

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

AB-9620

File: 21-429779; Reg: 15083495

BALBIR KAUR SANDHU and MAKHAN SINGH,
dba M & B Cordova Liquors
2787 Don Juan Drive, Rancho Cordova, CA 95670,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: April 6, 2018
Sacramento, CA

ISSUED APRIL 18, 2018

Appearances: *Appellants:* Jeffrey S. Kravitz, as counsel for appellants Balbir Kaur Sandhu and Makhan Singh. (Appellants appeared in propria persona at the administrative hearing.)

Respondent: Sean Klein, as counsel for Department of Alcoholic Beverage Control.

OPINION

Balbir Kaur Sandhu and Makhan Singh, doing business as M & B Cordova Liquors, appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days for selling alcohol to an obviously intoxicated

¹The Decision of the Department under Government Code section 11517, subdivision (c), dated November 2, 2016, is set forth in the appendix, as is the Proposed Decision of the administrative law judge (ALJ), dated June 10, 2016.

Section 11517, subdivision (c)(2)(E) permits the Department to reject the proposed decision—as it did here—and decide the case upon the record, including the transcript of the hearing.

person, in violation of Business and Professions Code section 25602, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on August 23, 2005. On December 17, 2015, the Department instituted an accusation against appellants charging that, on October 22, 2015, appellants' employee, Ram Sood, sold an alcoholic beverage to an obviously intoxicated person. Although not noted in the accusation, the accusation arose as the result of a shoulder tap operation² conducted jointly by the Department of Alcoholic Beverage Control and Rancho Cordova Police Department.

At the administrative hearing held on March 22, 2016, documentary evidence was received and testimony concerning the violation charged was presented by Department Agent Troy Wright; by Ram Sood (the clerk); and by appellant/licensee, Makhan Singh. Appellants were not represented by legal counsel at this hearing.

Testimony established that on October 22, 2015, Agent Wright was parked across the street from the licensed premises in an undercover capacity, monitoring two underage decoys engaged in a shoulder tap operation, visually and with an unrecorded body wire. One of the decoys asked a white male adult (Tyler) to purchase a Four Loko for them and he agreed. Agent Wright observed that the individual staggered as he walked and heard that he had slurred speech when he spoke to the decoys.

Agent Wright followed Tyler into the premises and noticed that he had bloodshot watery eyes, smelled of alcohol, and appeared to sway as he selected a 40-ounce Miller High Life beer from the coolers. Wright formed the opinion that Tyler was intoxicated.

²A "shoulder tap" operation involves minor decoys standing outside convenience stores who ask customers who are going into the store to purchase alcoholic beverages for them. If a customer does purchase alcoholic beverages for the minor decoys then the customer is charged with violating 25658(a) of the Business & Professions Code.

Tyler approached the sales counter and asked the clerk where the Four Loko was. The clerk directed him to another cooler and Tyler retrieved a Four Loko from it. Meanwhile, Agent Wright approached the counter with some items to purchase. He remarked to the clerk, "That guy is fucked up" in reference to Tyler. The clerk nodded. At the administrative hearing, the clerk testified that he did not recall hearing Wright make this remark, and that it did not register with him that Wright was calling his attention to Tyler's level of impairment.

Wright exited the premises and stood outside. Tyler completed his purchases, then approached the decoys and handed the Four Loko over to them. He was detained by Wright and other officers involved in the operation for furnishing alcohol to a minor.

Agent Wright re-entered the premises and contacted the clerk—who thought he was in trouble for allowing Tyler to purchase alcohol for the decoys. Wright questioned the clerk about Tyler's level of intoxication, and the clerk was later cited for selling alcohol to an obviously intoxicated person, in violation of section 25602(a). That citation was subsequently dismissed. (RT at p. 47.)

Both on the day of the operation and at the hearing, the clerk maintained that while Tyler may have been drinking, he was not obviously intoxicated. In his estimation, "He was good" because he did not require help in paying for his purchase. Had he been drunk, the clerk believed he would have required help. (RT at p. 42.) Tyler is a regular customer, and comes into the premises multiple times a day.

Following the hearing, on April 18, 2016, the ALJ issued a proposed decision recommending that the accusation be dismissed. The ALJ found that there was no evidence that established that Tyler staggered or stumbled in the presence of the clerk. He found the evidence presented did not establish that the clerk knew or should have known that Tyler was intoxicated, and that therefore alcohol should not have been sold to him.

