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

AB-7745
File: 42-273569 Reg: 00049063

DONALD W. HEFNER and JANIE R. HEFNER dba The Oasis Bar
6158 Magnolia Avenue, Riverside, CA 92506,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 6, 2001
Los Angeles, CA

ISSUED NOVEMBER 14, 2001

Donald W. Hefner and Janie R. Hefner, doing business as The Oasis Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for twenty days for their bartender having served an alcoholic beverage (beer) to Thomas Boudreau, an obviously intoxicated patron, 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 Donald W. Hefner and Janie R. Hefner, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated November 16, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public premises license was issued on July 3, 1992. An accusation against appellants charging the service of an alcoholic beverage to an obviously intoxicated patron was filed on June 14, 2000.

An administrative hearing on the charge of the accusation was held on September 26, 2000. At that hearing, testimony was presented by Gerald Ackley and Michael Lorek, Department investigators, and by Catherine Shaw, the bartender who served Boudreau.

Ackley testified that when Boudreau caught his attention, Boudreau was staring into space. His eyes were watery and unclear, his bodily motions were slow and lethargic, and he seemed on four or five occasions to have trouble finding his mouth with his beer bottle. Ackley observed Boudreau over a 45-minute period; after having observed him a few minutes, Ackley concluded Boudreau was intoxicated in public. He observed Shaw ask Boudreau if he wanted "another one," following which she served him a bottle of Budweiser beer. Lorek testified that after Boudreau was taken into custody, he told Lorek he knew he had too much to drink.

Subsequent to the hearing, the Department issued its decision which determined that Boudreau was obviously intoxicated when he was served the beer, and that Shaw knew or should have known he was in that state when she served him.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the findings do not establish obvious intoxication; and (2) the Administrative Law Judge improperly relied on evidence of appearance after the service of alcohol.

DISCUSSION

I

Appellants contend that the absence from the findings of the ALJ of any statement that Boudreau was “obviously” intoxicated is a fatal omission. Conceding that the findings established that Boudreau was intoxicated (App.Br. at Page 10), appellant nevertheless argues that none of the behavior exhibited by Boudreau reflected intoxication.

Appellants’ argument is essentially a contention that there is not substantial evidence to support the findings. “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].)

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].)

Contrary to appellant’s contention, it is not necessary that an ALJ incorporate the term “obvious” into a finding that an obviously intoxicated person was served an alcoholic beverage. It is sufficient that enough symptoms of intoxication be present as to put a reasonable person with an opportunity to observe such symptoms on notice

that the intoxicated person should not be served any more drinks.

In Coulter v. Superior Court (1978) 21 Cal.3d 144, 155 [145 Cal.Rptr.534], the California Supreme Court, quoting from People v. Johnson (1947) 81 Cal.App.2d Supp. 973, 975-976 [185 P.2d 105], found it unnecessary to use the term when it explained the nature of the crime of serving an obviously intoxicated person:

> "The use of intoxicating liquors by the average person in such quantity as to produce intoxication causes many commonly known outward manifestations which are 'plain' and 'easily seen or discovered.' If such outward manifestations 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 what was apparent."

That having been said, we view this as an unacceptably weak example of obvious intoxication. Ackley observed Boudreau staring into space or at a spot on the floor with eyes that were red and unclear. Over a 45-minute span, Boudreau on four or five occasions had trouble finding his mouth with the bottle from which he was drinking.

While it is true that an obviously intoxicated person does not have to display every possible symptom of intoxication, he or she must at least display enough symptoms as to put a reasonable person on notice of his or her state of intoxication. The fewer and more ambiguous the symptoms, the greater the question whether a reasonable person would have been put on notice. Here, Ackley concluded after only a few minutes that Boudreau was intoxicated, a time span during which he merely saw Boudreau appearing slow and lethargic, staring at a spot on the floor and, on at least one of four or five occasions having difficulty getting a beer bottle to his mouth.

If, as Ackley testified, he watched Boudreau over a span of 45 minutes, and these are the only outward signs of intoxication he observed, and the only beer Ackley saw being served to Boudreau, after 45 minutes of observation, was the one Ackley

seized, we doubt that appellant's bartender, even with reasonable diligence, would have been put on notice that Boudreau was intoxicated.

II

Appellant contends that the Administrative Law Judge erroneously relied on a photograph taken 30 minutes after Boudreau was charged with intoxication. Appellants contend the photo should have been excluded on relevancy grounds.

It is difficult to see how appellants were prejudiced by the receipt into evidence of the photograph. The decision merely refers to the photograph and the bartender's testimony that it depicts Boudreau as he looked when seated at the bar.

Indeed, our impression is that the photo simply shows a tired male with his eyes closed.

ORDER

The decision of the Department is reversed.[2]

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

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[2] 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.