

ISSUED JANUARY 12, 1999

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

CHINA HOUSE ENTERPRISE, INC.	)	AB-7046
dba Su Nuevo Rodeo)	
6531 Van Nuys Boulevard	)	File: 41-282707
Van Nuys, California 91401,	)	Reg: 97040836
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Ronald M. Gruen
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	November 4, 1998
	)	Los Angeles, CA
)	

China House Enterprise, Inc., doing business as Su Nuevo Rodeo (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its on-sale beer and wine public eating place license for 25 days, for appellant's bartender, Rosaura Arellano Valdez, having served an alcoholic beverage, beer, to Jose Efrain Marquez, a person obviously intoxicated, such sale 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

¹The decision of the Department, dated January 29, 1998, is set forth in the appendix.

Professions Code §25602, subdivision (a).

Appearances on appeal include appellant China House Enterprise, Inc., appearing through its counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

The Department instituted an accusation against appellant charging: the sale by appellant's bartender of an alcoholic beverage, beer, to a person who was obviously intoxicated, in violation of Business and Professions Code §25602, subdivision (a) (count 1); the employment of a person under a commission, percentage, salary or other profit-sharing scheme for the solicitation of drinks, in violation of Business and Professions Code §24200.5, subdivision (b) (count 2); the employment of a person to procure or encourage the purchase or sale of alcoholic beverages on the licensed premises, in violation of Business and Professions Code §25657, subdivision (a) (count 3); the solicitation of a drink by an employee, in violation of Rule 143 (4 Cal.Code Regs., §143) (count 4); and the acceptance of a drink by an employee, also in violation of Rule 143.

An administrative hearing was held on December 1, 1997, at which time oral and documentary evidence was received. Following the conclusion of that hearing, the Administrative Law Judge (ALJ) concluded that only the count charging the sale of beer to a person who was obviously intoxicated had been established, and the Department adopted his proposed decision to that effect. Appellant has now appealed, contending that the facts do not support the decision, in that there is no evidence Marquez was obviously intoxicated.

DISCUSSION

The Department and appellant each presented two witnesses in support of their respective positions, and, predictably, their testimony was in conflict with regard to the degree of sobriety, or lack thereof, exhibited by Marquez.

Department investigator Robert Rodriguez testified that, while in the licensed premises in an undercover capacity, he observed a patron named Jose Efrain Marquez sitting at the end of the fixed bar, next to a female patron. Marquez was pulling the female toward him, as if he were attempting to kiss her on the cheek or ear. The female laughed, as did the female bartender, who was observing Marquez's actions.

Rodriguez walked over to Marquez and asked if Marquez had any matches. Marquez, displaying no difficulty in his response, replied that he did, and handed Rodriguez matches off the bar counter, also without difficulty. As he was being handed the matches by Marquez, Rodriguez noted that Marquez's eyes were red and watery, and he had a strong odor of alcohol coming from his breath and person. Rodriguez returned to his table, and as he did so, advised Los Angeles undercover officer Vargas of his observations. Rodriguez then resumed watching Marquez. Shortly thereafter, Marquez and the female got up to dance. On his way to the dance floor, Marquez swayed as he walked by. While dancing, Marquez several times lost his balance and grabbed on to his female companion and other patrons on the dance floor. It seemed to Rodriguez that Marquez was about to fall, but he did not. Marquez and his partner were dancing a "cumbio," which Rodriguez described as a fast dance in which the partners do not hold each other,

although at times Marquez held his partner and at other times she held him.

Observing Marquez several minutes later, after he and his companion had returned to the bar, Rodriguez again saw him pull her toward him in an attempt to kiss her. At this point, the bartender served a Miller Genuine Draft beer to Marquez, and a light beer to the female. Rodriguez did not observe any difficulty on Marquez's part getting the money from his pocket or wallet, or in giving it to the bartender. Nor did Marquez exhibit any difficulty in holding the cigarette he smoked while sitting at the bar.

Rodriguez could not hear any of the conversation which ensued between Marquez and the bartender, but did see the bartender laughing at his actions. The bartender was behind the counter the entire time Rodriguez observed Marquez's actions.

Rodriguez concluded Marquez was intoxicated when Marquez and his companion left the dance floor and returned to the bar.

Alex Vargas, a Los Angeles undercover police officer, accompanied Rodriguez on the night in question. Vargas testified that he also observed Marquez while Marquez was seated at the bar, talking in a loud and boisterous voice with slurred speech, leaning toward his female companion, at times losing his balance. He watched Marquez walk toward the dance floor, bumping into patrons along the way, and, while dancing, losing his balance and bumping into people. Vargas had no recollection of seeing Marquez leave the dance floor, nor did he see him any time thereafter. (It may be noted that Vargas said Marquez was sitting in a chair near the entrance to the premises, while Rodriguez testified Marquez was seated on

a 30-inch tall bar stool at the fixed bar. Additionally, Rodriguez, seated 10 feet away, could not hear Marquez's conversation, while Vargas, seated 12 feet away, said Marquez was loud and boisterous.)

Rosaura Valdez, the bartender, denied that Marquez was intoxicated when she sold him a beer. She claimed Marquez normally walked with a noticeable limp. She also said that when Marquez ordered the beer, she was busy, and he yelled to get her attention.

Dennis Yu, the manager, testified that Marquez was a regular customer, and walks with a limp because of a crippled foot, appearing almost to be falling. Yu denied that Marquez appeared intoxicated on the night in question.

Called in rebuttal, investigator Rodriguez denied seeing Marquez walk with a limp while going to and returning from the dance floor or while being escorted to the police car.

Appellant stresses the absence of any testimony that Marquez was "obviously" intoxicated, contending that the statute requires proof of "obvious intoxication." Appellant concedes that investigator Rodriguez testified to "some minimal objective symptoms of intoxication," and that police officer Vargas also testified to some but not all of those same symptoms. Thus, appellant contends, since neither witness said in his testimony that he thought Marquez was "obviously" intoxicated, their testimony is insufficient to sustain a violation of the statute.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's 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. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.²

It would seem clear that "obvious intoxication" is a conclusion to be drawn by the trier of fact from evidence of symptoms of intoxication displayed by the person in question. 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].)

²The California Constitution, article XX, §22; Bus. and Prof. Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

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 foundation for his opinion, 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. Murietta (1967) 251 Cal.App.2d 1002, 1004 [60 Cal.Rptr. 56].)

The record shows that there were no obstructions between the bartender and the patrons; thus a reasonable inference is that the bartender could have seen what the officer observed, and is charged with that knowledge. (Rice v. Alcoholic Beverage Control Appeals Board (1981) 118 Cal.App.3d 30 [173 Cal.Rptr. 232]; and People v. Smith (1949) 94 Cal.App.2d 975 [210 Cal.Rptr. 98].)

Appellant's principal contention, that the police officers did not testify that they believed Marquez was "obviously" intoxicated, lacks merit. The symptoms displayed by Marquez were enough to lead the officers to believe he was intoxicated. As described by the officers, those symptoms were sufficient to persuade the trier of fact that Marquez's level of intoxication was obvious. Appellant's bartender was in a position to observe those symptoms.

Given these considerations, it is our opinion that the decision of the Department should be affirmed.

ORDER

The decision of the Department is affirmed.³

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

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.