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

AB-7721
File: 48-166347 Reg: 00049155

KATHY SILVA and THOMAS A. MORRIS, JR. dba The Connection
5740 Mission Street, San Francisco, CA 94112,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: October 11, 2001
San Francisco, CA

ISSUED DECEMBER 28, 2001

Kathy (Silva) Morris[1] and Thomas A. Morris, Jr., doing business as The Connection (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[2] which suspended their license for 20 days for appellants' bartender serving an alcoholic beverage to a patron exhibiting obvious signs of 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 Kathy Morris and Thomas A. Morris, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel,

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[1]At the time of the original issuance of the license, this co-licensee's name was Kathy Silva. However, her testimony in these proceedings is that her name is now Kathy Morris [RT 5].

[2]The decision of the Department, dated November 2, 2000, is set forth in the appendix.

Dean R. Lueders.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on January 16, 1985. Thereafter, the Department instituted an accusation against appellants charging the sale and service of an alcoholic beverage to a patron who exhibited obvious signs of intoxication.

An administrative hearing was held on September 19, 2000, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the service had been made as charged in the accusation.

Appellants thereafter filed a timely appeal in which they raise the issue that the findings are not supported by substantial evidence.

DISCUSSION

Appellants contend the findings are not supported by substantial evidence, arguing that the actions of the patron as seen by the police, have been the same physical actions for the past many years.

"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].)

In our review of this matter, it is the Department which is authorized by the California Constitution to exercise its discretion whether to suspend an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals.

The Appeals Board's duty of 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.[3]

The statute concerned states in pertinent part:

> "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to ... any obviously intoxicated person is guilty of a misdemeanor."

The term "obviously" denotes circumstances "easily discovered, plain, and

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[3]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].

evident" which places 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].)

The Administrative Law Judge (ALJ) after hearing all the evidence, concluded apparently due to the testimony and the conclusions of the police officers, that Espinoza was intoxicated. Co-appellant Kathy Morris, and two concerned patrons of the premises (apparently who knew Raymond Espinoza well), also testified that Espinoza showed signs which are commonly indicative of intoxication, which signs were obvious or easily seen by all within the premises: slurred speech, speaking in a loud and boisterous voice, unsteady coordination while leaning against the bar counter and walking to and from a lighted pool table, being apparently greatly involved in reading and scratching "Scatcher" cards [Findings III, V, and VI].

Apparently, the ALJ found the officers' testimony as credible. The ALJ also found appellants' two witnesses' testimony also credible [Finding VI]. It would also appear that all the testimony came to the same conclusion, that Espinoza exhibited obvious signs which are usually associated with intoxication.

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].)

The decision of the Department sets forth much of the basic case concerning intoxication, and the observable signs of that intoxication in its Legal Basis For Decision, III, and Determination of Issues, I, third paragraph.

We agree with the Determinations I, second paragraph, that as a practical matter, the state of intoxication is not at issue, but the obviousness of the symptoms generally found among intoxicated persons. Therefore, any server who observes or should have observed, such symptoms, should not give alcoholic beverage service to such a person. 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].)

While this matter appears at first blush, to be rather a "run of the mill" type matter, the complication lies in the fact that all agree as to the actions and symptoms displayed. With such basis, the police reasonably formed the opinion that Espinoza was intoxicated. The server did not.[4] In most cases, we would defer to the ALJ on the legal basis of credibility, as set forth above. But that law, as set forth above, and usually followed, does not assist in this matter.

The problem as we see it, is found in Determination of Issues I, fourth paragraph. The first sentence of paragraph four is an obvious statement of a

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[4]Kathy Morris testified that she knew Espinoza for the last 15 years as a regular patron, that he slurred his speech till such was ofttimes unintelligible; he always speaks loudly, and he was very happy that night as many patrons were involved in the scratching of cards, hopeful of winning money with the possession of winning cards.

server's duty. The dilemma is in the next and concluding sentence:

> "Although there was substantial evidence in the record that the symptoms of intoxication shown by patron Espinoza were his usual behavior and although seen by bartender Morris, caused no concern to her or regular patrons, the weight of the evidence is that on March 11, 2000, Morris observed a person (Espinoza) exhibiting the signs of obvious intoxication and then sold him an alcoholic beverage."

We view the violation is not just in exhibiting obvious signs commonly associated with intoxication, but being intoxicated to the point the signs are obviously present. Otherwise, the law would be a mere shell of fairness, and totally illogical.

