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

AB-8621
File: 48-313101 Reg: 06062356

MARY ESTHER BALLARD dba Whiskeytown
5660 Thornton Avenue, Newark, CA 94560,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Robert R. Coffman

Appeals Board Hearing: January 10, 2008
San Francisco, CA

ISSUED MARCH 25, 2008

Mary Esther Ballard, doing business as Whiskeytown (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended her license for 30 days, 15 of which were conditionally stayed for a one-year probationary period, for her bartender having been permitted to remain in the premises while intoxicated and unable to care for her own safety or that of others, a violation of Business and Professions Code section 24200, subdivisions (a) and (b), in conjunction with Penal Code section 647 subdivision (f).

Appearances on appeal include appellant Mary Esther Ballard, appearing through her counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

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[1]The decision of the Department, dated September 21, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general license was issued in January 1996. Thereafter, the Department instituted an accusation against appellant charging that, on January 7, 2006, she permitted her bartender to remain in the premises while intoxicated and unable to care for her own safety or that of others.

An administrative hearing was held on July 14, 2006, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant raises the following issues: (1) there is no evidence in the record that the clerk posed a high risk of imminent physical danger or harm to herself or others; and (2) the Department communicated with its decision maker on an ex parte basis.

DISCUSSION

I

Citing the Board's decision in *Kaur* (2001) AB-7508, appellant argues that the Department was obligated to prove that the bartender's intoxication presented "a high risk of imminent physical danger or harm" to either herself or others, but failed to offer any evidence in support of its burden. With "not a shred of evidence in the record" indicating the bartender posed an imminent danger of harm to herself or others, appellant asserts, affirming the Department's decision would have to be based on pure speculation.

The Department's decision, in Finding of Fact 3, sets out the facts forming the basis for the accusation:

> The circumstances were that Newark Police Department police officers were dispatched to the premises on January 7 at approximately 1:00 a.m. upon the report of an altercation at the premises. When the officers arrived, Dong, the bartender on duty, would not cooperate with the officers, but acted in a belligerent manner.
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> Dong's speech was slow and slurred, her eyes watery and red, and a strong odor of alcohol emanated from her person. She had difficulty in holding her head erect. She staggered when she attempted to walk; her poor balance required her to hold onto the bar to prevent falling. She was extremely intoxicated and unable to care for herself.

"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].) 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 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].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*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].)

The offense of public intoxication requires more than simply being intoxicated in a public place. The offense is complete when a person "is (1) intoxicated (2) in a public place and *either* (3) is unable to exercise care for his own safety or the safety of others *or* (4) interferes with or obstructs or prevents the free use of any street, sidewalk or public way." (*People v. Lively* (1992) 10 Cal.App.4th 1364, 1368-1369 [13 Cal.Rptr.2d 368] (*Lively*), italics in original; Bus. & Prof. Code, § 647, subd. (f).)

Newark police officer Sean Farley testified that he and a fellow officer arrived at the premises after being informed an altercation had taken place there. When they arrived at the premises, he observed several patrons outside, but no visible evidence of any altercation. Upon inquiry, the patrons said there was no problem. Farley and his partner then entered the premises to make a premises check. He testified that his attention was drawn to the bartender “right away. She was very agitated. She seemed to be upset. And from the beginning of my conversation with her, I noticed that she appeared to be intoxicated.” [RT 6.] Farley's testimony continued:

> Q. Okay. And from the beginning of your conversation with her, what about her made her appear to be intoxicated, to you?
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> A. I noticed her eyes were extremely red and bloodshot, watery, if you’ll allow the phrase. I noticed that when she spoke, she slurred her words. She was unable to communicate in a smooth fashion. It was a very, very deliberate slur. And I noticed that she was having difficulty holding her head up when she spoke. She was very – – she’d come down and then kind of snap out of it right away, and she was also, in my opinion, aggressive.
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> Q. Okay. And could you describe how the bartender reacted to you approaching her to converse with her?
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> A. She told me that all she wanted to do was close the bar. I asked her if she had been drinking. She told me that no, she had not been drinking. She told me that she was on her period at the time; therefore, she had not drunk any alcohol. I continued to try to speak with her, at which point she turned around and tried to walk away from me.

