

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

HARGRAVE INDUSTRIES, INC.	)	AB-7390
dba Rich Man, Pour Man Bar & Lounge)	
13809 Roscoe Boulevard	)	File: 48-227541
Panorama City, CA 91402,	)	Reg: 98045092
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.	)	May 4, 2000
	)	Los Angeles, CA

Hargrave Industries, Inc., doing business as Rich Man, Pour Man Bar & Lounge (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked its on-sale general public premises license, but stayed revocation conditionally, subject to a 40-day suspension, the suspension to continue indefinitely until appellant obtains a certificate of revivor from the Secretary of State, and a one-year period of discipline-free operation, for having served an alcoholic beverage to an obviously intoxicated patron, having sold or offered for sale adulterated and/or contaminated spirits, and for having exercised the privileges of a license while its corporate powers had been suspended by the

¹The decision of the Department, dated April 1, 1999, is set forth in the appendix.

Secretary of State, 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 §24200, subdivision (a), and §25602, subdivision (a), and Penal Code §347, subdivision (b).

Appearances on appeal include appellant Hargrave Industries, Inc., appearing through its counsel, Andreas Birgel, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on November 22, 1993. Thereafter, the Department instituted an accusation against appellant charging that appellant had exercised the privileges of a license while its corporate powers had been suspended, had served an alcoholic beverage to an intoxicated patron, and had sold or offered to sell contaminated spirits, all constituting violations of the law.

An administrative hearing was held on February 11, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Los Angeles police officer Richard Driscoll in support of the charges involving service to an intoxicated patron and the contaminated bottles of spirits. In addition, Thomas Tomlin, appellant's bartender, and Louise Ratliff, one of the owners, testified with respect to the service-to-intoxicated-patron charge, and Ratliff and James Pursell testified concerning the suspension of the corporation's powers.

Subsequent to the hearing, the Department issued its decision which, although dismissing the charges relating to three of the allegedly contaminated bottles of spirits, sustained the balance of charges of the accusation.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) There is insufficient evidence to support the findings and supplemental findings regarding the alleged service to an intoxicated patron; and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends that there is not sufficient evidence to support the finding that its bartender served an intoxicated patron. Appellant argues that the symptoms displayed by the patron do not establish that the patron was intoxicated, and, alternatively, even if the patron was intoxicated, the bartender had no opportunity to see the symptoms said by the police officer to have been observed. Further, appellant contends that the police officer's testimony, which the ALJ found in sharp contrast to that of the bartender, is not credible, because of inconsistencies with and variances from his written report.

The ALJ, in reliance upon officer Driscoll's testimony, found that the patron, Carl Montanez, while sitting at the bar, was talking loudly, with his arm around the woman next to him in a manner which indicated he was holding on to her for support. Montanez was also observed using his hands on the bar fixture for support, and was observed to hold on to the bar fixture to stabilize himself when he

stood. Montanez walked to the restroom with an unsteady gait, using a nearby video machine for support to keep from falling. All this occurred within the sight of the bartender.

Although not mentioned by the ALJ, officer Driscoll also testified that Montanez's speech was slurred.²

The ALJ made a specific supplemental finding to the effect that officer Driscoll's testimony was credible.³ Since 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] ; Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644]), the only questions the Board need address are whether the symptoms of intoxication observed by officer Driscoll were sufficient to demonstrate the patron was intoxicated at the time he was served the beer, and whether the bartender had a reasonable opportunity to observe those symptoms.

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

² Appellant questions officer Driscoll's testimony that Montanez's speech was slurred, asserting Driscoll testified he could not hear what Montanez had said. This is not an accurate reading of Driscoll's testimony, which was that he could not recall specific words.

³ "The complainant's evidence is found to be credible and supports the finding of a violation as to count 2."

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].)

Appellant makes much of symptoms of intoxication Driscoll admitted he either did not observe or was not in a position to observe, such as whether Montanez's eyes were bloodshot, or that he was incontinent, or displayed an alcoholic breath. But it is unnecessary that an intoxicant display all possible symptoms of intoxication.

