

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

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| DOUGLAS and GAYLE REED |) | AB-6592 |
| dba Palomino Room |) | |
| 723 Main Street |) | File: 48-255850 |
| Red Bluff, CA 96080, |) | Reg: 94030322 |
| Appellants/Licensees, |) | |
| |) | Administrative Law Judge |
| v. |) | at the Dept. Hearing: |
| |) | M. Amanda Behe |
| THE DEPARTMENT OF ALCOHOLIC |) | |
| BEVERAGE CONTROL, |) | Date and Place of the |
| Respondent. |) | Appeals Board Hearing: |
| |) | June 5, 1996 |
| |) | Sacramento, CA |

Douglas Reed and Gayle Reed, doing business as Palomino Room (appellant), appealed from a decision of the Department of Alcoholic Beverage Control¹ which suspended their on-sale general public premises license for five days for appellants' employees selling alcoholic beverages to obviously intoxicated patrons, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, Article XX, §22, arising from a violation of Business and Professions Code

¹The decision of the department dated November 9, 1995, is set forth in the appendix.

§25602, subdivision (a).

Appearances on appeal included appellants Douglas Reed and Gayle Reed, appearing through their counsel, Richard Scheuler; and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on January 25, 1991. Thereafter, the department instituted an accusation against appellants on August 3, 1994, alleging sales to persons showing obvious signs of intoxication, and allowing persons to remain in the premises, a public place, while in a state of intoxication.

An administrative hearing was held on April 19, 1995, at which time oral and documentary evidence was received. Subsequent to the hearing, the department issued its decision which determined that appellants' employees had sold alcoholic beverages to patrons who were obviously intoxicated and suspended appellants' license for five days. For some undetermined reason, the department did not determine that the accusation counts III and IV, being violations of Penal Code §647(f), were proven. Appellants thereafter filed a timely notice of appeal.

In their appeal, appellants raised the issue that the department's decision was not supported by the findings and the findings were not supported by substantial evidence.

DISCUSSION

Appellant contended that the department's decision was not supported by the findings and the findings were not supported by substantial evidence.

We infer from the arguments of the parties, that there is confusion as to the law as such applies to the review process before the appeals board. The scope of the appeals board's review is limited by the California Constitution, by statute, and by case law. In reviewing a department's decision, the appeals board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the department are supported by substantial evidence in light of the whole record, and whether the department's decision is supported by the findings.² Our power concerning consideration of the evidence, stated directly, is: "It is not within our province to weigh the evidence." (Buckhantz v. R.G. Hamilton & Co. (1945) 71 C.A.2d 777, 780 [163 P.2d 756, 758].)

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456], and 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

²The California Constitution, Article XX, Section 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 84 Cal.Rptr. 113.

reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) The court in County of Mariposa v. Yosemite West Associates (1988) 202 Cal.App.3d 791, 807 [248 Cal.Rptr. 779] stated: "[I]n examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is, under the rule which has always prevailed in this court, to be resolved in favor of the finding.' (Bancroft-Whitney Co. v. McHugh (1913) 166 Cal. 140, 142, [134 P. 1157].)" The Mariposa court further stated: "It is not enough that there is more evidence against than in favor of a judgment. (9 Witkin, California Procedure (3d ed. 1985) Appeal, §282, p.293.) 'Of course, all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable [evidence] discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.' (Estate of Teel (1944) 25 Cal.2d 520, 527 [154 P.2d 384].)"

Additional statements of the court in the case of Buckhantz v. R.G. Hamilton & Co., supra, at 163 P.2d 758, are applicable in the present matter: "...and this court will not extend its inquiry for the purpose of determining whether appellant's evidence was as 'overwhelming' as he claims in his brief."

We determine that the crucial findings V and VI were supported by substantial

evidence [R.T. 8-14, 21, 23-24, 46-47, 76-79, 82-84, 88, 133].

