ISSUED NOVEMBER 20, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ALAN and DOROTHY WALBRIDGE dba Maggie's Red Cove 1809 East Main Street Ventura, CA 93001, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)))))))))))))	AB-7536 File: 48-333964 Reg: 99046629 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: October 5, 2000 Los Angeles, CA

Alan and Dorothy Walbridge, doing business as Maggie's Red Cove (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 20 days for their bartender, Sean J. Marklein ("Marklein"), having served an alcoholic beverage (a Bud Light beer) to John Dalzell ("Dalzell"), an obviously intoxicated patron, 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 Professions Code §25602,

[1]The decision of the Department, dated November 10, 1999, is set forth in the appendix.

subdivision (a).

Appearances on appeal include appellants Alan and Dorothy Walbridge, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on September 23, 1997. Thereafter, the Department instituted an accusation against appellant charging, in two counts, that appellants had permitted a 19-year-old minor to enter and remain in the premises without lawful business therein (count 1), and that appellants' employee had sold, furnished, or given an alcoholic beverage to an obviously intoxicated patron (count 2).

An administrative hearing was held on September 23, 1999, at which time oral and documentary evidence was received. No evidence was presented as to count 1, and that count was dismissed. Testimony relating to the obvious intoxication charge was presented by Judy Matty, an investigator employed by the Department of Alcoholic Beverage Control; by Marklein; and by Irene Golff, another bartender employed by appellants.

Subsequent to the hearing, the Department issued its decision which determined that there had been a sale of an alcoholic beverage to an intoxicated patron, and ordered appellants' license suspended for 20 days.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the findings are not supported by the

evidence; and (2) the evidence failed to establish that the patron exhibited sufficient signs of obvious intoxication to give reasonable notice to the bartender.

DISCUSSION

I

Appellants contend that there is not substantial evidence that the patron, Dulzell, was obviously intoxicated.

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 US 474, 477 [71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

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].)

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]

Appellate review does not "resolve conflicts 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.2d 658].)

The findings of the Administrative Law Judge that an alcoholic beverage was sold to an intoxicated patron are predicated on the testimony of Department investigator Matty. She described Dalzell's behavior extending over a 15 to 20 minute period, behavior that confirmed her observation upon first seeing Dalzell that he was obviously intoxicated.

Appellants' attack on the sufficiency of the evidence is premised on their contention that the record does not support portions of Finding of Fact IV. Specifically, appellants claim that the Administrative Law Judge demonstrated bias and an inability to analyze the record fairly when, without evidentiary support, he made an "incriminating finding" that Dulzell's friend was "stating loudly that Dulzell had had too much to drink" [3] and that the same is true of his finding that Dalzell was falling when grabbed by the Department investigator (App.Br., page 7).

Neither of appellants' arguments warrants setting aside the determination that Dalzell was obviously intoxicated, nor does either establish that the ALJ was

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

[3] Actually, what the ALJ said was that the friend was "stating aloud that Dalzell had had too much to drink."

guilty of bias or ineptness.

The spoken comments attributed to Dalzell's friend were that he was Dalzell's dedicated driver, that he was babysitting Dalzell and that he wanted to go home. By themselves, these comments do fall short of a statement that Dalzell had had too much to drink. However, in a context where the friend was trying to convince Dalzell to leave with him, and finding it necessary to help Dalzell regain a standing position after Dalzell missed the bar stool and knocked it over, these remarks could well be construed as a concern that Dalzell had had too much to drink.

The decision does not expressly find that Dalzell was falling. What it did find was that "while Dalzell was speaking to Matty, she reached out and grabbed him once to keep him from falling over backwards as he swayed to and fro." Appellants say that the ALJ transmuted Matty's thought - that Dalzell was falling - into the deed - Dalzell falling. Not so.

Matty testified:

> "[Dalzell] held onto the bar with his left hand, but even so he swayed a lot back to front. And at one point when he was facing me, he started to move backwards almost as if a tree were falling, and I reached out and grabbed the front of his – he had on a denim vest. I reached out and grabbed it because I thought he was going to fall over backwards."

We are inclined to agree with the argument in the Department's brief that Matty's simile of a falling tree was her way of describing Dalzell's near fall, but for her preventing it by grabbing his clothing. The ALJ's description of Dalzell's movement is not inconsistent with her testimony.

The record contains substantial evidence of the display by Dalzell of

symptoms of obvious intoxication. Investigator Matty, who concluded almost immediately upon seeing Dalzell that he was intoxicated, identified a number of such symptoms: Dalzell knocked over a bar stool; he swayed to and fro; he held onto the bar for support; his speech was slurred to the point of not being understandable; his eyes were bloodshot, and at times he had to squint in an attempt to focus; he was, at times, near comatose; he smelled heavily of alcohol; and he knocked over his beer.

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].)

Dalzell displayed most of these symptoms and more. The finding that he was obviously intoxicated is well-supported by the evidence.

II

Appellants contend that the decision unreasonably concluded that Marklein saw or should have seen sufficient symptoms of intoxication to conclude Dalzell should not have been served.

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].)

Appellants, citing Tseng (1994) AB-6371, concede that "if such outward manifestations [of intoxication] exist and the seller still serves the customer so affected, he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or, because having observed, he ignored that which was apparent." (App.Br., page 8.)

The evidence is that Dalzell's behavior extended over a 15 to 20 minute period, and that he was in varying proximity to the bartender, Marklein, throughout that period. Marklein acknowledged being aware of a bar stool having been knocked over, but denied observing the symptoms narrated by Matty.

The ALJ was not bound to accept Marklein's denials. It is sufficient that Marklein was in a position where, with even a moderate exercise of diligence, he could or should have been aware that Dalzell was intoxicated.

The time necessary to observe misconduct and act upon that observation requires some reasonable passage of time. However, the observer must not be passive or inactive in regards to his or her duty, but must exercise reasonable diligence in so controlling prohibited conduct. (Ballesteros v. Alcoholic Beverage Control Appeals Board (1965) 234 Cal.App.2d 694 [44 Cal.Rptr. 633].)

We are satisfied that Marklein failed to exercise the requisite diligence, and his sale and service of the beer to Dalzell violated the law.

ORDER

The decision of the Department is affirmed.[4]

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

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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 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.