

ISSUED MARCH 30, 1998

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

|                                |   |                          |
|--------------------------------|---|--------------------------|
| ACAPULCO RESTAURANTS, INC.     | ) | AB-6876                  |
| dba Acapulco                   | ) |                          |
| 4444 Sunset Boulevard          | ) | File: 47-196184          |
| Los Angeles, California 90027, | ) | Reg: 96037989            |
| Appellant/Licensee,            | ) |                          |
|                                | ) | Administrative Law Judge |
| v.                             | ) | at the Dept. Hearing:    |
|                                | ) | John P. McCarthy         |
| DEPARTMENT OF ALCOHOLIC        | ) |                          |
| BEVERAGE CONTROL,              | ) | Date and Place of the    |
| Respondent.                    | ) | Appeals Board Hearing:   |
|                                | ) | January 7, 1998          |
|                                | ) | Los Angeles, CA          |

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Acapulco Restaurants, Inc., doing business as Acapulco (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended its license for 25 days, with 10 days stayed for a probationary period of one year, for appellant's bartender having sold an alcoholic beverage (beer) to an obviously intoxicated person, 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).

Appearances on appeal include appellant Acapulco Restaurants, Inc.,

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<sup>1</sup>The decision of the Department, dated May 22, 1997, is set forth in the appendix.

appearing through its counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

#### FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on December 30, 1986. Thereafter, the Department instituted an accusation against appellant charging that appellant's bartender, Antonio Lopez, sold or furnished an alcoholic beverage (beer) to Jose Ignacio Valencia, a person who was obviously intoxicated.

An administrative hearing was held on March 11, 1997, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of Julio Duarte, a Los Angeles police officer, in support of the charge of the accusation. Appellant presented the testimony of Antonio Lopez, the bartender charged with having sold or furnished the beer; Jose Ignacio Valencia, the patron allegedly intoxicated at the time the beer was sold or furnished to him; Humberto Llamas, appellant's assistant manager; and Stacey Franscella, appellant's training director.

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

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issue: the Department's decision is based upon observations by the police officer of matters which could not have been observed by anyone other

than himself.

## DISCUSSION

Appellant contends that the decision is flawed because officer Duarte testified that, in forming his opinion that Valencia was obviously intoxicated, he relied on factors that the bartender, even if on the alert for symptoms of intoxication, could not have been in a position to observe. Thus, appellant argues this is not a case where the issue is one of credibility,<sup>2</sup> but one where the issue is whether there is any substantial evidence in the record to support the finding of the Administrative Law Judge (ALJ). Appellant frames the question as whether appellant's bartender had the ability and opportunity to observe that which the officer observed.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the 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,

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<sup>2</sup> The ALJ found the credibility of the testimony of Lopez and Llamas damaged by the fact that they both testified that Valencia was a "clown," when no clowning characteristics were in issue. We think the ALJ may have been mistaken in this respect. There was the testimony of Duarte that Valencia danced on his return from the rest room. That someone may view a man dancing alone as clownish is not that difficult to believe. Having said this, we nonetheless agree with appellant that the controlling issue is not one of credibility, and the fact that the ALJ chose to disbelieve certain aspects of the testimony of Lopez and Llamas does not impair the Department's decision.

and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.<sup>3</sup>

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

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].)

This is not the typical case where Duarte, the police officer, observed a

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<sup>3</sup>The California Constitution, article XX, §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].

collection of symptoms of intoxication after watching Valencia, the intoxicant, for a few minutes in a context where Lopez, the bartender, if paying attention, had an identical opportunity to observe those symptoms, and the issue being whether officer Duarte's testimony is to be deemed credible. In this case the credibility of the police officer has not been questioned. And, although the ALJ found the testimony of appellant's witnesses suspect, neither does the issue raised by appellant involve a challenge to that finding. Instead, the issue that is determinative is whether the statute is violated where there is evidence that Lopez had the opportunity to observe those symptoms known to be associated with a state of obvious intoxication that led the ALJ to conclude that Valencia, the intoxicated patron, was obviously intoxicated when Lopez sold him the beer. Stated another way, is it fatal to the Department's case that Lopez did not observe all of the symptoms and behavior which the police officer observed in formulating his opinion that Valencia was obviously intoxicated when he was served the beer?

The argument appellant presents to the Appeals Board was also made to the ALJ, who found it unpersuasive. The ALJ's findings stress that Lopez had the same opportunity to view the symptoms of intoxication that officer Duarte had, with the exception of what Duarte observed during the time he and Valencia were in the restroom together, and those symptoms - bloodshot and watery eyes, slurred voice, flushed face, unsteady gait, stumbling while dancing, odor of alcoholic beverage - were sufficient to put the Lopez on notice that Valencia should not be

served another drink.

The law demands that a licensee 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].)

