total of eight witnesses testified concerning the matter alleged in count 2 of the accusation.[2]

Shawn Collins, a Department investigator, testified that, just as he entered appellants' bar, he saw Paula Spence fall from a bar stool and be helped to her feet by a male patron who had been standing next to her. He then watched her for the next 30 minutes, and, according to his testimony, observed her request alcoholic beverages from the bartender three separate times, and, after being turned down twice, on the

[2] No evidence was presented with respect to count 1 of the accusation, and it was dismissed.

third attempt was permitted to order three mixed drinks containing distilled spirits. She attempted to pay for the drinks with two one-dollar bills [RT 22]. During this time, Ms. Spence was observed to have bloodshot eyes, droopy eyelids, slurred speech, and at times she rested her head in her hands on the bar [RT 14-16, 18].

Appellants presented testimony from six witnesses, one of whom was Ms. Spence. The others were the bartender, three bar patrons who were in the premises at the time who either had accompanied Ms. Spence to the bar or otherwise knew her, and one of the owners of the bar. Except for the latter, who was not present until after Ms. Spence had been removed from the premises, these witnesses disputed Collins' testimony. The thrust of their testimony was that Ms. Spence was not intoxicated and the the drink in question was given to her by a patron (the brother of one of the owners) who obtained it from a different bartender at the other end of the bar. Francisco Cabada, the bartender, denied serving Ms. Spence, claiming that he was just coming on duty and had not had time to serve any drinks to anyone [RT 125]. He specifically denied serving Spence [RT 125, 133].

Eric Froeschner, another Department investigator who had accompanied Collins into the bar, testified as a rebuttal witness, and essentially corroborated Collins' testimony [RT 138].

The Administrative Law Judge (ALJ) weighed this conflicting testimony and concluded that the version of events described by the two investigators was entitled to

greater weight because it was consistent, while there were a number of inconsistencies in the testimony of the witnesses called by appellants. The ALJ detailed these inconsistencies in his proposed decision, which concluded that the Department had established the charge in count 2 of the accusation.

Appellants filed a timely notice of appeal, and raise the following issues: (1) the ABC investigators have observed hundreds of people who were obviously intoxicated in other establishments, yet this is only the second citation they have issued for a violation of the Code provision in question; (2) the investigators had the ability to conduct a preliminary alcohol screening and elected not to do so; (3) San Luis Obispo police officers at the scene did not cite or arrest Ms. Spence for a violation of Penal Code §647, subdivision (f); (4) the ABC investigators cited appellants for the violation of Business and Professions Code §25602 only after finding out Ms. Spence was over 21; and (5) the penalty is excessive and punitive for a licensee with a clean record for six years.

DISCUSSION

I

Appellants claim the Department investigators have cited only appellants and one other licensee for a violation of §25602, subdivision (a), despite having observed hundreds of obviously intoxicated persons in bars in the course of their investigations.[3]

[3] Collins put this number as between 500 and 1,000 [RT 29].

We must admit that we have to speculate as to what appellants are contending in their letter brief. We will assume appellants either question the ability of the investigators to make a determination whether a person is obviously intoxicated or else attempt to allege discriminatory prosecution on the part of the Department. If either is their objective, appellants have failed to demonstrate the basic elements of those claims.

The issue of discriminatory prosecution was discussed in Balayut v. Superior Court (1996) 12 Cal.4th 826, 832-833 [50 Cal.Rptr.2d 101], where the Court stated;

> "Unequal treatment which results simply from laxity of enforcement or which reflects a non-arbitrary basis for selective enforcement of a statute does not deny equal protection and is not constitutionally prohibited discriminatory enforcement. ...
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> In Murgia[4] this court explained the showing necessary to establish discriminatory prosecution: '[I]n order to establish a claim of discriminatory enforcement a defendant must demonstrate that he has been deliberately singled out for prosecution on the basis of some invidious criterion. Because the particular defendant, unlike similarly situated individuals, suffers prosecution simply as the subject of invidious discrimination, such defendant is very much the victim of the discriminatory enforcement practice. Under these circumstances, discriminatory prosecution becomes a compelling ground for dismissal of the criminal charge, since the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities.' ...
>
> There must be discrimination and that discrimination must be intentional and unjustified and thus 'invidious' because it is unrelated to legitimate law enforcement objectives ... ."

(Balayut v. Superior Court, supra, 12 Cal.4th at 832-833.)

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[4] Murgia v. Municipal Court (1975) 15 Cal.3d 286 [124 Cal.Rptr. 204].

People v. Battin (1978) 77 Cal.App.3d 635, 666 [143 Cal.Rptr.731], summarized the burden on a party making such a claim:

> "Discriminatory prosecution constitutes adequate grounds for reversing a conviction ... when the defendant proves: '(1) that he has been deliberately singled out for prosecution on the basis of some invidious criterion;' and (2) that 'the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities.' ... The discrimination must be 'intentional and purposeful.' ... Further, defendant must carry the burden of proof that he has been deliberately singled out in order to overcome the presumption that '[prosecutorial] dut[ies have] been properly, and constitutionally exercised.'" (Citations omitted.)