Thereafter, on April 25, 2016, the Department's Administrative Hearing Office sent a letter from its Chief ALJ to both appellants and Department counsel, inviting the submission of comments on the decision, stating that the proposed decision and any comments submitted would be submitted to the Director of ABC in 14 days.

Appellants did not submit comments. On May 9, 2016, counsel for the Department submitted a letter pursuant to the comment procedure, arguing that the proposed decision should be reversed. It requested that the accusation be sustained and a penalty of 15-days' suspension be imposed.

The Department initially adopted the proposed decision—dismissing the accusation—on May 23, 2016. A Certificate of Decision was issued on June 10, 2016.

Subsequently, on June 28, 2016, a Motion for Reconsideration was submitted by the Department, which was granted by Director Prieto by an Order dated July 7, 2016. On the same day, the Department issued a Notice stating that it had reconsidered its adoption of the proposed decision and would instead decide the matter itself pursuant to Government Code section 11517, subdivision (c). The Director then reviewed the record, including the transcript of the administrative hearing held on March 22, 2016, and on November 2, 2016 issued a Decision Under Government Code Section

11517(c), sustaining the accusation and suspending appellants' license for 15 days.

Appellants then filed a timely appeal contending the decision is not supported by the findings and the findings are not supported by substantial evidence.

DISCUSSION

Appellants contend the decision is not supported by the findings and the findings are not supported by substantial evidence. (App.Op.Br. at p. 2.) They maintain "the Department Decision factual findings *supplant* that of the trial court in ways that simply do not match the evidence as presented at the hearing." (*Id.* at p. 10.)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts,

the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].)

Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, 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. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris, supra*, at 114.)

Business and Professions Code section 25602, subdivision (a) states:

Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.

This statute "places a duty on the seller, before serving the intended purchaser, to use his powers of observation." (*People v. Johnson* (1947) 81 Cal.App.2d Supp. 973, 975 [185 P.2d 105].) The test for "obvious intoxication" is as follows:

A seller violates the law, and is liable, if the seller serves a customer affected by the commonly known outward manifestations of liquor intoxication, whether by failing to observe what was plain and easily seen or discovered or, having observed, by ignoring what was apparent. To establish liability, it must be proved not only that the patron was intoxicated but that this was obvious. The standard for determining

obvious intoxication is measured by that of a reasonable person having normal powers of observation.

(*Schaffield v. Abboud* (1993) 15 Cal.App.4th 1113, 1140 [19 Cal.Rptr.2d 205].)

In a very old appeal, *Samaras* (1959) AB-921, the Board considered a case in which the alleged obviously intoxicated customer, like Tyler in this case, was a regular customer with whom the bartender was familiar. Even though the customer walked unsteadily, had a flushed face, watery eyes and was incoherent, appellant argued that this evidence was overcome by testimony of his bartender who stated that he didn't think the customer was drunk because this was his usual demeanor, and the statements of two customers in the premises who said the man was a former prize fighter and therefore he would often appear "punchy." The Department suspended the license and the Appeals Board affirmed, as did the Court of Appeal. (*Samaras v. Dept. of Alcoholic Bev. Control* (1960) 180 Cal.App.2d 842 [4 Cal.Rptr. 857] [finding that the alternate explanations did not override the evidence of obvious intoxication].)

In another case, *Strassburger* (1980) AB-4750, an obviously intoxicated person was observed by a Department investigator swaying back and forth, staggering, having slurred speech, difficulty keeping his eyes open, and displaying bloodshot and watery eyes. A clerk who testified stated that the person "always looked that way," and the appellant argued that there was no substantial evidence to establish that the behavior was due to alcohol, since no tests showed him to be intoxicated. The Appeals Board agreed and reversed the Department. The Court of Appeal disagreed and annulled the Board's decision, holding that because the manifestations of intoxication are so well known, non-expert witnesses may offer opinion testimony based

on their observations as to a person's intoxication. (*Rice v. Alcoholic Bev. Control Appeals Bd.* (1981) 118 Cal.App.3d 30, 35-36 [173 Cal.Rptr. 232].) There, as in this matter, the “he always looks like that” defense was overcome by evidence that the individual displayed outward manifestations of being intoxicated.