I noticed as she walked, she was staggering. At one point I remember her having to lean over to take ahold of the bar to brace herself from having to fall over. Again, I asked her if she had had any alcohol, at which point she told me no, that she had not. I remember during our conversation, on two or three separate occasions, she tried to turn and walk away from me.

Q. Okay. And do you recall the gist of your conversation with the bartender?

A. I just – I remember she was very aggressive. She continued to tell me that all she wanted to do was close the bar, that I should leave her alone, that she hadn't done anything wrong. She was speaking in a very loud manner – yelling, I would describe it as.

I continued to try to ask her to calm down, to relax, at which point she just told me she wanted to close the bar, to leave her alone, and again tried to turn around and walk away from me – not in a manner that I would say she was trying to run to get away from me; I would describe it as she wanted to go back to what she was doing, and she did not want to continue speaking to me.

Q. And earlier in your conversation, you indicated that when the bartender spoke, her words were slurred. At any part of your conversation with the bartender, would you say that she spoke and her words were not slurred?

A. No, not that I remember. I remember being able to understand what she was saying. I do remember the statement "I'm not drunk. I'm on my period." But everything that she said that I recall was in a slurred fashion.

Q. At any time that evening, did you make any determination as to whether or not the bartender was able to care for herself?

A. Absolutely. She was extremely intoxicated. I did not feel that she could take care of herself, let alone the business of Whiskeytown. She was extremely, extremely intoxicated.

Q. And what did you do as a result of your conclusion?

A. I did not feel that she could – the bartender was able to take care of herself and provide adequate safety, due to her intoxication level. And due to that decision, I placed her under arrest for being drunk in public.

[RT 7-10.]

. On cross-examination, Farley acknowledged the possibility that the bartender's difficulty in holding herself up might have been caused by a sprained ankle, but persisted in his conviction that she was extremely intoxicated:

> A. It's possible, ma'am, that she did sprain her ankle. I definitely cannot contest that. I can let you know that she was extremely intoxicated. I could smell the scent of alcohol coming from her person in a very strong odor, okay? Her eyes were extremely red and bloodshot, watery. She was unable to speak in a clear fashion. And again, as she walked, she was displaying – I know you've been in this profession. You know when you see somebody, you can tell when they're intoxicated.
>
> Q. Yes.
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> A. I understand that you do have concerns as far as she's providing one version of the story to you, and now you're here and getting a second version of the story today. I assure you, though, ma'am, that when I made my decision to arrest her for being intoxicated, it was because honestly in my heart, I did not feel that she could take care of herself. I definitely did not feel she could take care of your bar. She was extremely intoxicated, and that's why I made the decision that I did.

On redirect examination Farley testified that the bartender never said anything about a sprained ankle.

The California courts have considered the applicability of Penal Code section 647, subdivision (f), in a number of factual contexts and have addressed arguments similar to that appellants make here, i.e., that the individual was not shown to be a danger to self or to others. Although some factual situations are highly indicative of such danger, others are not, and each situation must be considered on its own facts.

> In an arrest for public intoxication, the totality of circumstances must be considered in determining whether the intoxicated person can exercise care for his or her own safety or the safety of others. An inebriated person behind the wheel of a car or power boat or plane or train poses a greater danger to himself or herself and others than the same person lying on a park bench.

(Lively, *supra*, 10 Cal.App.4th 1364, 1372-1373.)

