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

AB-7999
File: 48-300348 Reg: 01050336

FRANCISCO T. LOYA and OFELIA LOYA dba La Cabana #2
5960 East Gage Avenue, Bell Gardens, CA 90201,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: April 3, 2003
Los Angeles, CA

ISSUED MAY 22, 2003

Francisco T. Loya and Ofelia Loya, doing business as La Cabana #2 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for their bartender having permitted a person to loiter in the premises for the purpose of soliciting drinks, in violation of Business and Professions Code section 25657, subdivisions (a) and (b).

Appearances on appeal include appellants Francisco T. Loya and Ofelia Loya, appearing through their counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on October 11, 1994. Thereafter, the Department instituted a four-count accusation against appellants

[1]The decision of the Department, dated June 20, 2002, is set forth in the appendix.

charging that Linda Felix was employed or knowingly permitted to loiter in the premises for the purpose of soliciting drinks for her from patrons (counts 1 and 4), and was employed or paid a percentage or commission for soliciting drinks from patrons (counts 2 and 3).

An administrative hearing was held on February 5, 2002, and April 17, 2002, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigator Jesus Mejia, who described acts of drink solicitation by Linda Felix on November 17, 2001 and December 1, 2001. Myra Escobar, appellants' bartender, Linda Felix, and appellant Ofelia Loya testified on behalf of appellants.

Subsequent to the hearing, the Department issued its decision which determined that only those charges in counts 3 and 4 had been sustained by the evidence. Concluding that serious questions were raised as to appellants' comprehension of their duties and responsibilities as licensees, based on their disciplinary history involving drink solicitation, and the failure to instruct the bartender that solicitation of drinks was illegal, the Department ordered the license revoked.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the appointment by the Administrative Law Judge (ALJ) of a non-certified interpreter constituted a mistake of law and denial of due process; (2) the finding as to count 3 is not supported by substantial evidence because it was based upon a credibility determination of appellants' witnesses who testified without the benefit of a court-certified interpreter; and (3) the finding as to count 4 is not supported by

substantial evidence, in that the ALJ found that Felix's conduct did not constitute loitering, while loitering is required under the statute.

DISCUSSION

I

When the hearing resumed on April 17, 2002, counsel for appellants acknowledged his readiness to proceed, and stated that he had brought an informal interpreter to interpret for his Spanish-speaking witnesses pursuant to a discussion which he represented took place on the record at the February 5, 2002, hearing. Department counsel denied agreeing to the use of an informal interpreter, and the ALJ did not recall such a discussion. The transcript of the February hearing is silent on the subject.

Nonetheless, after a lengthy discussion of the provisions of the Administrative Procedure Act relating to interpreters (Gov. Code, §11435.15 *et seq*.), the ALJ overruled the Department's objection and permitted the use of the uncertified interpreter. Appellants now contend that his doing so violated the provisions of the Administrative Procedure Act and resulted in a denial of due process.

This is a classic case of invited error. The attorney who represented appellants at the hearing was the moving force in the use of a non-certified interpreter, insisting upon her use as a condition of his ability to go forward. (See II RT 5-12.) The rule is that when a party by his conduct induces the commission of error, he is estopped from asserting it as error. (See 9 Witkin, Cal. Procedure (4th Ed. 1997) Appeal, §383, p. 434, and cases cited therein.)

The ALJ, after hearing counsel and consulting the applicable statutes, ultimately permitted appellants' counsel to use as an interpreter a woman who had provided her services as an interpreter to him when he interviewed witnesses, including the witnesses in this case. Now, appellants' appellate counsel says he erred in permitting her to interpret because she is not a certified interpreter, and is disqualified because of her prior involvement in the case. Appellants cite Government Code section 11435.65, subdivision (b), and argue, without citation of authority, that the requirement in that subdivision that the interpreter not have had any involvement in the issues of the case prior to the hearing cannot be waived. We have no doubt that the requirement can be waived, and was clearly waived in this case by appellants.

Appellants and their then attorney of record were informed in the notice of hearing dated April 6, 2001, that, if they were not skillful in speaking or understanding the English language and asked for language assistance, the Department would provide them with the necessary information to obtain the services of an interpreter. Appellants would have to pay the cost of providing an interpreter, and were advised to notify the Department immediately if language help was needed. It is apparent that appellants, or their attorney, sought to avoid this cost by providing an interpreter with whom appellants' attorney had prior experience. There is nothing in the record to indicate that appellants requested the Department to provide language assistance.

Appellant has not identified a single instance where the interpreter erroneously translated the testimony of any witness. At most, appellants point to a few pages of the transcript [RT 65-70] at the beginning of the interpreter's work, where she was learning

the ground rules. It may be true that she was inexperienced and uncertified, but, as she testified, she was fluent in Spanish and English, and none of the testimony involved technical terminology or other material likely to challenge one proficient in a language.

We agree with appellants' argument that the ALJ was aware of the problems inherent in the use of the interpreter supplied by appellants' counsel. We think it quite likely that when he said "the issue is not closed today," he was advising the parties that if the interpreter appeared unable to perform competently, he would still be free to change his mind.

Our review of the testimony satisfies us that the proceeding was fairly conducted, with only minor problems in the interpretation, all of which were resolved as the examination by the attorneys went forward. If there was any bias as a result of the interpreter's prior involvement in the case, or her contact with appellants' witnesses, it could only have worked in appellants' favor and against the Department.

