

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

AB-7696

File: 42-347392 Reg: 00048255

AMAL Z. and MARTIN E. BOUSSON, dba Muscle Mike's Tavern
1179 West Redlands Boulevard, Redlands, CA 92373,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: June 7, 2001
Los Angeles, CA

ISSUED JULY 27, 2001

Amal Z. and Martin E. Bousson, doing business as Muscle Mike's Tavern (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 20 days for their bartender having served an alcoholic beverage to a person exhibiting symptoms of obvious intoxication, 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 Professions Code §25602, subdivision (a).

Appearances on appeal include appellants Amal Z. and Martin E. Bousson, appearing through their counsel, Gregory T. Annigian, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The decision of the Department, dated September 14, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public premises license was issued on January 14, 1999. Thereafter, the Department instituted an accusation against appellants charging that Lisa Wilson, appellants' bartender, sold, furnished or gave an alcoholic beverage (beer) to Samuel Gonzalez, an obviously intoxicated person.

An administrative hearing was held on July 20, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigators Gregory Lorek and Michael Ackley in support of the accusation, and by Lisa Wilson and Wendy Reiner, appellants' bartenders, and Samuel Ramirez, the patron in question, on behalf of appellants.

Subsequent to the hearing, the Department issued its decision which determined that Ramirez had exhibited sufficient symptoms of intoxication to have put Wilson on alert that he was intoxicated, such that she should not have served him with any additional beer.

Appellants thereafter filed a timely appeal in which they contend that the evidence does not support the decision.

DISCUSSION

The thrust of appellants' position in this appeal is that the Administrative Law Judge gave too much weight to the testimony of the Department investigators concerning the symptoms of intoxication displayed by Ramirez, and too little to the testimony of appellants' witnesses. To a large extent appellants seek to have the Appeals Board weigh the evidence in a manner more favorable to their position, that Ramirez gave no indication he might be intoxicated. In so doing, appellants

seek more than this Board may give them.

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

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

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].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals

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].

Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

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].)

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].)

We have reviewed the hearing transcript, and are satisfied that the findings are fully supported by the evidence. Ramirez displayed several of the classic symptoms of intoxication - slurred or unintelligible speech, staggered gait, excessive swaying, red, watery, droopy eyes - and did so while in a position where appellants' bartender had ample opportunity to observe them. Indeed, the bartender's admission to the investigators that she simply underestimated the degree of drunkenness displayed by Ramirez confirms she was aware of his intoxication.

The fact that Ramirez may have been able to walk directly to his vehicle upon leaving the premises proves little. Nor does the fact the investigators permitted him to do so. They had already alerted the Redlands police to the situation, and were awaiting

their arrival, when Ramirez drove off. Until that moment, they were hoping to preserve their undercover status. Once Ramirez drove away, they were left with no choice but to pursue and apprehend him, thus revealing their law enforcement status.

ORDER

The decision of the Department is affirmed.³

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

³ 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.