ISSUED APRIL 3, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MIGUEL VALDOVINOS dba Puerto Escondido 12925 Saticoy Street North Hollywood, CA 91605, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6860 File: 48-274654 Reg: 96035562 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: January 7, 1998 Los Angeles, CA

Miguel Valdovinos, doing business as Puerto Escondido (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered his on-sale general public premises license suspended for 20 days, for his bartender, Ivelisse Lantigua, having served alcoholic beverages, namely 12-ounce bottles of Corona beer, to each of two bar patrons who were obviously intoxicated, 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 §25602, subdivision (a).

[1] The decision of the Department, dated April 3, 1997, is set forth in the appendix.

Appearances on appeal include appellant Miguel Valdovinos, appearing through his counsel, Armando H. Chavira; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on August 14, 1992. Thereafter, the Department instituted an accusation alleging that appellant's bartender served alcoholic beverages to two bar patrons who were obviously intoxicated.

An administrative hearing was held on July 26, 1996, and February 18, 1997, at which time oral and documentary evidence was received regarding the charges in the accusation. Los Angeles police officer Lorenzo Barbosa testified to the symptoms of obvious intoxication he observed displayed by two bar patrons who were each served a 12-ounce bottle of Corona beer, in circumstances where, according to Barbosa, the bartender had sufficient opportunity to observe those symptoms. The bartender did not testify. Appellant, who did testify, claimed that he had recognized Barbosa and his companion as police officers, cautioned his bartender against serving anyone who might be intoxicated, and denied observing any symptoms of intoxication on the part of either of the two patrons.

The Administrative Law Judge (ALJ) resolved the conflict in the testimony in favor of that given by the police officer, finding that the charges of the accusation had been proven. His proposed decision was adopted by the Department without change.

Appellant filed a timely notice of appeal of the Department's decision, and raises two issues. Appellant first contends that the Department engaged in prosecutorial misconduct in attempting to introduce into evidence pleas of nolo contendere entered by appellant and his bartender to misdemeanor criminal charges of having violated Business and Professions Code §25602, subdivision (a), although it knew the pleas were inadmissible by reason of the provisions of Penal Code §1016. Secondly, appellant contends that the evidence does not support the findings, since the officer who testified was unable to match each of the persons alleged to have been intoxicated with the particular Corona bottle from which that person drank.

DISCUSSION

I

Appellant contends that the Department engaged in prosecutorial misconduct in attempting to introduce into evidence pleas of nolo contendere entered by appellant and his bartender to misdemeanor criminal charges of having violated Business and Professions Code §25602, subdivision (a), although it knew the pleas were inadmissible by reason of the provisions of Penal Code §1016, and as so held in numerous court decisions, for the purpose of improperly influencing the ALJ. Appellant contends that despite his objections to the admissibility of the nolo contendere pleas, and despite the ALJ's ultimate ruling that such pleas were not admissible, his client was prejudiced by the fact the ALJ was exposed to what he could only perceive as admissions of guilt.

Appellant cites Penal Code §1016, which states, in pertinent part:

> "... in cases other than those punishable as felonies, the plea [of nolo contendere] and any admissions required by the court during any inquiry it makes as to the voluntariness of, and any factual basis for, the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based."

Appellant also cites County of Los Angeles v. Civil Service Commission (Calzada) (1995) 39 Cal.App.4th 620 [46 Cal.Rptr.2d 256], which sustained the exclusion of such a plea in an administrative proceeding challenging the termination of employment of a deputy sheriff who had entered a plea to a misdemeanor charge of receiving stolen property. The Calzada court, in turn, relied upon a decision of the California Supreme Court in Cartwright v. Board of Chiropractic Examiners (1976) 16 Cal.3d 762 [129 Cal.Rptr. 462], an administrative proceeding to revoke the license of a chiropractor who had pled nolo contendere to a charge of keeping a disorderly house. In that case, the Court affirmed the judgment of the trial court which had ordered the Board of Chiropractic Examiners' order of revocation set aside.

