

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

AB-9091

File: 48-298535 Reg: 09071418

UJPEST, INC., dba Ujpest Sports Lounge
14034 Vanowen Street, Van Nuys, CA 91405,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: May 5, 2011
Los Angeles

ISSUED JUNE 21, 2011

Ujpest, Inc., doing business as Ujpest Sports Lounge (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its on-sale public premises license for 10 days for its bartender, Kristina Barabas, having served an alcoholic beverage to Ricky Zamudio, an obviously intoxicated patron, a violation of Business and Professions Code section 25602, subdivision (a).

Appearances on appeal include appellant Ujpest, Inc., appearing through its counsel, Ralph B. Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on November 22,

¹The decision of the Department, dated January 5, 2010, is set forth in the appendix.

1994. Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to an obviously intoxicated patron.

An administrative hearing was held on November 4, 2009, at which time documentary evidence was received and testimony concerning the violation charged was presented.

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

Appellant filed a timely notice of appeal, in which it contends: (1) the finding that Ricky Zamudio was obviously intoxicated is not supported by substantial evidence; and (2) the decision fails to explain the bases for its findings regarding credibility. These issues will be discussed together.

DISCUSSION

Appellant contends that the finding that Ricky Zamudio was obviously intoxicated is not supported by substantial evidence. Appellant also contends that the administrative law judge (ALJ) did not explain the basis for his determination that the police officer's testimony about the symptoms of intoxication displayed by Zamudio was more credible than that of bartender Barabas and Zamudio.

"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 Appeals Board may not disregard or overturn a finding of fact by the Department merely because it thinks a contrary finding would have been equally or more reasonable. (*Boreta Enterprises, supra*, at p. 94.)

Conclusion of Law 7 delineates the factors supporting the Department's conclusion that Ricky Zamudio was obviously intoxicated:

(1) he was loud, (2) he dozed off at times, (3) his speech was slurred, (4) his breath smelled of alcohol, and (5) he had trouble balancing. Collectively, these symptoms are sufficient to conclude that Zamudio was obviously intoxicated. Since Barabas was in a position to see all of the symptoms, she should not have served him any additional alcohol.

The term "obviously" denotes circumstances "easily discovered, plain, and evident" which place upon the seller of an alcoholic beverage the duty to see what is easily visible under the circumstances. (*People v. Johnson* (1947) 81 Cal.App.2d Supp.

973 [185 P.2d 105], cited with approval in *Schaffield v. Abboud* (1993) 15 Cal.App.4th 1133, 1140 [19 Cal.Rptr.2d 205].) Such signs of intoxication may include bloodshot or glassy eyes, flushed face, alcoholic breath, loud or boisterous conduct, slurred speech, unsteady walking, or an unkempt appearance. (*Jones v. Toyota Motor Co.* (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611].)

The court in *Schaffield v. Abboud, supra*, approved a jury instruction² which stated:

The term "obvious intoxication" as used in these instructions refers to visible and outward manifestations of intoxication, which include incontinence, unkempt appearance, alcoholic breath, loud or boisterous conduct, bloodshot or glassy eyes, incoherent, slow, deliberate or slurred speech, flushed face, poor muscular coordination, unsteady or slow and deliberate walk, loss of balance, impaired judgment or argumentative behavior. *For an individual to be obviously intoxicated, he must exhibit one or more of these outward and visible signs of intoxication sufficient to cause a reasonable person to believe that he is intoxicated.* It is not sufficient proof to merely show that an individual has been drinking.

(*Schaffield v. Abboud, supra*, 15 Cal.App.4th at p. 1139, emphasis supplied.)

This is not a case where the proof merely showed a person had been drinking.³ There was testimony, which if believed, would support a finding that Zamudio displayed outward signs of intoxication, as well as testimony, which if believed, would support a contrary result. The ALJ chose to believe the testimony of the police officer, and we

²The case involved a personal injury action by Schaffield against Smallwood, the driver of a vehicle which struck her while she was riding a motor scooter, and Abboud, who allegedly sold an alcoholic beverage to an obviously intoxicated Smallwood.

³Los Angeles police officer Javier Lara testified that he and his partner arrived at the premises at 8:30 p.m., and remained there one hour and 20 minutes before calling for backup. Barabas testified that Zamudio arrived at the premises at 7:00 p.m. Zamudio said he arrived at 6:00 p.m. Given these time parameters, it would seem that Zamudio consumed 180 ounces of beer, the equivalent of 15 12-ounce cans or bottles of beer, in less than four hours, and possibly, less than three hours.

cannot fault the manner in which he did so. He explained his reasoning in Conclusions of Law 4, 5 and 6:

CL 4: Whereas Zamudio testified that he ordered four mini-pitchers of beer that evening, Barabas testified that she served him seven mini-pitchers of beer. Each mini-pitcher contains approximately 30 ounces of beer. Ofcr. Lara saw Barabas serve Zamudio the last two mini-pitchers of beer. Since he was not present the entire time that Zamudio was inside the Licensed Premises, he had no way of knowing the total number of mini-pitchers served. Barabas was charged with keeping track of the number of beers she served to Zamudio, including beers ordered but not yet served. Accordingly, she was more credible than Zamudio on this issue and her testimony is expressly relied upon.

CL 5: Each mini-pitcher contains approximately 30 ounces. Zamudio consumed a total of six mini-pitchers, or 180 ounces of alcohol. Thus, prior to the service at issue here (the seventh mini-pitcher), Zamudio consumed an amount of alcohol equivalent to that contained in fifteen 12-ounce cans.

CL 6: The testimony of the witnesses is in direct conflict on the issue of Zamudio's intoxication. Whereas Ofcr. Lara testified that Zamudio displayed a number of symptoms of intoxication, Barabas denied seeing any such symptoms and Zamudio denied displaying such symptoms. California Evidence Code section 780 lists a series of factors to be used in determining the credibility of a witness. In the present case the testimony of Ofcr. Lara is more credible. Whereas Ofcr. Lara has no direct interest in the outcome of this matter, Barabas and Zamudio have an apparent bias as an employee and a regular patron, respectively, of the Licensed Premises. Furthermore, given the quantity of alcohol consumed by Zamudio, his capacity to recognize such symptoms in himself would have been compromised. Accordingly, the testimony of Ofcr. Lara (Finding of Fact ¶¶ 4-8) is expressly relied upon and the testimony of Barabas (Finding of Fact ¶ 11) and Zamudio (Finding of Fact ¶ 9) is rejected.

Citing Government Code section 11425.50, subdivision (b), and the decision in *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 596 [128 Cal.Rptr. 514], appellants argue that the ALJ failed to consider "any specific evidence of the observed demeanor, manner or attitude" of the witnesses when he made his credibility determinations, other than an "apparent bias."

This claim ignores the obvious. Barabas would have an obvious interest in

protecting her employer and her job, Zamudio in protecting what one could fairly assume was his favorite bar. Zamudio testified that he visited the premises three or four times a week, and had been doing so for three or four years. He knows the bartender by her first name, and would have an obvious interest in not saying anything that would get her in trouble or would make him an unwelcome patron. He minimized the number of pitchers of beer he consumed, perhaps because his ability to recall had been compromised, as the ALJ believed, or to protect Barabas from being guilty of having over served.

California Youth Authority, supra, is a very different case. In that case, the credibility determinations lacked any meaningful basis upon which a reviewing court might discern whether the ALJ took the statutory factors into consideration. In the present case, the ALJ explained, and we think sufficiently, the reasons why his conclusions are entitled to great weight.

ORDER

The decision of the Department is affirmed.⁴

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴ 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.