Appellants raised arguments concerning conflicts between the testimony of witnesses who testified at the administrative hearing. Appellate review does not "...resolve conflict[s] 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. 658].) Where there are conflicts in the evidence, the appeals board is bound to resolve conflicts of evidence in favor of the department's decision, and must accept all reasonable inferences which support the department's findings. (Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]--a case where there was substantial evidence supporting the department's as well as the license-applicant's position; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].) The Buckhantz court, supra, stated at 163 P.2d 758 that: "The trial judge was face to face with the witnesses and it is trite to say that he was able to determine and did determine from their demeanor on the stand and their manner of testifying which of the expert witnesses were qualified upon the subject and which of those giving positive testimony were entitled to greater weight."

In the present matter, the conflicts in the testimony raise fundamental questions as to the credibility of the witnesses and upon what basis the appeals board may question the credibility of a particular witness. The credibility of a witness's testimony

is determined within the reasonable discretion accorded to the trier of fact. (Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644], and Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812].

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These are some of the perimeters in which the appeals board may review a decision of the department. Continuing, the powers and authority of the department in review of the matters before it are quite different. The department is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the department shall reasonably determine for "good cause," that the continuance of such license, would be contrary to public welfare or morals.

The department found that the bartenders served alcoholic beverages to two patrons who exhibited obvious signs of intoxication. The term "obviously" denotes circumstances "easily discovered, plain, and evident" which places 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].) 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 investigators' testimonies, being percipient witnesses to the signs of intoxication shown by the patrons observed, were sufficient to meet the requirements

of case law. (Jones v. Toyota Motor Co., *supra*; In re William G. (1980) 107 Cal.App.3d 210 [165 Cal.Rptr. 587]; and People v. Murrietta (1967) 251 Cal.App.2d 1002 [60 Cal.Rptr. 56].) The record shows that there were no obstructions between the bartender and the patrons; thus a reasonable inference is that the bartender could have seen what the investigators observed, and is charged with that knowledge. [R.T. 85-86]. (Rice v. Alcoholic Beverage Control Appeals Board (1981) 118 Cal.App.3d 30 [173 Cal.Rptr. 232]; and People v. Smith (1949) 94 Cal.App.2d 975 [210 Cal.Rptr. 98].)

A licensee is vicariously responsible for the unlawful on-premises acts of his employees. Such vicarious responsibility is well settled by case law. (Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; and Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].)

Appellants argue that the bartenders being "very busy bartenders handling a record crowd, working in a very noisy, smoke filled and crowded room are [should not be] expected by the Department to form an opinion of obvious intoxication during cursory conversations and glances at the subjects [the obviously intoxicated patrons]."

Observing misconduct and acting upon that observation requires some reasonable passage of time. However, the observer must not be passive or inactive in regards to his or her duty, but must exercise reasonable diligence in so controlling prohibited conduct. (Ballesteros v. Alcoholic Beverage Control Appeals Board (1965)

234 Cal.App.2d 694 [44 Cal.Rptr. 633].) The Ballesteros case concerned members of a motorcycle club who entered a bar and sat at a table. The bartender knew some of those persons to be members of the club, and had checked the ages of some of the members of the club on prior occasions. However, on this occasion, a minor, who should have been excluded because he was a minor, entered with the club members and remained in the premises unknown to the bartender for about ten minutes before a police officer entered and discovered the unlawful presence of the minor. The court determined that the bartender, while very busy "...was inactive or passive with respect to his affirmative duty to ascertain the age" of the minor. So it would appear in the present matter.

The record shows that a substantial period of time passed, approximately one hour [R.T. 6, 16], in which the bartenders should have observed what the investigators observed, and formed the opinion the investigators formed, that the patrons concerned should not have been provided alcoholic beverages. Failing in this duty, the bartenders violated the law. The law demands that appellants or their employees use substantial efforts in maintaining a lawfully conducted business. (Givens v. Department of Alcoholic Beverage Control (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446, 450].)

CONCLUSION

The decision of the department is affirmed.³

³This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

pursuant to §23090 of said statute.