We therefore, will consider this Determination which appears ambiguous:

1. "Although there was substantial evidence in the record that the symptoms of intoxication shown by patron Espinoza were his usual behavior" – as the ALJ found that there was a violation, we must conclude there was substantial evidence of the signs intoxication as testified to by the police officers. As the ALJ also states, there was substantial evidence that the signs seen by both police officers and Morris, were just the expression, demeanor, and personal bodily traits of Espinoza. It would seem to us that the ALJ with the evidence all showing the usual signs, was caught on the "horns of a dilemma," as the signs as interpreted by the police officers were an indication of intoxication, and by Morris, and apparently by some patrons, as the usual and peculiar traits of Espinoza.

2. "... although seen by bartender Morris [that is, the same signs the police officers observed], caused no concern to her or regular patrons" – Morris' testimony and her patrons who testified, show that she saw only the usual man with his peculiar

traits, nothing to call attention to a possible intoxication, unless Morris is lying, a factor scrupulously avoided by the ALJ.

3. " ... the weight of the evidence is that on March 11, 2000, Morris observed a person (Espinoza) exhibiting the signs of obvious intoxication and then sold him an alcoholic beverage" – it is obvious the ALJ is caught in an illogical trap caused by the peculiar facts of this matter. We must ask: what weight of the evidence? All the ALJ appears to be saying is that all saw the same signs, and therefore, Morris, even with her experience of Espinoza (apparently believed by the ALJ), served Espinoza at her own risk. If Espinoza was not intoxicated, such a conclusion of the ALJ that Morris acted at her risk (improper), flies in the face of a just and intelligent approach to the law. The law was never designed to thwart in-depth and honest inquiry into the actual circumstances, no matter the apparent facts.

There is substantial evidence as to both possible causation of the signs: Espinoza was intoxicated and the signs were legally sufficient, or, those signs were in fact only the demeanor of a non-intoxicated Espinoza. The ALJ essentially leaves the ultimate question unanswered and in effect, creates the illusion of just inquiry, and with no explanation of this "leap to judgment" into the morass of arbitrary conclusion. What factors did the ALJ think were the "weight" sufficient to side with the police officers' conclusion of intoxication, against the equally shown factors against that conclusion? Such pontificated conclusion is not a fair hearing, for appellants. But speaking to weight, where the balance is equal, as stated by the ALJ as to the substantiality of the evidence, it comes down to whether the conclusions of the police officers or Morris

were correct. We can never know, from this record.

We remind the Department that from the record, looking for "weight," shows that appellants have been licensed since June of 1989, with no violations of this type (except a violation in 1989 for improper alcoholic beverage purchases from apparently, a retail establishment); and the bartender acting within her knowledge of a regular patron, Espinoza, for 15 years, and his bodily actions.

How can any reviewing tribunal justly review a decision such as this, nicely worded, but internally without substance and thoughtful consideration of the dichotomy.

The case of Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836, 522 P.2d 12], sets forth the fundamental criteria which in this case should not have been ignored. Adherence to the principles of Topanga, would go a long way in resolving the dilemma in this matter, or at least, giving a reviewing tribunal some platform on which to make an intelligent review. The court stated:

> "Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions [citations omitted]. In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis [citations omitted]. (¶) Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency [citations omitted]. Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they seek review [citations omitted]. They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable."

The reasoning of the Topanga case demands that the Department set forth the

reasoning, grounds, and patterns of thought which caused the Department to decide that the penalty levied is rational and legally sufficient. The terms "reasoning" and "grounds" are defined in Webster's Third New International Dictionary, 1986, page 1891, as:

> "An expression or statement offered as an explanation of a belief or assertion or as a justification of an act or procedure ... a rational ground or motive ... a sufficient ground of explanation or of logical defense; esp: a general principal, law, or warranted presumption that supports a conclusion, explains a fact, or validates a course of conduct ... the ability to trace out the implications of a combination of facts or suppositions ...Syn REASON, GROUND, ARGUMENT, PROOF can mean, in common, a point or set of related points offered or offerable in support of something disputed ... GROUND AND GROUNDS are often used interchangeably with REASON and REASONS but tend to apply to evidence, facts, data, reasoning used in defense rather than to motives or considerations, often suggesting a more solid support than REASON. REASON centers attention on the faculty for order, sense, and rationality in thought, inference, and conclusion about perceptions."

There is a complete absence of apparent thoughtful consideration as demanded by Topanga.

ORDER

The decision of the Department is reversed.[5]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5]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.