In Cartwright, the court looked to the legislative purpose in making certain conduct grounds for discipline in administrative proceedings, discerning an intent "to reach those who have actually committed the underlying offenses." (16 Cal.3d at 773). But when the conviction of the underlying offense is based upon a nolo contendere plea, said the Court, its reliability as an indicator of guilt is substantially reduced because of the defendant's reservations about admitting guilt for all purposes,

and the indication of weakness in the evidence reflected by the willingness of the court and the prosecutor to approve the plea. (Ibid.)

The Cartwright decision discusses the decision in Kirby v. Alcoholic Beverage Control Appeals Board (1969) 3 Cal.App.3d 209 [83 Cal.Rptr. 89], a case where the Appeals Board had set aside a revocation order of the Department on the ground it was not supported by substantial evidence. The Board concluded that a conviction based upon a nolo contendere plea to a charge of receiving stolen property did not constitute a "plea, verdict, or judgment of guilty to any public offense involving moral turpitude" within the meaning of then §24200, subdivision (d) of the Business and Professions Code.

The Court of Appeal also reversed the Department, agreeing with the Appeals Board that the nolo contendere plea was not a "plea, verdict, or judgment of guilty to any public offense involving moral turpitude" within the meaning of then §24200, subdivision (d). The court cited two earlier California cases (Caminetti v. Imperial Mutual Life Insurance Co. (1943) 59 Cal.App.2d 476 [139 P.2d 681], and In re Hallinan (1954) 43 Cal.2d 243 [272 P.2d 768]), in which pleas of nolo contendere were ruled inadmissible.[2]

The court pointed out (Kirby, supra, at 220-221) that subsequent to the Hallinan decision, the Legislature had amended a number of statutes in the Business and

[2] Caminetti was a proceeding to dissolve a conservatorship established by the Insurance Commissioner, and In re Hallinan was a disbarment proceeding.

Professions Code to ensure that convictions following a plea of nolo contendere could be used to provide the basis for an administrative penalty. Section 24200, subdivision (d), was not one of the statutes so amended. The court reasoned that this omission reflected the Legislature's reaction to the Caminetti and Hallinan decisions by removing the judicial shield from specific occupations and professions, and a legislative intent not to remove the shield from occupations and professions not so designated. The alcoholic beverage control provisions of the Business and Professions Code were not among those which were amended.

The Department cites the fact that the legislature amended §24200 in 1978 to include a reference to a plea of nolo contendere. The Department argues further (Dept.Br. 3) that it "needs only an enabling statute ... to permit the consideration of nolo plea convictions for disciplinary actions in an administrative hearing," and cites several of the provisions contained in Division 1.5 of the Business and Professions Code, which relate generally to the denial, suspension and revocation of licenses.

We believe the Department has misread the law. It is this Board's view that there was no proper basis for the Department's attempt to introduce the plea of nolo contendere, for the following reasons:[3]

First, the Department overlooks the requirement of §24200, subdivision (d), that the plea be to a public offense involving moral turpitude. Thus, the section does not

[3] The Department concludes its brief with the statement that "it was proper to admit such evidence before this case, remains proper, and will be done in the future." (Dept.Br. 9.) We disagree, and are of the opinion the Department must be so advised.

authorize the use of the nolo contendere plea in a disciplinary proceeding where the underlying offense is not one involving moral turpitude.

Moral turpitude is a term susceptible to broad interpretation. It has been defined to embrace:

> "any crime or misconduct committed without excuse, or any 'dishonest or immoral' act not necessarily a crime. ... The definition depends on the state of public morals and may vary according to the community or the times, as well as on the degree of public harm produced by the act in question. ... Its purpose as a legislative standard is not punishment, but protection of the public. ...
>
> "Moral turpitude has also been defined in criminal cases involving the use of prior convictions for impeachment purposes. Crimes which reveal a defendant's dishonesty, general 'readiness to do evil,' bad character or moral depravity involve moral turpitude."

