

ISSUED NOVEMBER 27, 2000

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

ALLEN O. and RISE B. HERRING	)	AB-7544
dba Starlite Room	)	
11411 Moorpark Street	)	File: 48-315496
North Hollywood, CA 91602,	)	Reg: 99046908
Appellant s/Licensees,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Ronald M. Gruen
	)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	October 5, 2000
	)	Los Angeles, CA

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Allen O. and Rise B. Herring, doing business as Starlite Room (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended their license for 20 days for their bartender having served an alcoholic beverage to a patron who was then 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).

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<sup>1</sup>The decision of the Department, dated November 18, 1999, is set forth in the appendix.

Appearances on appeal include appellant Allen O. and Rise B. Herring, appearing through their counsel, Andreas Birgel, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Kim.

#### FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on February 21, 1996. Thereafter, the Department instituted an accusation against appellants charging that, on June 11, 1999, appellants' bartender, George Lawing, sold, furnished or gave, or caused to be sold, furnished or given away, an alcoholic beverage (beer) to John Notarnicola, a person who was then obviously intoxicated, in violation of Business and Professions Code §25602, subdivision (a).

An administrative hearing was held on October 14, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Los Angeles police officer Camerino Mesina; by George Lawing, appellants' bartender; and by appellant Allen Herring, one of the licensees.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation, and ordered a 20-day suspension.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the findings of fact are not supported by substantial evidence in light of the whole record; (2) the evidence is insufficient to support a finding that Business and Professions Code §25602, subdivision (a), was violated; and (3) the penalty is excessive. The issues concerning the sufficiency of

the evidence will be discussed together.<sup>2</sup>

## DISCUSSION

### I

Appellants contend that the findings are not supported by substantial evidence, and that there is insufficient evidence to support a finding of a violation of Business and Professions Code §25602, subdivision (a).

"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]; 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].)

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<sup>2</sup> Although appellants' brief sets forth as an issue the question whether there was relevant evidence which was excluded from the hearing and which was available to the Department, the brief contains no discussion of the issue. Therefore, we do not consider this issue. (See Horowitz v. Noble (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710]; Sutter v. Gamel (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].)

Business and Professions Code §25602, subdivision (a), states, in pertinent part, that “every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any ... obviously intoxicated person is guilty of a misdemeanor.” Appellants contend there is no credible evidence that Notarnicola, the patron in question, was obviously intoxicated, or that his condition was obvious to the bartender.

The Administrative Law Judge, relying upon the testimony of officer Mesina, found that Notarnicola kibitzed in a very loud voice while his companions were playing darts (Finding 5); held a bottle of beer in each hand, swayed from side to side, lost his balance and leaned twice against a nearby wall, walked unsteadily toward the fixed bar, accompanied by a companion who held him by his shoulder, apparently to steady him as he walked (Finding 6); his eyes red and his face flushed, Notarnicola slammed the bottle in each hand on the counter in an apparent loss of balance, while two feet from the bartender who was busy behind the bar serving patrons (Finding 7); and paid for the beer served to him by the bartender, who had removed the two beer bottles Notarnicola had placed on the bar.

The findings delineated above are clearly sufficient to support a finding that Notarnicola was obviously intoxicated.

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].) These are clearly questions for the trier of fact. (See Sheffield v. Abate (1993) 15 Cal.4th 1133, 1140-1141 [19 Cal.Rptr.2d 205].)

Appellants challenge the credibility of officer Mesina's testimony, contending, among other things, that he was inexperienced, that his testimony was inconsistent with matters stated in his investigation report, that he testified about matters that were not mentioned in his report, and that he made his observations over a relatively short period of time.

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].) Here, the police officer was questioned extensively on direct and cross-examination. The ALJ had ample opportunity to assess his credibility. While there may have been inconsistencies and discrepancies in Mesina's testimony, the ALJ obviously concluded that, on the whole, his testimony was sufficiently credible as to support his findings regarding Notarnicola's behavior.

Appellants acknowledge that the Board may not substitute its own judgment of a witness's credibility for that of the trier of fact, but suggest that the Board can accomplish the same purpose by declaring that such testimony does not constitute substantial evidence. Whatever may be the merit of such an argument in the abstract, we do not find it persuasive in this case. It is apparent that the ALJ

found officer Mesina's testimony both credible and substantial.

Appellants also contend that there was no evidence that Notarnicola's condition was obvious to the bartender. They contend that the bar was very busy, and that he was not given an adequate period of time to observe the symptoms of intoxication.

The ALJ rejected appellants' claim. Instead, he found it no excuse that the bartender did not pay attention to Notarnicola's symptoms of intoxication because he was busy serving other patrons.

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].) Given the array of symptoms displayed by Notarnicola, many of which should have drawn the attention of a person charged with the duty of maintaining a lawfully-conducted business, we are inclined to agree with the ALJ that the fact that the bartender was busy was no excuse.<sup>3</sup>

## II

Appellants contend that the penalty - a 20-day suspension - is excessive, since this was appellants' first offense.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage

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<sup>3</sup> The fact that Notarnicola, his eyes red and his face flushed, slammed two beer bottles on the bar while the bartender was only two feet away, suggests that a reasonably diligent bartender would have had reason to believe Notarnicola should not be served an alcoholic beverage.

Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].)

However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The suspension in this case is that which the Department ordinarily orders in matters involving service to intoxicated patrons. There is nothing the Board can point to that would suggest that the Department abused its discretion in imposing its standard penalty for this type of violation.

#### ORDER

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

TED HUNT, CHAIRMAN  
RAY T. BLAIR, JR., MEMBER  
E. LYNN BROWN, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>4</sup> 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.