The standard for determining whether a person is obviously intoxicated is that of a reasonable person who observes the outward manifestations of intoxication. (See: *Schaffield v. Abboud, supra.*) These indicia include:

incontinence, unkempt appearance, alcoholic breath, loud or boisterous conduct, bloodshot or glassy eyes, incoherent or slurred speech, flushed face, poor muscular coordination or unsteady walking, loss of balance, impaired judgment, or argumentative behavior.

(*Jones v. Toyota Motor Co.* (1988) 198 Cal.App.3d 364, 370 [243 Cal. Rptr. 611].)

Appellants maintain there is insufficient evidence that Tyler was intoxicated, and note that he was not cited for being intoxicated in public nor was he given any kind of test to determine if he was under the influence. The statute and precedential opinions on obvious intoxication, however, do not require that the individual be cited, nor do they require any kind of test. Appellants contend that Tyler appears to be a homeless person, and that the description of his appearance is an indication of homelessness, not intoxication. Appellants rightly note that the only basis for the conclusion that Tyler was “obviously intoxicated” is the testimony of Agent Wright. (App.Op.Br. at p. 5.)

Testimony established:

[MR. KLEIN]

Q. Could you describe Mr. Tyler?

[AGENT WRIGHT]

A. He was a white male, appeared to be disheveled, appearance of his clothes were a wreck, and a mess. As

he approached the decoys he approached with a staggering gait, so he had trouble making a straight line as he's walking.

[¶ . . . ¶]

Q. And based on your training and experience, did Mr. Tyler exhibit symptoms of being obviously intoxicated?

A. He had a staggering gait, he was disheveled, basically his clothes were a mess. When he - - he had bloodshot watery eyes and slurred speech. And when he stood, he swayed from side to side.

[¶ . . . ¶]

Q. Did you get close enough that you could detect any odor about him?

A. Yes.

Q. And what was that?

A. I could smell an odor of alcoholic beverages emitting from his person.

Q. And how would you describe that odor? I mean, was it - - could you smell it from a distance? Did you have to get right up next to him?

A. I could smell him from about two or three feet away.

(RT at pp. 19-22.)

Later in his testimony, Agent Wright recounts his interaction with the clerks in the premises:

[MR. KLEIN]

Q. And did you have any discussion with the clerks at that time?

[AGENT WRIGHT]

A. Yes. I told, "That guys pretty fucked up." Pardon the language. And that "He's drunk."

Q. When you said, "That guy is fucked up," you were referring

to Tyler?

A. Yes, I was.

Q. Did you get any response from the clerks?

A. I had - - they nod their heads in the affirmative and Mr. Sood said, "Yes."

(*Id.* at p. 25.)

Agent Wright's testimony was the basis for the following conclusions by the Director:

7. Although Wright observed a wider range of symptoms of intoxication than were displayed in front of Sood, there is evidence that clerk Sood was in a position to readily observe sufficient indicia of intoxication such that he should not have made the sale of alcoholic beverages to Tyler. Specifically, the record establishes that Tyler had a staggering gait and had trouble walking in a straight line as he approached the counter, while he was being watched by Sood. In addition, while standing at the counter, Tyler swayed from side to side, had blood shot and watery eyes, spoke with slurred speech, and had a strong odor of alcohol about his person. Although Sood testified that Tyler is "always like this" and was "a little bit drunk" does not mean that Tyler was not obviously intoxicated. In fact, it suggests that Tyler often purchases alcoholic beverages from the Licensed Premises while intoxicated. Just because that may be a regular occurrence does not justify the sale of alcohol to someone who appears obviously intoxicated.

8. The evidence at hearing was sufficient to establish that Tyler's outward manifestations of intoxication were plain and easily seen or discovered. Sood was in a position where he knew or should have known that Tyler was obviously intoxicated prior to making the sale of an alcoholic beverage to him.

(Conclusions of Law, ¶¶ 7-8.)

After careful examination of the record, we find no flaw in the Department's findings or determinations. Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to

support those findings. As *Masani* instructs us, neither the courts nor the Board “may reweigh the evidence or exercise independent judgment to overturn the Department’s factual findings to reach a contrary, although perhaps equally reasonable, result.” (*Masani, supra* at p. 1437.) Appellants are essentially urging the Board to re-litigate the underlying case, but it is not within the Board’s authority to do so. (See Bus. & Prof. Code, § 23084, *supra*; *Boreta, supra*, at p. 94; *Harris, supra*, at 114; *Kirby, supra*, at p. 335.)

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, 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.