ISSUED JANUARY 12, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

KUM CHA CHOE and JONG WOON KIM dba 5th Street Market 116 East 5th Street Los Angeles, CA 90013, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6833 File: 20-317631 Reg: 96037650 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: October 1, 1997 Los Angeles, CA

Kum Cha Choe and Jong Woon Kim, doing business as 5th Street Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which ordered their license suspended for 25 days, with 10 of those days stayed for a probationary period of one year, and subject to certain conditions, for their clerk having sold an alcoholic beverage (a 12-ounce container of beer) to Beridio Beltran, an obviously intoxicated person, being contrary to the universal and generic public welfare

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

and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25602, subdivision (a).

Appearances on appeal include appellants Kum Cha Choe and Jong Woon Kim, appearing through their counsel, Angela Oh; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued April 17, 1996. Thereafter, on September 30, 1996, the Department instituted an accusation alleging that, on May 9, 1996, appellants' clerk sold an alcoholic beverage (beer) to Beridio Beltran, a person who was obviously intoxicated.

An administrative hearing was held on December 12, 1996, at which time oral and documentary evidence was received. At that hearing, the testimony of three witnesses was presented. Los Angeles police officer Robert Grant III, an experienced officer with training in alcohol-related offenses, testified concerning the location of the licensed premises, the symptoms of intoxication displayed by Beltran, and the circumstances of the challenged sale. Jong Woon Kim, one of the owners, and his clerk, Jorge Barrios, testified in defense of appellants. Los Angeles police officer Juan Hernandez testified as a rebuttal witness concerning the symptoms displayed by Beltran.

Officer Grant vividly described the area in which the premises are located [RT 7-

8]:

> " This location itself is a high narcotics, high intoxicated drunk area. Just north of the location is one of our Indian missions, and it's probably one of the exclusive places they purchase their alcohol. We have a lot of intoxicated patrons lying in the alley drinking, a lot of intoxicated patrons laying along the sidewalk also drinking."

Officer Grant testified that while he was in the process of apprehending several persons observed smoking marijuana near the entrance to appellants' premises, he observed Beridio Beltran approaching. Beltran attracted Officer Grant's attention because of the way he was walking, and because of his bloodshot eyes and distinct odor of alcohol. Beltran was described as having difficulty moving and maintaining direction [RT 14], as well as maintaining his balance and calculating where his step was landing [RT 15], at times staggering [RT 16]. Based on Beltran's general demeanor and his lack of coordination and balance, Officer Grant concluded that it was obvious that he was intoxicated.

Officer Grant testified further that after Beltran staggered to the counter, he used both hands to stand the beer up on the counter. At that point, according to Grant, the clerk said to Beltran: "I can't sell you that. The police are here" [RT 18-19]. Beltran responded: "It's okay" [RT 19], and the clerk then sold him the beer. Grant detained Beltran as he was leaving the store, and after confronting the clerk and citing him for making the sale, took Beltran into custody and sent him to a detoxification center.

Officer Grant was cross-examined extensively with respect to the problems

encountered by small business licensees in dealing with difficult and intoxicated customers who respond with threats and violence if they are refused in their attempt to purchase alcoholic beverages, and with respect to the persons detained in connection with the smoking of marijuana. However, his testimony with regard to the condition of Beltran did not vary in any material respect.

Jong Woon Kim testified through an interpreter that although he was in the store at the time of the sale to Beltran, he did not observe the sale, and noticed Beltran only as he was leaving the store. At the time he purchased the premises he was told by the previous owner: "Don't sell alcohol to drunks," and also that if he was cited for three violations he could lose his license.

Appellants' clerk admitted selling beer to Beltran, but claimed it was in a bottle rather than a can. He denied that Beltran appeared to be intoxicated as well as having red and watery eyes, or problems talking or walking. He described Beltran as a regular customer, stopping in the store only once daily, and buying only one beer at a time. Barrios denied making the comment attributed to him by Officer Grant [RT 87, 91].

At the conclusion of the hearing, Department counsel recommended a suspension of 20 days, and a finding that an additional condition be added to the license, permitting sales of malt beverages only in the manufacturer's original multi-unit package of 12- or 16-ounce containers, and prohibiting sales of 22-ounce and larger containers.

On March 20, 1997, the Department issued its decision, adopting the proposed decision of the Administrative Law Judge (ALJ), which determined that the violation charged in the accusation had been established. Although devoid of any detailed findings, the decision concluded that an alcoholic beverage had been sold to an obviously intoxicated person, and that cause for discipline had been established. The overall suspension exceeded that recommended by the Department, but is less than what was recommended after the stayed portion is deducted. In addition to the customary condition regarding violations, the stay was conditioned upon appellants' participating in the Department's LEAD program, and upon their selling malt beverages only in 12- and 16-ounce sizes and only in the manufacturer's original multi-unit packaging.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants contend that the decision of the Department is not supported by its findings, and that the conditions imposed by the decision are unreasonable.