As the next to last witness was excused (who was apparently expected to be the last witness, until the Department called appellant Ofelia Loya), the following exchange took place:

The Court: You're free to go, ma'am. Thank you.

The Interpreter: You're welcome.

The Court: Your - - you did fine interpreter.

Mr. Koon [appellants' counsel]: She did splendid.

Accordingly, we find no merit in appellants' contention that the use of the interpreter supplied by their counsel requires reversal of the Department's decision.

II

Appellants contend that count 3 must be reversed because there was no substantial evidence that Felix was employed at the premises or paid a commission.

“Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., 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].)

Appellants contend that the ALJ could not make a credibility determination, citing their earlier arguments concerning the interpreter supplied by appellants’ hearing counsel. This argument is unpersuasive, for the reasons already stated.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Appellants' argument that there was no evidence that bartender Escobar overheard any solicitation by Felix, or was within earshot of any statement made by Felix is a red herring. Escobar served only the first beer to investigator Mejia and Felix. Both Mejia and Felix identified Sara Sanchez as the bartender with whom the order for the second beer was placed and the $2.00 change given to Felix. [I RT 41-42; II RT 94-96.]

The ALJ found that the bartender gave the change from Mejia's $5.00 to Felix rather than to Mejia. Felix's statements, to which appellants' counsel objected on hearsay grounds, appear not to have been relied upon to support the finding that there was a solicitation and a commission paid, but in support of the ALJ's determination that Felix's testimony was not credible. Does this warrant reversal? We do not think so.

Government Code section 11513, subdivision (c), provides that hearsay evidence may be used "for the purpose of supplementing or explaining other evidence, but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." The statements in question, had they been offered after Felix testified, would have been admissible to impeach Felix, which was how the ALJ appears to have treated them. That they emerged in the record before Felix testified is, at most, harmless error.

III

Appellants contend that the Department's finding with respect to count 4 is not supported by substantial evidence. Appellants contend that the statute underlying the violation charged in count 4 requires proof of loitering, and assert that "the ALJ

specifically stated on the record that Felix did not loiter" so there could be no violation. (App.Br., p. 5).

Counts 3 and 4 related to events which occurred on December 1, 2000. Count 3 charged a violation of Business and Professions Code section 25657, subdivision (a), while Count 4 charged a violation of section 25657, subdivision (b). Section 25657 states:

> It is unlawful:
>
> (a) For any person to employ, upon any licensed on-sale premises, any person for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, or to pay any such person a percentage or commission on the sale of alcoholic beverages for procuring or encouraging the purchase or sale of alcoholic beverages on such premises.
>
> (b) In any place of business where alcoholic beverages are sold to be consumed upon the premises, to employ or knowingly permit anyone to loiter in or about the premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverage for the one begging or soliciting.

Counts 3 and 4 were both sustained. The Department's findings (Finding of Fact 5) are as follows:

> Counts 3 and 4 were established by the evidence. Count 2 was not. On December 1, 2000, Department investigators on a follow-up investigation went to the Respondents' bar and again observed Linda Felix sitting alone at the fixed bar without a drink. Investigator Mejia struck up a conversation with Felix, whom he had previously met, and she asked him to buy her a drink. Felix then ordered a beer from bartender Escobar; was served and for which the investigator paid $3.00.
>
> After consuming this beer, Felix herself placed an order for a second beer with bartender Sanchez. Sanchez served Felix the beer and then asked investigator Mejia for $3.00 in payment.
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> The investigator offered bartender Sanchez a $5.00 bill in payment, Sanchez rang up the sale and returned $2.00 in change not to the investigator but instead to Felix. Felix testified that she, in fact, received the change from the bartender but not as a commission for any solicitation, but because she had requested the

> money from the investigator to play the juke box and he had agreed.
>
> There was little credibility to Felix's testimony. On the one hand, she denied that she ever solicited drinks from Investigator Mejia or having received any money from the investigator in connection with such solicitation.
>
> On the other hand, Investigator Mejia's version of these events are [sic] that Felix placed the $2.00 in change in her purse, and that when the investigator stated to Felix, "You only get $2.00?", Felix responded that she normally gets $5.00 and advised the investigator that, "The next beer will cost you $5.00." On this state of the record, Felix has effectively been impeached.

There is nothing in the findings to suggest that the ALJ was of the belief that Felix had not loitered. Appellants point to an exchange that occurred between appellants' counsel and the ALJ during closing argument. Appellants' counsel was responding to an argument by Department counsel that Felix had been loitering while seated at the bar for 30 minutes before the Department investigators arrived. Appellants' counsel argued: "What Linda Felix was doing during the half hour that she sat at the bar before the officers, the undercovers, came in didn't have anything to do with anything." The ALJ interrupted, and said: "I don't lend any credence to that argument that it constitutes loitering in itself. You can jump over that."

We think from the context of the discussion that the ALJ was simply indicating his unwillingness to make a speculative finding as to Felix's conduct during a 30-minute period when the investigator could not have known what she was doing. That is different from a finding, implicit in his decision, that Felix was loitering during the time when she solicited drinks from the investigator. We certainly do not think he would have sustained counts 3 and 4 if he truly believed that Felix was not loitering to solicit drinks when the investigators were in the bar.

ORDER

The decision of the Department is affirmed.[2]

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

[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.