ISSUED MARCH 2, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ENEDINA V. LOPEZ dba El Nuevo California 11717 ½ Victory Blvd. North Hollywood, CA 91606, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7569 File: 42-321144 Reg: 99047197 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: November 3, 2000 Los Angeles, CA

Enedina V. Lopez, doing business as El Nuevo California ([appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended her on-sale beer and wine public premises license for 35 days with 15 days stayed during a two year probationary period, for appellant's employee furnishing an alcoholic beverage to a patron who exhibited obvious signs of intoxication, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code

[1]The decision of the Department, dated December 23, 1999, is set forth in the appendix.

§24200, subdivisions (a) and (b), arising from a violation of Business and Professions Code §25602, subdivision (a).

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

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on December 18, 1996. Thereafter, the Department instituted an accusation against appellant charging the furnishing of the beverage to the patron. An administrative hearing was held on October 27, 1999, at which time oral and documentary evidence was received.

Subsequent to the hearing, the Department issued its decision which determined that count 1 of the accusation concerning intoxication had been proven, but count 2 concerning a slot machine had not been proven.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant raises the following issues: (1) findings and decision are not supported by substantial evidence, and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends the findings and decision are not supported by substantial evidence, arguing that the evidence is almost nonexistent concerning the symptoms of intoxication.

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.[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 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and 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].) 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 Department is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the

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

Department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals.

Officer Espinoza of the Los Angeles Police Department, while within the premises, testified that he observed a patron 12 to 15 feet away from his location, who had bloodshot and watery eyes and his face was flushed. The patron was swaying in his chair, a "little bit from side to side." [RT 8-9.] The bartender left the bar counter and went to the table at which the patron was sitting. There was a conversation for one to two minutes. The bartender returned to the bar counter, and obtained a beer. The patron left his table and in an unsteady manner, went to the bar counter, obtained the beer and paid for it without incident of fumbling for his money [RT 10-11, 26].

On cross examination, the officer testified that there is no mention in his report of the incident of the patron's face being flushed, eyes bloodshot, or walking unsteadily to the bar counter. Also, the testimony that the officer kept the patron under observation for the space of 15 minutes was not in the report of the incident. Additionally, the officer stated that the patron swayed three to five inches off from center in either direction, while at his seat [RT 29].

The investigation was defective, at best. We are not unmindful of the realities of testimony as to observations of symptoms of intoxication that are relatively common and generally universal as to most patrons. This fact opens up to the observant trier of fact the unenviable task of determining from the testimony whether these are real and careful observations of the patron, or, from experienced

officers who know that most symptoms are few, common, and usually present in almost all such cases. It should come as no surprise, as we have observed the records of untold numbers of such cases, that many police investigators know that their appraisal given some months after the incident will be accepted almost always without question by the trier of fact, creating a potential for lax, it not worse, accuracy in testimony.

With this record so generic in its findings and direct testimony, the only light as to a potential problem was brought to view by very effective cross examination. That examination showed that the testified-to usual symptoms were not sufficiently important to find place in the police report. While all items of observation possibly need not be in a report, there should have been sufficient inquiry into the basis of the testimony, in light of the convoluted testimony, to create a proper record.

Finding 8 is a wholly inadequate questioning of the evidence. The last sentence of Finding 8 boarders on the frivolous, given the realities of the many cases of this type the trier of fact undoubtedly has observed.

This record does not have substantial evidence to support the decision.

II

Appellant contends the penalty is excessive. Owing to the intended disposition of this review, it is not necessary to consider this contention.

ORDER

The decision of the Department is reversed.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, 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.