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

AB-8510
File: 47-397906 Reg: 05060096

CREATIVE ENTERTAINMENT CONCEPTS, INC., dba Level 3
6801 Hollywood Boulevard, C343, Los Angeles, CA 90028,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 3, 2006
Los Angeles, CA
Redeliberation: January 11, 2007; February 1, 2007

ISSUED MARCH 15, 2007

Creative Entertainment Concepts, Inc., doing business as Level 3 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its bartender furnishing beer to an obviously intoxicated patron, a violation of Business and Professions Code section 25602, subdivision (a).

Appearances on appeal include appellant Creative Entertainment Concepts, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated January 12, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on October 29, 2003. On June 30, 2005, the Department instituted an accusation against appellant charging that its bartender, Kara Lawton, furnished beer, an alcoholic beverage, to Eddie A. Cornejo, a person who was obviously intoxicated.

At the administrative hearing held on October 26, 2005, documentary evidence was received and testimony concerning the violation charged was presented by Los Angeles police officers Gary Tchilingarian and José Alvarez, store manager David Bradley, and the bartender, Kara Lawton.

Officer Alvarez testified that he entered the premises about 10:30 p.m. on October 29, 2003, in an undercover capacity, to check for unlawful service of alcoholic beverages to minors or obviously intoxicated individuals. At some point, his attention was drawn to a patron, Eddie Cornejo, staggering from the area of the dance floor to the bar area. Cornejo bumped into a female patron as he entered the bar area, and then attempted to speak to her, but she drew away from him and continued speaking to her companion.

Then, when he was two to three feet from the bar counter, Cornejo grabbed the friend who was with him, Calautti, and hugged him and shook him back and forth, yelling loudly, "I love you, man. I love you. You're my nigger. You're my nigger. Yeah, I love you." At that time, Alvarez observed that the bartender, Lawton, was in a position to see Cornejo hugging and shaking his friend.

Cornejo and Calautti moved up to the bar counter, and Alvarez then moved closer to Cornejo. When Cornejo reached the counter, he put his left arm on the counter and put his head down on his arm. Several seconds later, Cornejo lifted his

head, put his right arm up in the air, and yelled, making noise but using no words. He put his head down on his arm again, and few seconds later again raised his head and yelled. During this time, his body was swaying as if he were trying to keep his balance, and he bumped into another female patron at the bar counter.

While Cornejo was doing this, Calautti was ordering drinks from Lawton. She brought Calautti a Corona beer, put it down in front of him and, by gesture and facial expression, asked him if he wanted only one beer. Calautti indicated he wanted two beers, and Lawton got another Corona beer, which she placed directly in front of Cornejo. Cornejo took a drink from the beer, and he and Calautti walked away to join a group of their friends.

Before Cornejo received the Corona beer from Lawton, Alvarez had formed the opinion that Cornejo was obviously intoxicated, and that the bartender had a clear view of Cornejo. Alvarez continued to monitor Cornejo until uniformed officers entered the premises.

The bartender, Lawton, testified that she was trained to identify obviously intoxicated individuals and she did not remember seeing Cornejo exhibiting any signs of intoxication that night. She remembered serving a mixed drink to Cornejo earlier in the evening, but did not remember serving him a Corona beer when she served a Corona beer to Calautti. The club was noisy, she said, and one would have had to yell to be heard by someone eight to ten feet away.

Subsequent to the hearing, the Department issued its decision which determined that the violation occurred as charged. Appellant filed a timely appeal contending that: 1) the evidence is insufficient to support the finding that Cornejo was obviously intoxicated and that his symptoms of intoxication were clear enough to have alerted the

bartender to his condition, and 2) the administrative law judge (ALJ) failed to explain why he thought the bartender's testimony was not credible.[2] Appellant also filed a motion to augment the administrative record with any Form 104 (Report of Hearing) included in the Department's file, and a supplemental letter brief regarding the recent decision of the California Supreme Court in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*).

DISCUSSION

I

Appellant contends that Cornejo could not have been obviously intoxicated because Officer Alvarez allowed Cornejo to finish the Corona beer served to him. Allowing Cornejo to drink the beer would have been a violation of Alvarez's duty as a police officer, charged with ensuring the welfare of citizens, and therefore, appellant concludes, Cornejo could not have been obviously intoxicated.

Appellant posits explanations other than intoxication for Cornejo's behavior. Additionally, appellant contends the circumstances prevented Lawton from being able to observe any symptoms of intoxication exhibited by Cornejo.

When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the

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[2]Appellant has filed a motion to augment the record to include documents which may have been transmitted to the Department's decision maker, but has not raised any issue in its brief concerning the possibility that there were such documents. In a separate memorandum it sets forth due process arguments that the Board has previously considered and rejected. We reject them here as well.

decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) "Substantial evidence" is relevant evidence which reasonable minds would accept as 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]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

In making its determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the Department's decision. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

On appeal, appellant has the burden of showing that there is no substantial evidence to support the Department's findings. (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 336 [25 Cal.Rptr.2d 842].) If substantial evidence supports the findings of the Department, the existence of a possible alternate explanation for certain symptoms does not negate the substantial evidence for the Department's findings. The Board's inquiry is not whether a different result could have been reached

if the ALJ had found the facts to be otherwise than he did, but whether there is substantial evidence, even if contradicted, to support the Department's findings. Such evidence exists here.

