

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

AB-9301

File: 48-376331 Reg: 12076492

JOYCE ANN SMITH,
dba Joyce's Cocktails
1025 & 1029 Elkelton Boulevard, Spring Valley, CA 91977,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: June 6, 2013
Los Angeles, CA

ISSUED JULY 30, 2013

Joyce Ann Smith, doing business as Joyce's Cocktails (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended her license for 25 days for selling alcohol to an obviously intoxicated person, a violation of Business and Professions Code section 25602(a).

Appearances on appeal include appellant Joyce Ann Smith, appearing through her counsel, A.P. Zmurkiewiez, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly Belvedere.

¹The decision of the Department, dated August 8, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on June 18, 2001. On February 14, 2012, the Department instituted an accusation against appellant charging that, on or about December 3, 2011, appellant's bartender, Julia Lang, sold alcohol to an obviously intoxicated patron, Rodrigo Corral, in violation of section 25602(a).

At the administrative hearing held on May 31, 2012, documentary evidence was received and testimony concerning the violation charged was presented by Department investigators Miguel Rios and Dean Maier. Appellant presented no witnesses.

Testimony established that Rios entered the premises in an undercover capacity at approximately 11:10 p.m. and observed a female sleeping at the bar. Rios exited and informed Maier that they would be staying at the premises, and the two reentered the premises.

Rios approached the bar and was greeted by Lang, the bartender. Rios ordered and was served a Coors Light beer. He then pointed out the female asleep at the bar, and asked Lang what was wrong with her. Lang replied that the woman was tired but okay.

Corral was standing approximately three feet from the sleeping individual, and overheard investigator Rios' conversation with Lang. Corral approached Rios in an aggressive manner, with his chest pushed out and his arms at his sides. Corral got within a foot of Rios, and asked if there was a problem.

At that point, Rios observed that Corral's speech was slurred, the odor of alcohol emanated from his breath, and he swayed slightly. Lang was standing behind the bar and was in a position to observe Corral's demeanor.

Rios defused the situation by suggesting he was concerned about the sleeping woman's health. Corral then introduced himself and shook hands with Rios. Rios again observed that Corral's speech was slurred, his breath smelled of alcohol, and he swayed while standing. Rios also noted that Corral had a metal bucket with four bottles of Coors Light in front of him.

Rios determined at that point that Corral was drunk, but that he was not yet exhibiting all the usual signs of an obviously intoxicated person.

Rios and Corral continued to converse. Rios observed that as Corral consumed more beer, he became louder and more aggressive. He boasted about his fighting abilities and the number of fights he had been in. Rios noted that Corral's voice was slurred.

At one point, Corral put Rios in a headlock, squeezed Rios' biceps, and said he could beat Rios up. Lang was behind the bar at the time and was in a position to see Corral's conduct.

Corral also approached another unidentified patron in an aggressive fighting posture, with his hands raised and an angry expression on his face. The other patron managed to defuse the situation. Rios, as he observed this interaction, noted that Corral was swaying as he walked, was very loud, slurred his words, and that a heavy odor of alcohol emanated from his breath. Again, Lang was in a position to observe Corral's conduct.

After an hour of observation, Rios concluded that Corral was obviously intoxicated.

At about 12:13 a.m., Corral ran out of beer. Lang asked him if he wanted anything else, and Corral replied that he wanted more beer.

Rios observed that Corral's voice had grown more slurred. In a loud voice, Rios asked Lang if she was sure she was going to give Corral alcohol, and pointed out that Corral was drunk. Lang did not respond, and Rios repeated himself. Lang then told Rios that Corral would be okay, placed four bottles of Coors Light in a metal bucket, and placed the bucket in front of Corral. Rios observed as Corral reached into his wallet in a lethargic manner, almost in slow motion, and removed a twenty dollar bill, which he gave to Lang.

After Lang served Corral the beer, another patron, Richard Olsen, called Lang over, pointed out that Corral was drunk, and questioned whether she was going to let him drink. Lang told Olsen that Corral would be okay. Olsen called Lang over again and said something, to which Lang replied, in Spanish, "Shut your mouth, stupid."

Rios then asked Maier to call the San Diego Sheriff's Department. At approximately 12:30 a.m., deputy sheriffs arrived. Corral was arrested for being drunk in public, and Lang was arrested and cited for furnishing an alcoholic beverage to an obviously intoxicated person. When Maier explained to Lang that Corral was being arrested for being drunk in public, Lang protested, stating, "But he is drunk in a bar. So what's the big deal?" Lang repeated that she knew Corral was drunk, but that she didn't see what the problem was.

Subsequent to the hearing, the Department issued its decision which determined that the charge had been proven.

Appellant filed a timely appeal contending that the Department's findings are not supported by substantial evidence.

DISCUSSION

Appellant contends that the Department's finding that appellant's bartender sold alcohol to an obviously intoxicated individual is not supported by substantial evidence in light of the whole record.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. National Labor Relations Bd.* (1950) 340 U.S. 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].)

The California Supreme Court has noted that

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.