In the juvenile court case *In re William G*. (1980) 107 Cal.App.3d 210, 214 [165 Cal. Rptr. 587], the appellate court was faced with the same argument appellants make in the present appeal, under rather similar facts, and the court answered the argument thus:

> Appellant contends that the record contains " . . . no indication that he was unable to take care of himself" as is required to sustain a section 647, subdivision (f), conviction. However, the arresting officer's testimony as to the appellant's condition is itself some evidence of this element. (See *In re John C*. (1978) 80 Cal.App.3d 814, 821 [145 Cal.Rptr. 228].) He testified that appellant was "staggering very badly, very unsteady on his feet, his speech was slurred, eyes bloodshot, and there was a strong odor of alcoholic beverage on his person." This evidence was countered by two friends of the minor who were with him just prior to the arrest and who swore that William had been drinking, but was not staggering, slurring his speech, or falling down. The observations by the officer alone were sufficient to warrant placing appellant under arrest for violation of section 647, subdivision (f). (See *People v. Longwill* (1975) 14 Cal.3d 943, 945 [123 Cal.Rptr. 297, 538 P.2d 753].) They were also grounds for the officer to conclude that appellant was unable to exercise care for his own safety. (*People v. Murrietta* (1967) 251 Cal.App.2d 1002, 1004-1005 [60 Cal.Rptr. 56]; see also *People v. Goldberg* (1969) 2 Cal.App.3d 30, 34 [82 Cal.Rptr. 314].) Likewise the juvenile judge could reasonably infer the same conclusion from all of the surrounding circumstances.

Appellants do not address the case law made by the courts in this area, but argue that this board's opinion in *Kaur*, *supra*, set the standard the Board should now apply. *Kaur*, however, is clearly distinguishable from the present case. In *Kaur*, a police officer testified that he observed the clerk in a 7-Eleven store wait on two customers, swaying from side to side as he worked and having "great difficulty" working the cash register keys, although the officer did not know if the transactions were correctly done. While waiting on the next customer, the clerk could not get the cash register to open, and the officer intervened at that time. The officer testified that the clerk's speech was halting and slurred, he smelled of alcoholic beverages, and his eyes were bloodshot and watery. The officer believed the clerk was intoxicated and the clerk's blood alcohol level of .30 confirmed this.

The appellants in *Kaur* also argued that the Department had not established its case because there was no evidence that the clerk "was falling down, belligerent, bumping into things or in any fashion acting dangerously toward himself or others." The

ALJ rejected this argument, saying:

> [The clerk], as a seller of alcoholic beverages, if nothing more, protects the public from difficulties associated with their unlawful sales. In the condition [the officer] found him, he was in no condition to judge or ensure that such beverages were sold only to those of legal age and he was in no shape to ensure that no alcoholic beverages were sold to anyone who was already intoxicated. In that way alone, in the condition he was in, he was a danger to others. One could go on and on.

The Appeals Board responded to this as follows:

> The difficulty with this case is that while the evidence supports a finding that the clerk was intoxicated, there was no evidence presented supporting the opinion of the officer that the clerk was unable to care for his own safety or the safety of others. The ALJ rationalized that the clerk "was a danger to others" because he might, as a result of his inebriation, make an unlawful sale of an alcoholic beverage. This does not appear to be what the statute means by "unable to care for his own safety or the safety of others."
> [¶] . . . [¶]
>
> The clerk may have been more likely to make an unlawful sale to a minor or an obviously intoxicated when inebriated, but that is not the same as being unable to exercise care for the safety of others. Such an unlawful sale may put in motion a series of events that could eventually lead to a risk of danger for someone, but the statute is not designed to apply to such an attenuated possibility of danger. There must be evidence of a more or less *immediate* threat to someone's *safety* posed by the clerk's intoxication.

In the present case, the evidence showed that the inebriated individual was the bartender, and the only employee present, in the bar. She was uncooperative and belligerent with the officer; she gave off a strong odor of alcohol; her speech was slow and slurred; her eyes were red and watery; she had difficulty holding up her head; she staggered when she tried to walk; and she had to hold on to the bar to keep from falling.

