

ISSUED JANUARY 14, 1998

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

RAFAEL LOPEZ	)	AB-6841
dba Atoron)	
119-21 Burbank Boulevard	)	File: 40-124204
North Hollywood, California 91601,	)	Reg: 96037617
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Ronald M. Gruen
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	November 5, 1997
	)	Los Angeles, CA
_____)	

Rafael Lopez, doing business as Atoron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which ordered his on-sale beer license revoked, but which stayed revocation for a probationary period of three years, subject to an actual 60-day suspension, for appellant having employed two females for the purpose of procuring or encouraging the purchase of alcoholic beverages, and for appellant's bartenders having served alcoholic beverages to three obviously intoxicated persons, being contrary to the universal and generic public welfare and morals

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

provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§25657, subdivision (a), and 25602, subdivision (a).

Appearances on appeal include appellant Rafael Lopez, appearing through his counsel, Andreas Birgel, Jr.; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on June 15, 1982. Thereafter, the Department instituted an accusation alleging that on July 12, 1996, appellant's bartenders served alcoholic beverages to four patrons who were obviously intoxicated, and on that same day employed two females to procure and encourage the purchase of alcoholic beverages, in violation of the aforementioned statutes. In addition, the accusation alleged that two undercover police officers were served alcoholic beverages in an unlicensed area adjacent to the premises.

An administrative hearing was held on January 21, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Lorenzo Barbosa, an undercover vice investigator of the Los Angeles Police Department, concerning the matters he observed during an on-site inspection of the licensed premises on July 12, 1996. Barbosa was part of a state employment enforcement task force composed of employees or investigators of the Board of Equalization, Employment Development Department, Department of Alcoholic Beverage

Control, and the Los Angeles Police Department [RT 6-7].

Subsequent to the hearing, the Department issued its decision which determined that the matters alleged in the accusation were supported by the evidence, except for the charge that alcoholic beverages had been served in an unlicensed area, and, as to one patron, the charge of having served an alcoholic beverage to an obviously intoxicated person. Appellant thereafter filed a timely notice of appeal.

In his appeal, appellant contends that there is not substantial evidence to support the findings and the decision, and that the penalty is excessive in light of the evidence.

DISCUSSION

I

Appellant contends that there is not substantial evidence to support the findings and the decision, arguing that the testimony of Officer Barbosa depended too greatly on the contents of his report, which was both inaccurate and incomplete, rather than on his personal knowledge.

The scope of the Appeals Board's review is limited. 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.²

“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 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

² The California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085.

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].)

Officer Barbosa was the only witness to testify at the administrative hearing. Although appellant was present at the hearing, and called as a witness by his counsel, he professed an inability to understand the significance of having to swear under oath to tell the truth, and was withdrawn without having testified.

Appellant's brief is essentially a broadside attack on Officer Barbosa's testimony, arguing that he lacked an independent recollection of the location, the persons involved, and the events which transpired on the date in question. Appellant's attack is based for the most part on the fact that Barbosa found it necessary from time to time to review the report he wrote concerning the matter, and at times remembered things that were not in the report while also not remembering things that were in the report.

We have reviewed the transcript of Officer Barbosa's testimony. While it is true there were instances where he found it necessary to refer to his report to refresh his recollection of the events, and at times he recalled details which were not included in his report, we do not find that at all unusual. The witness is rare indeed who remembers every detail that is in a report he or she prepared six months earlier, and who remembers nothing that was not in that report.

The experienced Administrative Law Judge (ALJ) saw and heard Officer Barbosa on the witness stand. This Board did not. It is well settled that 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].)

It is apparent that the ALJ carefully weighed and considered Officer Barbosa's testimony from his proposed decision in which he found certain of the charges of the accusation not to have been established. While his findings are generally conclusional in nature and less than helpful to the Board in reviewing their basis in the record, we are unable to say that there is insufficient evidence to support them. Officer Barbosa's testimony concerning the indicia of obvious intoxication displayed by patrons Montes [RT 28-32, 66-69, 73-78], Hernandez [RT 37, 88-94], and Barrera [RT 32-34, 69-73, 78-79] describes the symptoms which the cases have said are relevant in making a determination of obvious intoxication.

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].) According to Barbosa, whose testimony was accepted by the ALJ, the three patrons in question displayed those symptoms.

The same is true with respect to the two charges relating to solicitation of alcoholic beverages. Officer Barbosa's testimony was sufficient to sustain both.

II

Appellant contends that the penalty is excessive in light of the evidence. 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 challenge to the penalty is premised on his contention that there was insufficient evidence in the record, viewed as a whole, to sustain the charges of the accusation. Having failed in that challenge, appellant's arguments regarding the penalty must also fall.

CONCLUSION

The decision of the Department is affirmed.³

BEN DAVIDIAN, CHAIRMAN
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD⁴

³ 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.

⁴ Ray T. Blair, Jr., Member, did not participate in the oral argument or decision in this matter.