(*Coulter v. Superior Court* (1978) 21 Cal.3d 144, 155 [145 Cal.Rptr. 534].) The California court of appeals has explained that, in determining whether a person is obviously intoxicated, "the standard to be applied is whether such outward signs of

intoxication are sufficient to cause a reasonable person to believe that the one with whom he or she is dealing is intoxicated." (*Schaffield v. Abboud* (1993) 15 Cal.App.4th 1133, 1143 [19 Cal.Rptr.2d 205].)

A determination of obvious intoxication may properly be made by the observation of objective symptoms by an officer trained to make such judgments, and the testimony of such an officer, adequately articulating the foundation for his opinion, is sufficient to sustain a finding that the subject was obviously intoxicated. (*In re William G.* (1980) 107 Cal.App.3d 210, 214 [165 Cal.Rptr. 587]; *People v. Murietta* (1967) 251 Cal.App.2d 1002, 1004 [60 Cal.Rptr. 56].) "Obvious intoxication" is a conclusion to be drawn by the trier of fact from evidence of symptoms of intoxication displayed by the person in question. (*China House Enterprise, Inc.* (1998) AB-7046.)

Appellant would have this Board adopt the reasoning in *Hefner* (2001) AB-7745. In that case, this Board reversed the Department's decision, which was based on insufficient evidence: the investigator "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." (*Id.* at p. 4.) The case turned on "whether a reasonable person would have been put on notice" of Boudreau's state, and this Board concluded that it was unlikely that "appellant's bartender, even with reasonable diligence, would have been put on notice that Boudreau was intoxicated." (*Id.* at pp. 4-5.)

In this case, however, there is little doubt that Lang observed Corral's conduct. According to investigator Rios' testimony, Lang was behind the bar and in a position to observe Corral's initial aggression toward him, as well as his conduct toward other

patrons. [RT at pp. 19-20, 27-28, 32.] Moreover, Lang was actively put on notice of Corral's condition when Rios pointed out that Corral was drunk. [RT at p. 35.] Lang was put on further notice when another patron, Richard Olsen, also pointed out Corral's condition and questioned her decision to serve him alcohol.² [RT at pp. 36-39.]

Lang rebuffed these observations and proceeded to sell Corral four more bottles of Coors Light. [RT at p. 39.] It was reasonable for the ALJ to conclude that Lang had the opportunity to observe that Corral was intoxicated, and chose to ignore what was apparent.

Alternatively, appellant would have this Board follow the reasoning in *Silva* (2001) AB-7721. In *Silva*, this Board overturned the Department's decision due to an absence of credibility findings. Testimony from officers in the case indicated that the patron, Espinoza, demonstrated obvious signs of intoxication. (*Id.* at p. 4.) The officers' testimony, however, was countered by testimony from a co-licensee and two "concerned patrons," all of whom were familiar with Espinoza and indicated that this conduct represented his usual and peculiar behavior. (*Id.* at pp. 4, 6.) The ALJ did not explain why he chose to credit the testimony of the officers over that of the co-appellant and patrons, which this Board held was grounds for reversal. (*Id.* at pp. 7-8.)

In the present case, appellants suggest that Lang was familiar with Corral and that his aggressive conduct reflected his ordinary behavior. There is very little evidence to support this assertion, however. Lang did not testify; in fact, appellants presented no

²We note that Olsen did not testify at the hearing. His statement, though hearsay, is fully admissible because it shows notice, rather than the truth of the matter asserted. (See, e.g., *Taylor v. Centennial Bowl, Inc.* (1966) 65 Cal.2d 114, 125 [52 Cal.Rptr. 561]; *Caro v. Smith* (1997) 59 Cal.App.4th 725, 733 [69 Cal.Rptr.2d 306]; *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 [179 Cal.Rptr. 61].)

witnesses whatsoever. There are fragments of hearsay evidence; according to investigator Rios, Lang stated that Corral was "a regular and always acts in that manner," [RT at p. 103], that "[h]e is a homey," and that "[a]nyone else, it would not be okay, but he will be all right." [RT at p. 56.] Additionally, Lang did ask Corral to check on the woman who had been sleeping at the bar. [RT at p. 55.]

The ALJ in this case chose not to credit this hearsay evidence over the firsthand testimony of the officers. While it is true that an ALJ may be required to make certain findings regarding the credibility of a testifying witness, no such credibility findings are necessary with regard to hearsay evidence. We see no deficiency in the ALJ's findings, nor any error in his conclusions. In fact, it would be mere speculation to infer from these very limited statements and circumstances that Lang knew Corral well enough to conclude that his behavior represented his usual conduct, rather than intoxication.

Finally, appellant contends that Corral did not show sufficient signs of obvious intoxication. It was undisputed, however, that Corral behaved in an aggressive fashion, had the odor of alcohol on his breath, swayed when he walked, spoke with a slur, and was slightly sluggish as he removed cash from his wallet. [RT 78-79, 81-86.] Corral certainly did not show every known symptom of intoxication, but no such showing is required. The inference of intoxication is supported by the testimony of investigators Rios and Maier, both of whom are trained to make such judgments.

In his findings, the ALJ reasonably concluded that Corral showed signs of obvious intoxication, that Lang was put on notice of Corral's condition, and that she nonetheless chose to sell him not one, but four more beers. We are satisfied that the ALJ's inferences and conclusions are supported by substantial evidence.

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.