ISSUED MAY 25, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JESUS RENTERIA PEREZ dba La Ronda 10215 South Atlantic Boulevard South Gate, CA 90280, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6982 File: 42-269945 Reg: 97038956 Administrative Law Judge at the Dept. Hearing: John A. Willd Date and Place of the Appeals Board Hearing: April 1, 1999 Los Angeles, CA

Jesus Renteria Perez, doing business as La Ronda (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 45 days, with 20 days of the suspension stayed for a 2-year probationary period for appellant's employee selling or furnishing an alcoholic beverage to an obviously intoxicated person and for appellant's employee permitting the removal from the premises of beer in open containers, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§25602, subdivision (a); 23300; and 23355.

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

Appearances on appeal include appellant Jesus Renteria Perez, appearing through his counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine license was issued on April 10, 1992. Thereafter, the Department instituted an accusation against appellant charging that Minerva Lopez, appellant's bartender, on June 15, 1996, sold a beer to Ricardo Velazquez, who was obviously intoxicated (count 1), and that Thelma Montoya, appellant's bartender, on August 31, 1996, permitted patrons to remove beer in open plastic cups from the premises (count 2).

An administrative hearing was held on August 11, 1997, at which time documentary evidence was received and testimony was presented by two South Gate police officers: officer Batino testified regarding count 1 and officer Alfonso testified regarding count 2. No witnesses appeared for appellant.

Subsequent to the hearing, the Department issued its decision which determined that the violations charged in both counts of the accusation had been proven.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) The findings regarding count 1 are not supported by substantial evidence; (2) appellant was unfairly prejudiced by the Department's attempt to move into evidence the nolo contendere plea of appellant's bartender to a criminal misdemeanor charge of selling alcohol to an obviously intoxicated person;

and (3) the statutes charged in count 2 do not make it illegal to remove alcohol from the premises in cups after closing.

DISCUSSION

I

Appellant contends the testimony of officer Batino cannot be the basis for the findings regarding sale to an obviously intoxicated person because it was unreliable, not credible, and was inadmissable hearsay under Government Code §11513 because it was based on the written report of another officer who was not present at the hearing.

Batino testified that he observed the patron, Velazquez, sitting at the bar two seats away from Batino, with his head down on the bar. Velazquez occasionally raised his head and sat weaving on the bar stool. Velazquez' speech was slurred, one time he slammed his beer bottle on the counter, and he had trouble taking money out of his pocket to pay for the beer he was served. Batino observed these symptoms in Velazquez for 10 to 15 minutes before Velazquez purchased another beer from the bartender, Lopez. Lopez passed Velazquez, who was sitting at the center of the bar, a number of times as she moved from one end of the bar to the other, serving other customers. [RT 9-11.]

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].)

The ALJ implicitly found officer Batino's testimony credible, since the Findings are based on the officer's testimony. No witnesses were called on behalf of appellant;

therefore, the only thing that could possibly contradict officer Batino's testimony would be the report that was written by officer Lopez, Batino's partner that evening. Only one paragraph from that report, however, was read to Batino by appellant's counsel at the hearing. While that paragraph did not correspond exactly to Batino's testimony, Batino was testifying to his own independent observations of Velazquez, which would not necessarily be the same as those of Lopez.

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], overruled on other grounds, Paez v. Alcoholic Beverage Control Appeals Board (1990) 222 Cal.App.3d 1025, 1026 [272 Cal.Rptr. 272].) 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].)

A determination of obvious intoxication may properly be made by the observation of objective symptoms by an officer trained to make such judgments, and the testimony of such an officer, adequately articulating the factual bases for his judgment, is sufficient to sustain a finding that the subject was obviously intoxicated. (In re William L.G. (1980) 107 Cal.App.3d 210,214 [165 Cal.Rptr. 587]; People v. Murrietta (1967) 251 Cal.App.2d 1002, 1004 [60 Cal.Rptr. 56].)

No physical sobriety test is necessary in determining "obvious intoxication" for purposes of Business and Professions Code §25602, and the lack of one here does not affect the finding of obvious intoxication. (Jones v. Toyota Motor Company, Ltd., 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611, 614-615].)

The testimony of officer Batino supports the findings made by the ALJ that Minerva Lopez, appellant's bartender, served a beer to Ricardo Velazquez, who was obviously intoxicated, in violation of the statute.

Appellant has presented no argument supporting his contention that officer Batino's testimony was inadmissible hearsay.

II

Appellant contends that the Department unfairly prejudiced the ALJ by offering as evidence the misdemeanor conviction of Minerva Lopez, based on her plea of "no contest." The ALJ accepted the court document conditionally, subject to his review of counsels' points and authorities on its admissibility [RT 41]. He ultimately concluded (Finding II): "After reviewing the argument of counsel, the Administrative Law Judge has determined that the plea of nolo contendere of Minerva Lopez will not be received in evidence in this proceeding, and the findings will be made exclusively on the testimony presented at the hearing of August 11, 1997."