The officer's failure to immediately detain Cornejo is not evidence that Cornejo was not obviously intoxicated. Appellant's contention falls in the face of the officer's explanation that he waited for uniformed officers to enter and detain Cornejo so that he could remain undercover. Obviously, the ALJ found it reasonable for the officer to remain undercover because of the inherent difficulties, and possible safety issues, when a non-uniformed officer attempts to make an arrest, particularly in the context of a large drinking establishment.

Appellant's contention that the physical circumstances prevented Lawton from being able to observe any symptoms of intoxication exhibited by Cornejo must also fail. The ALJ resolved the conflicts in the evidence and assessed the credibility of the witnesses, ultimately concluding that the symptoms exhibited by Cornejo were clear enough that Lawton should have observed them and refused to serve Cornejo. These determinations are the responsibility of the trier of fact to make, and this Board will not interfere with them in the absence of a clear abuse of discretion.

Appellant makes much of the fact that the bartender could not get close to the bar counter because of ice bins and bottle racks, and this prevented her from being able to see signs of Cornejo's intoxication. Appellant, through its bartenders, bears a responsibility to refuse to serve alcoholic beverages to an obviously intoxicated person. If appellant chooses to arrange its facilities in a way that makes it difficult for its bartenders to comply with the law, appellant must be prepared to assume the risk. We can have little sympathy for such an invitation to a violation.

II

Appellant contends the decision must be reversed because the ALJ did not provide "clear and convincing reasons to disbelieve" the bartender's testimony. Appellant's contention relies on language in *Holohan v. Massanari* (9th Cir. 2001) 246 F.3d 1195 (*Holohan*).

The Board has considered, and rejected, many times over, the authority cited by appellant, finding that the court's view expressed in *Holohan* "is peculiarly related to federal Social Security disability claims, and does not reflect the law of the State of California." (*7-Eleven, Inc./ Huh* (2001) AB-7680; accord *7-Eleven & Singh* (2002) AB-7792, *Lewis Salem, Inc.* (2003) AB-8054, *Chevron Stations, Inc*. (2005) AB-8223.) There is no reason for us to decide the issue differently in the present appeal.

III

On November 13, 2006, the California Supreme Court held that the provision of a Report of Hearing by a Department "prosecutor" to the Department's decision maker (or the decision maker's advisors) is a violation of the ex parte communication prohibitions found in the APA. (*Quintanar*, *supra*, 40 Cal.4th 1.) In *Quintanar*, the Department conceded that a report of hearing was prepared and that the decision maker or the decision maker's advisor had access to the report of hearing, establishing, the court held, "that the reports of hearing were provided to the agency's decision maker." *(Id.* at pp. 15-16.)

In the present case, appellant contends a report of hearing was prepared and made available to the Department's decision maker, and that the decision in *Quintanar*, therefore, must control our disposition here. No concession similar to that in *Quintanar* has been made by the Department.

Whether a report was prepared and whether the decision maker or his advisors had access to the report are questions of fact. This Board has neither the facilities nor the authority to take evidence and make factual findings. In cases where the Board finds that there is relevant evidence that could not have been produced at the hearing before the Department, it is authorized to remand the matter to the Department for reconsideration in light of that evidence. (Bus. & Prof. Code, § 23085.)

In the present case, evidence of the alleged violation by the Department could not have been presented at the administrative hearing because, if it occurred, it occurred *after* the hearing. Evidence regarding any Report of Hearing in this particular case is clearly relevant to the question of whether the Department has proceeded in the manner required by law. We conclude that this matter must be remanded to the Department for a full evidentiary hearing so that the facts regarding the existence and disposition of any such report may be determined.[3]

ORDER

The decision of the Department is affirmed as to all issues raised other than that regarding the allegation of an ex parte communication in the form of a Report of

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[3]The Department has suggested that, if the matter is remanded, the Board should simply order the parties to submit declarations regarding the facts. This, we believe, would be wholly inadequate. In order to ensure due process to both parties on remand, there must be provision for cross-examination.

The hearing on remand will necessarily involve evidence presented by various administrators, attorneys, and other employees of the Department. While we do not question the impartiality of the Department's own administrative law judges, we cannot think of a better way for the Department to avoid the possibility of the appearance of bias in these hearings than to have them conducted by administrative law judges from the independent Office of Administrative Hearings. This Board cannot, of course, require the Department to do so, but we offer this suggestion in the good faith belief that it would ease the procedural and logistical difficulties for all parties involved.

Hearing, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[4]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.