DISCUSSION

Appellants contend that the decision is not supported by its findings. Specifically, they assert that the decision appears to be based upon the testimony of police officers Grant and Hernandez, and fails to credit or even acknowledge the testimony of their clerk that the purchaser did not appear to him to be intoxicated.

The decision contains no detailed findings explaining the ALJ's determination. It

merely states the ALJ's finding as to the ultimate fact, that is, an alcoholic beverage was sold to an obviously intoxicated person, and his conclusion that grounds for discipline were established.

While it is ordinarily helpful to the Board and to the parties for the ALJ to have explained the path of reasoning which led him to the result stated in his opinion, the fact that he did not do so does not impair its vitality. The decision that grounds warranting discipline had been established is supported by the finding that appellant's clerk sold an alcoholic beverage to an obviously intoxicated person. The real issue is whether there was substantial evidence in the record to support that finding. (See generally, Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 514-517 [113 Cal.Rptr. 836].)

There is substantial evidence in the record supporting the finding that the sale was made to an obviously intoxicated person, consisting of the testimony of police officers Grant and Hernandez.

Appellants complain that the ALJ paid no heed to the testimony of their clerk, who denied observing the symptoms of intoxication Grant and Hernandez observed. This argument raises what is essentially a credibility issue, and it is well-settled that the Appeals Board may not second-guess the Department or the ALJ on the question of witness credibility. This is especially so in this case where the police officers had ample opportunity not only to observe the symptoms of intoxication displayed by the

purchaser, but also to observe the ability of appellant's clerk to observe those symptoms. The testimony of Officer Grant that the clerk told the purchaser "I can't sell you that. The police are here." is evidence that the clerk not only observed those symptoms but realized he had no business making the sale.

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].) Those symptoms were established by the evidence in this case.

II

Appellants contend that the conditions imposed in the order are unreasonable, and will generate undue hardship. Their attack is focused on the condition which limits their sales of malt beverages to 12- and 16-ounce sizes in the manufacturer's original multi-unit packaging, and banning sales of single containers and sizes larger than 12 or

16 ounces.[2] They assert that the area where the premises are located "is one of the poorest in Los Angeles," their customers cannot afford to purchase alcohol in large quantities, and will shop elsewhere for their needs, resulting in irreparable injury.

Appellants contend the transaction was an isolated occurrence, so that, even if it were true that their business is in a "skid row" area where poor alcoholics tend to buy beer in single cans, the condition is unreasonable.

The Department recommended a finding that single container and size restrictions be added as a condition to the license.

The ALJ did so, making as well a special finding, based upon the testimony of Officer Grant, that the premises were located in a high crime area where single-can purchases of beer by transients contributed to the proliferation of alcohol-related problems. The ALJ in the same finding acknowledged that appellants had been licensed for only a month, and were responsible and mature individuals who desired training in the law governing the sale of alcoholic beverages and their responsibilities as licensees.

It would seem clear, based upon the violation of Business and Professions Code §25602, subdivision (f), and the special finding, that the Department was justified in including the condition in its order. Business and Professions Code §23800 authorizes the Department to place reasonable conditions upon a license or a licensee in certain

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[2] Appellants do not appear to object to the probationary condition that they participate in and complete the Department's LEAD program.

circumstances, one of which is:

> "(b) Where findings are made by the department which would justify a suspension or revocation of a license and where the imposition of the condition is reasonably related to those findings. In the case of a suspension, the conditions may be in lieu of or in addition to the suspension."

The term "reasonable" as set forth in §23800 means, in our view, that the condition is reasonably related to resolution of the problem for which the condition was designed. Thus, there must be a nexus, defined as a "connection, tie, link,"[3] in other words, a reasonable connection between the problem sought to be eliminated, and the condition designed to eliminate the problem.

The nexus in this case is seen in the testimony of Officer Grant as to the problems encountered in the area where appellants' store is located as a result of single-can sales of beer to transients and intoxicated buyers, coupled with appellants' inexperience in the sale of alcoholic beverages. That the ALJ and the Department elected to impose the condition on the licensee, as a term of probation, rather than a condition on the license, indicates to us that some consideration was being given to appellants' claim that, for competitive reasons, they needed to be able to sell in single-can quantities. Thus, assuming they comply with all of the conditions of probation, they will be free to do so after one year.

This is because the single container restriction is imposed only as one of the conditions of the stay of a portion of the suspension, which by its terms would expire

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[3]See Webster's Third New International Dictionary, 1986, page 1524.

upon the completion of a full year without a further violation. Unlike a condition imposed upon a license, the condition in this case comes to an end when probation is completed. Under these circumstances, it cannot be said the Department acted unreasonably.

CONCLUSION

The decision of the Department is affirmed.[4]

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD[5]

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[4] 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.

[5] John B. Tsu, Member, did not participate in the oral argument or decision in this matter.