Appellants have shown only that these two investigators claim to have observed hundreds of obviously intoxicated persons but have cited only two. The record is completely silent as to the circumstances under which these "hundreds" were observed. Only if an intoxicated person is served an alcoholic beverage or allowed to remain in the premises when in such a state would §25602 come into play, and these facts are not known. Nor is there any evidence that appellants were singled out because of some invidious reason. Under these circumstances, we are unable to see any basis for a claim of discriminatory prosecution.

II

Appellants claim the Department investigators had the ability to conduct an objective preliminary alcohol screening, but elected not to do so.

There is no direct evidence in the record to indicate the Department investigators had the ability to conduct such an examination. Appellants' attorney asked Collins if he

knew whether a PAS device[5] was available that evening. The ALJ sustained the relevancy objection raised by Department counsel, and Collins did not answer the question. The ALJ also ordered stricken from the record an answer by Ms. Spence which referred to a breathalyser test given to one of the male patrons who was with her at the bar, after which she was released in his custody.

We agree with the ALJ that such evidence would have been irrelevant. Further, given Ms. Spence's testimony that she had two mixed drinks prior to falling off the bar stool, and the symptoms of intoxication observed by the Department investigators during the following 30 minutes, such evidence would have been cumulative, at best.

It is a matter of common knowledge that some persons are better able than others to control their behavior after having consumed alcohol. In this case, Ms. Spence demonstrated sufficient symptoms of intoxication as to make her condition obvious to the Department investigators. This being the case, a measurement of her blood alcohol content would only have suggested the level at which she became intoxicated, not that she was not intoxicated.

Appellants' argument suggests possible confusion arising from the different approach to the consequences of alcohol consumption addressed in the Motor Vehicle Code, where, in those provisions relating to the offense of driving a motor vehicle under the influence of alcohol, certain presumptive levels of blood alcohol are

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[5] We are informed the initials stand for "preliminary alcohol screening."

established. It does not follow that the same considerations are pertinent when the issue is whether person is obviously intoxicated, for the reasons stated above.

III

Appellants assert in their letter brief that the San Luis Obispo police did not cite Ms. Spence for a violation of Penal Code §647, subdivision (f), but do not say how that affects their appeal.

Under the circumstances, we do not see how the failure to charge Ms. Spence is relevant. The conduct which constitutes a violation of Penal Code §647, subdivision (f), is a person's being found in any public place under the influence of intoxicating liquor "in such a condition that he or she is unable to exercise care for his or her own safety or the safety of others." Business and Professions Code §25602, subdivision (a), requires only a sale to an obviously intoxicated person. The statute does not require proof that one who is obviously intoxicated is also unable to exercise care for his or her own safety or the safety of others.

The decision whether to charge a violation of the Penal Code was up to the San Luis Obispo police, who may not have been satisfied Ms. Pence met the standard of §647, subdivision (f), since they sent her home with an acquaintance.

IV

Although appellants claim the Department investigators originally intended to cite appellants for their bartender having served a minor, the only evidence in the record to

support this claim is the statement of Ms. Spence [at RT 55] that she believed she was taken outside by the ABC investigators because she was underage.

It is highly unlikely that if the investigators thought a sale to a minor had taken place, they would have waited from 30 to 45 minutes before taking action. There were drinks on the bar in front of Ms. Spence, and there were clear indications she had been drinking. There would have been no reason for them to wait for 30 to 45 minutes, while the supposed minor was attempting to order drinks.

V

Appellants contend the penalty (a 20-day suspension, with 5 days stayed) is excessive and punitive. They point out that there has been no prior disciplinary action against the license since its issuance in July 1991, and that the penalty forces a closure rather than the option of paying a fine.

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].)

The ALJ made specific note of the fact that appellants' license had no prior disciplinary history. Since the standard penalty assessed by the Department for

violations of Business and Professions Code §25602 is a 20-day suspension, it may be inferred that the ALJ took this record into account when he stayed five days of the suspension.

Nor can we say that the imposition of something more lenient than the norm for the type of violation being disciplined is excessive or punitive, such as to constitute an abuse of discretion. That the penalty imposed by the Department may result in some degree of closure is a matter within the broad discretion accorded the Department.

Cutting across this entire appeal is the underlying suggestion that the Department's investigators are not to be believed. However, the ALJ carefully considered the conflicting testimony, and the competing motives, biases and interests of the witnesses, and explained why he concluded, as he did, that the testimony of the investigators was entitled to the greater weight.

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].).

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 testimony in this case was in sharp conflict. The ALJ saw and heard the witnesses, and was in a superior position to evaluate their testimony than is the Board, which has only the cold record to examine.

CONCLUSION

The decision of the Department is affirmed.[6]

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

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[6] 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.