(Clerici v. Department of Motor Vehicles (1990) 224 Cal.App.3d 1016, 1027-1028 [274 Cal.Rptr.230].)

As broad as the term may be, we do not believe it can be said that the sale of a single bottle of beer to a person who, in the opinion of a police officer, is intoxicated at the time, is a crime involving moral turpitude. It is a subject for disciplinary action under public welfare and morals, in order to discourage the promotion of intemperance and the consequences which can flow from alcohol excesses, but, at least in our view, it does not descend to the level of moral turpitude.

The sections of the Business and Professions Code in Division 1.5 upon which the Department relies have no applicability. This is because of the language of §476, which provides that "nothing in this division shall apply to the licensure or registration of persons pursuant to Chapter 4 (commencing with section 6000) of Division 3, or

pursuant to Division 9 (commencing with Section 23000) or pursuant to Chapter 5, commencing with Section 19800) of Division 8.

It follows that the Department's reliance on the various sections of the Code cited on page 3 of its brief (§§475; 477; 490; and 494) is misplaced.

The Department cites a number of Board decisions it claims supports the propriety of its attempted use of the nolo contendere plea. However, each of the Board's decisions cited by the Department, with a single exception, and that not on point, involved crimes involving moral turpitude.[4]

The important question in this appeal becomes whether appellant is entitled to any relief, in light of the fact that the ALJ ultimately sustained his objection to the Department's use of the plea of nolo contendere. The Department argues that there was no prejudice because the ALJ decided the case without considering the plea, and because the "convictions" were not presented until the close of the evidence in the Department's case.

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[4] Sakhawat Ullah (1994) AB-6414 involved a plea of nolo contendere to charges of insurance fraud, grand theft, and perjury. Pete Paulsen (1994) AB-6431 involved a plea of nolo contendere to charges of possession for sale and transportation of amphetamines. The plea in Amelia & Louie Cisneros (1995) AB-6503 was to charges of the sale and possession for sale of controlled substances. Juan & Rose Garza involved a plea either of guilty or nolo contendere to charges of sale of marijuana. Adnam Alquidsi (1996) AB-6542 involved the crime of receiving stolen property.

The only exception, Roberto Herrera (1996) AB-6529, involved the revocation of a license where the licensee had failed to disclose a prior conviction of lewd conduct as well as his use of other names.

There is nothing concrete to which this Board can point to show that the offer of the plea tended to bias the ALJ against the appellant. In the hearing itself he ruled the proffered evidence inadmissible. In his proposed decision, he acknowledged the conflict in the evidence, and, stating that he was guided by the factors set forth in §780 of the Evidence Code, and gave greater weight to the testimony of the police officer in support of the Department's charges. The nolo contendere plea was not mentioned in the proposed decision. Since, in our view, there was substantial evidence to support the ALJ's findings and determinations, we see no reason to set aside his decision.

II

Appellant contends there is not substantial evidence in support of the findings, contending that the police officer's inability to identify the specific bottle from which each of the intoxicated patrons drank is a fatal evidentiary flaw.

"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 US 474, 477 [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

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 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].) 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].)

Officer Barbosa testified that he observed these symptoms, and that the bartender was also in a position where he should have been able to observe the symptoms being displayed and refused further service. The ALJ accepted the officer's testimony over that of the appellant. While Barbosa may not have been able to match each drinker to a particular bottle, his testimony that he saw each of the two intoxicants served a bottle of Corona beer is all that is necessary.

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both

the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; 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 credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

The ALJ saw and heard the witnesses, and if the testimony of the police officer is to be believed, as it was by the ALJ, there is substantial evidence in support of the charges of the accusation.

CONCLUSION

The decision of the Department is affirmed.[5]

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

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[5]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate 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.