We think it is beyond question that a greater risk of imminent harm exists in a bar where not only the patrons, but also the bartender, are drinking alcoholic beverages, than in a convenience store. The bartender's belligerence is also an indication that she

could not care for her own safety. Clearly, her inability to walk without staggering and holding on to the bar revealed the very real risk of immediate harm coming to her.

We are convinced that substantial evidence exists to support the findings and that the findings support the decision.

II

Appellant contends the Department violated the APA by transmitting a report of hearing, prepared by the Department's advocate at the administrative hearing, to the Department's decision maker after the hearing but before the Department issued its decision. She relies on the California Supreme Court's holding in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*) and appellate court decisions following *Quintanar*, *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th 116 [57 Cal.Rptr.3d 6] (*Chevron*) and *Rondon v. Alcoholic Beverage Control Appeals Board* (2007) 151 Cal.App.4th 1274 [60 Cal.Rptr.3d 295] (*Rondon*). She asserts that, at a minimum, this matter must be remanded to the Department for an evidentiary hearing regarding whether an ex parte communication occurred.

The Department makes no argument in its brief, but states that none of the documents requested in the motion to augment exist. Attached to this statement is a declaration signed by Department staff attorney Dean Leuders who represented the Department at the administrative hearing. In this declaration, Leuders states that at no time did he prepare a report of hearing or other document, or speak to any person, regarding this case. In its brief, the Department makes no statements or assertions concerning these denials or what it believes should be the effect of them on this appeal.

At oral argument, the Department argued that the Board should accept the declaration as conclusive evidence that the documents requested do not exist.

We agree with appellant that transmission of a report of hearing to the Department's decision maker is a violation of the APA. This was the clear holding of the Court in *Quintanar*, *supra*.

The Department apparently believes that it need only include a declaration denying the existence of an ex parte communication for the Appeals Board to rule in its favor. The appellant argues that the declaration is inadequate. We agree with appellant.

Three courts have now issued published decisions in which the Department's practice of ex parte communication with its decision maker or the decision maker's advisors is determined to be endemic in that agency. (*Quintanar*, *supra*, 40 Cal.4th 1, 5 [ex parte provision of report of hearing was "standard Department procedure"]; *Rondon*, *supra*, 151 Cal.App.4th 1274, 1287 ["widespread agency practice of allowing access to reports"]; *Chevron*, *supra*, 149 Cal.App.4th 116, 131 [ex parte communication not unique to *Quintanar* case, "but rather a 'standard Department procedure'"].) The Department has presented no evidence in this case, or any of the numerous other cases this Board has seen on this issue, that the "standard Department procedure" has changed. The Department has not provided, for example, a written policy, with a date certain, from which we could conclude that the Department has instituted an effective policy screening prosecutors from the decision makers and their advisors. The Department bears the burden of proving that it has adequate screening procedures (*Rondon*, *supra*), and without evidence of an agency-wide change of policy and practice, we would be exceedingly reluctant to affirm or reverse on the basis of a single

declaration, especially where there has been no opportunity for cross-examination.[2]

For the foregoing reasons, we will do in this case as we have done in so many other cases, that is, remand this matter to the Department for an evidentiary hearing.

ORDER

The decision is affirmed as to issues other than that involving an ex parte communication, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[3]

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

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[2]"The general rule in civil actions is that absent statutory authorization, stipulation of the parties, or a waiver by failure to object, an affidavit (Code Civ. Proc., § 2003) or a declaration under penalty of perjury (Code Civ. Proc., § 2015.5) is not competent evidence; it is hearsay because it is prepared without the opportunity to cross-examine the affiant. (Evid. Code, §§ 300, 1200; see Code Civ. Proc., § 2009; Witkin, Cal. Evidence (2d ed. 1966) § 628, p. 588.)"
(Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal.App.3d 586, 597 [155 Cal.Rptr. 63].)

[3]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.