Admittedly, this is not the strongest case of obvious intoxication to visit the Board. Indeed, but for the loud talking and the slurred voice, Montanez's gait and posture while at the bar could be explained simply as fatigue or stiffness. However, we do not believe it can be said that the evidence was insufficient.

By finding officer Driscoll's testimony credible, and in sharp contrast with that of the bartender, it follows that the ALJ chose not to believe the bartender's denial that he observed the same symptoms seen by Driscoll. As noted by the ALJ, the bar was not busy, the bartender was opposite Montanez and in a position to see him leave the bar and make his way to the restroom, including his encounter with the video machine.

In the last analysis, the ALJ chose to accept the testimony of the police officer, and that testimony is sufficient to sustain the charge.

II

Appellant challenges the penalty as excessive. Appellant cites Harris v.

Alcoholic Beverage Control Appeals Board (1965) 62 Cal.2d 589 [43 Cal.Rptr. 633], a case where the California Supreme Court affirmed an Appeals Board reversal of an order of revocation on the ground it was an abuse of discretion in light of the licensee's prior discipline-free record and the relatively insubstantial violations involved.

In so doing, however, the Harris court made it clear that "the propriety of the penalty is a matter vested in the discretion of the Department," and, unless there is a clear abuse of discretion, its determination may not be disturbed. Thus, even though the Appeals Board may disagree with the Department as to whether a penalty is appropriate, it may not reverse that penalty unless it is first satisfied that the penalty was a clear abuse of discretion.

According to the Department's penalty guidelines,⁴ the standard suspensions for the violations involving the sale to an intoxicated person and the contaminated bottles of spirits are, respectively, 20 days and 5 days. Neither of these violations, separately or together, would seem to warrant revocation, absent unusual or aggravated circumstances.

The guidelines do not specify the penalty for the operation of a licensed premises by a corporation whose corporate powers have been suspended for non-payment of taxes.

It appears from the record that Louise Ratliff, the present owner of the

⁴ These are set forth at pages L-225 through L-229 of the Department's Instructions, Interpretations and Procedures Manual, and are current as of December 4, 1996.

corporation, did not know when she purchased it that the corporation was, as the ALJ characterized it, "legally non-existent," because of its suspension for not having paid taxes owed to the State of California. The ALJ described the case as one involving "deception by the seller" and "ignorance and lack of due diligence on the part of the purchaser."

Although the accusation pleaded prior violations in 1998, including, among others, adulterated bottles and a sale to an intoxicated person, no evidence of any prior violations was introduced at the hearing. Thus, for all the record shows, a negligent buyer was deceived by her seller, and, as a result, the corporation exercised the privileges of a licensee while its corporate powers were suspended.

There would seem to be no question that a suspension of the license is appropriate, to run indefinitely until the corporation has obtained a certificate of revivor from the Secretary of State. Such a certificate would presumably issue once the taxes which are owed are paid.⁵

However, that part of the order revoking the license, even though stayed, appears to be an example of the "clear abuse of discretion" referred to in Harris, supra. According to the Department's guidelines, an indefinite suspension is usually used to permit a licensee correct some illegal situation. Such is the case here. The guidelines go on to state:

"Indefinite suspensions can be used in conjunction with stayed revocations where the violation(s) are egregious, or an indefinite suspension may stand

⁵ The Board was advised by appellant's counsel during oral argument that the taxes have now been paid and a certificate of revivor issued.

alone to correct less serious offenses such as failure to operate a bona fide restaurant; failure to produce records; failure to remove excessive signage or place required signs after notice.”

Without denigrating the seriousness of non-payment of corporate taxes, it does seem that where the non-payment was not the fault of the present owner, there is no moral opprobrium such as to make the violation an “egregious” one deserving a stayed revocation in addition to an indefinite suspension.

We believe it is unfair to put the present owner of the corporation, and her potential transferee, under the threat of a stayed revocation in the circumstances of this case. The portion of the suspension allocated to this charge⁶ seems more than enough.

ORDER

The decision of the Department is reversed, and the case is remanded to the Department for reconsideration of the penalty in light of the comments herein.⁷

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁶ Counsel for the Department advised the Board that this violation would account for 15 days of the penalty.

⁷ 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 final 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.