As the court explained in People v. Johnson (1947) 81 Cal.App.2d Supp. [185 P.2d 105, 106]:

“It seems clear, therefore, that a duty is placed upon the seller, before serving the intended purchaser, to use his powers of observation to such extent as to see that which is easily seen and to hear that which is easily heard, under the conditions and circumstances then and there existing. ... The use of intoxicating liquor by the average person in such quantities 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 that which was apparent. Upon trial therefore, the facts constituting the alleged outward manifestations should be presented, and it is the exclusive province of the jury to determine whether they are such as to be obvious to a person having normal powers of observation, and recognizable as the usual indications of an obviously intoxicated person.”

People v. Johnson, *supra*, was cited with approval, and quoted, by the California Supreme Court in Coulter v. Superior Court (1978) 21 Cal.3d 144, 155 [145 Cal.Rptr. 534], and in Rice v. Alcoholic Beverage Control Appeals Board (1981) 118 Cal.App.3d 30, 35-36 [173 Cal.Rptr. 232], where the court pointed out that “courts have long recognized that the outward manifestations of intoxication are well known and easily recognized.”

Such signs of intoxication may include bloodshot or glassy eyes, flushed

face, alcoholic breath, loud or boisterous conduct, slurred speech, poor muscular coordination, loss of balance, unsteady walking, or an unkempt appearance. (Jones v. Toyota Motor Co. (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611].)

In this case, the ALJ, sitting as the trier of fact in the first instance, determined from the evidence that Valencia exhibited sufficient symptoms of intoxication which could or should have been easily observed by Lopez so as to put him on notice that Valencia was intoxicated and should have been refused any further alcoholic beverages.

The facts set forth in Finding III of the proposed decision indicate that Lopez, the bartender, was in a position to observe at least the following indicia of intoxication that were observed by officer Duarte and which contributed to the ALJ's determination:

- (1) Head resting on hands on bar. This would clearly have been noticeable.
- (2) Slurred speech. Valencia's speech was slurred when he spoke to officer Duarte in the restroom. It is reasonable to infer that it was slurred when he was speaking to Lopez and others only moments earlier.
- (3) Unsteady walking. Lopez was in a position at the bar where he could see Valencia on his way toward, and returning from, the restroom, his circuitous travel each way marked by unsteadiness. Although officer Duarte was not able to testify that Lopez was watching Valencia at that moment, Duarte's description of the path Valencia followed showed that it was within the field of view of Lopez.

(4) Bloodshot and watery eyes. Lopez could easily have observed Valencia's eyes while he and Valencia, and two others, were huddled in conversation shortly before Valencia went to the restroom, and again when he returned.

(5) Flushed face. Duarte observed Valencia's flushed face, as well as his eyes, when Valencia walked by him before entering the restroom. Lopez could have noticed the condition of Valencia's face when he was speaking to him and when he later ordered the last beer.

(6) Dancing and appearing to stumble. Officer Duarte described Valencia as dancing alone during his return trip from the restroom, and appearing to stumble in the process. According to Duarte, Lopez was facing in the direction of Valencia when Valencia appeared to have trouble dancing, his steps unsteady and unmeasured, and appearing to stumble.

(7) Assistance in returning to bar. The security guard went to Valencia, put his arm around him, and accompanied him to the bar. An objective person seeing this would reasonably interpret the gesture as one of assistance to a person who needed it.

(8) Breath odor of alcohol. Although officer Duarte smelled Valencia's breath while in the restroom, Lopez had ample opportunity to do the same while they were huddled in conversation just prior to his trip to the restroom.

In addition to the above, the ALJ heard testimony from Duarte that appellant's manager or assistant manager, Humberto Llamas, told him (Duarte) that



he had told Lopez an hour earlier not to sell any more beer to Valencia, and to serve him only water. Appellant's witnesses, including the bartender, admitted such a statement had been made, but attempted to pass it off as a joke. The ALJ concluded that it was highly unlikely that Llamas would have told a police officer about the statement if it was something Llamas was saying only in jest.

It is not clear from the decision how much weight was placed on Llamas' statement, but there was sufficient evidence even without it to sustain the Department.

Appellant places great weight on the fact that the police officer formulated his opinion only after his conversation with the patron in the restroom, a conversation, and what was said in it, unknown to the bartender. However, the evidence clock did not stop once the officer concluded the patron was intoxicated. Valencia's return from the restroom was marked by his difficulty dancing, his unsteady steps and his stumbling. It was after the bartender had the opportunity to observe these additional symptoms of intoxication that he served Valencia another beer.

The basic error in appellant's reasoning lies in its assumption that it is the opinion of the police officer that provides the foundation for the Department's conclusion that Valencia was obviously intoxicated. The ALJ, as the trier of fact, was charged with the duty of considering the evidence on the issue of obvious intoxication, and coming to his own conclusion. He did so on the basis of facts to

which officer Duarte testified, not on Duarte's opinion. Thus, appellant's argument that it is unfair to charge Lopez with knowledge he could not have had when he sold the beer to Valencia upon his return from the rest room, rests on a false premise, and, accordingly, lacks merit.

### CONCLUSION

The decision of the Department is affirmed.<sup>4</sup>

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

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<sup>4</sup>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.