Appellant's only argument on this point consists of an assumption that the ALJ's awareness of the conviction "must have prejudiced him in favor of finding a violation in this case." (App.Br. at 7.)

Appellant has not pointed to, nor has this board found, anything in the record to support appellant's generalized assumption of prejudice on the part of the ALJ.

III

Appellant contends that Business and Professions Code §§23300 and 23355, the statutes that are alleged in count 2 to have been violated by removal of beer from the premises in open containers, "do not in any way relate to these facts."[2] (App.Br. at 8.) Appellant argues that these sections only generally require a licensee to operate within the terms of his or her license and there is not a rule or statute making it unlawful "to carry-out remainder alcohol in containers from an on-sale premises at the time of closing." (App.Br. at 9.) Unless the statue makes clear the illegal conduct it intends to prohibit, appellant argues, there can be no violation found. Therefore, appellant concludes, the Department exceeded its jurisdiction by finding a violation without citing the specific statute or rule that was violated.

Business and Professions Code §23300 states, in its entirety: "No person shall exercise the privilege or perform any act which a licensee may exercise or perform under the authority of a license unless the person is authorized to do so by a license issued pursuant to this division." Business and Professions Code §23355 states: "Except as otherwise provided . . . , the licenses provided for in Article 2 of this chapter authorize the person to whom issued to exercise the rights and privileges specified in this article and no others at the premises for which issued during the year for which issued."

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[2]Count 2 of the accusation states: "On or about August 31, 1996, respondent-licensee(s), by his agent and/or employee, Thelma Montoya at the above-designated premises, did permit open containers of alcoholic beverages, to wit: beer, to be removed in red plastic cups from the premises, in violation of Sections 23300, 23355 of the Business and Professions Code.

Section 23300 is not particularly applicable to this situation, since it deals with non-licensees acting like licensees. Section 23355 restricts licensees from doing anything other than what they are specifically allowed to do under their particular kind of license. This section, then, charges appellant with doing an act that his license does not allow him to do. The act that the Department says is violative of his license privileges was permitting customers to pour the remainder of their previously purchased beer into containers (plastic cups) and leave the licensed premises with the cups.

To determine whether appellant has been properly charged, we must determine whether the act charged was one appellant was not allowed to do. To do this, we must look at what he is allowed to do.

Appellant holds an on-sale beer and wine public premises license. The privileges allowed to on-sale licensees in general are found in §23396:

> "Any on-sale license authorizes the sale of the alcoholic beverage specified in the license for consumption on the premises where sold. No alcoholic beverages, other than beers, may be sold or served in any bona fide public eating place for which an on-sale license has been issued unless the premises comply with the requirements prescribed in Section 23038, 23038.1, or 24045.1"

Section 23401 provides certain off-sale privileges under on-sale licenses:

> "[A]ny on-sale license, with respect to the particular beverage or beverages mentioned in the license, also authorizes the exercise of the rights and privileges granted by an off-sale beer and wine license; . . ."

> Section 23393 provides:

> "A retail package off-sale beer and wine license authorizes the sale, to consumers only and not for resale, of beer in containers, and wine in packages and in quantities of 52 gallons or less per sale, for consumption off the premises where sold."

"Package" is defined in §23028 as "any container or receptacle used for holding alcoholic beverages which is corked or sealed with a stub, stopper, cap, or in any other manner." "Container" is not defined in the ABC Act.

The basic privilege of appellant's on-sale license is to sell beer "for consumption on the premises where sold." The beers purchased by the customers from appellant were purchased to be consumed on appellant's licensed premises, and could not be consumed off the premises. Only beer purchased for consumption off the premises, pursuant to the off-sale rights granted on-sale licensees, could be consumed off the premises. When appellant's bartender permitted on-sale beer to be carried off the premises for consumption, both the on-sale and off-sale privileges of appellant's license were exceeded.

Although one must look to several other statutes besides §23355 to determine what appellant *is* allowed to do under his license and, thereby, also what he *is not* allowed to do, none of those privilege-granting statutes were violated. The violation arose from appellant doing something not specifically allowed by those statutes. Such an action is a violation is §23355, and that section was properly charged in the accusation.

Government Code §11503 states that an accusation

> "shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statues and rules."

In an administrative proceeding, it is not necessary to follow strict rules of pleading: "So long as respondent is informed of the substance of the charge and

afforded the basic, appropriate elements of procedural due process, he cannot complain of a variance between pleadings and proof." (Stearns v. Fair Employment Practice Com. (1971) 6 Cal.3d 205 [98 Cal.Rptr. 467].) The question is whether appellant was sufficiently apprised of the grounds to be able to prepare his defense.

Appellant does not argue that any failure of specificity prevented him from preparing his defense. Theoretically, appellant was sufficiently apprised of the grounds to be able to prepare his defense: he had only to look at what is allowed and compare that to the action alleged as violative. As a factual matter, he did prepare and present a defense. This satisfies both Government Code §11503 and due process.

ORDER

The decision of the Department is affirmed.[3]

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

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[3]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

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