

ISSUED NOVEMBER 28, 2000

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

| | | |
|----------------------------|---|--------------------------|
| RAFAEL LOPEZ |) | AB-7567 |
| dba El Atoron |) | |
| 11 19-21 Burbank Boulevard |) | File: 40-124204 |
| North Hollywood, CA 91601, |) | Reg: 99047039 |
| Appellant/Licensee, |) | |
| |) | 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 |

Rafael Lopez, doing business as El Atoron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his on-sale beer license for his bartender having sold and furnished an alcoholic beverage (beer) to two 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 §25602, subdivision (a).

¹The decision of the Department, dated December 23, 1999, is set forth in the appendix.

Appearances on appeal include appellant Rafael Lopez, appearing through his counsel, Andreas Birgel, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on June 15, 1982. Thereafter, the Department instituted a three-count accusation against appellant charging that on May 1, 1999, appellant's employee, Socorro Toscano ("Toscano"), sold or furnished an alcoholic beverage to each of three patrons who were obviously intoxicated.

An administrative hearing was held on November 2, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Los Angeles police officer Edward Dominguez, the sole witness on the charges of the accusation.

Subsequent to the hearing, the Department issued its decision which determined that two of the three counts of the accusation should be sustained, those involving patrons Guadalupe Orozco ("Orozco") and Juan Garcia ("Garcia"). The third count, involving patron Florentino Sagastume ("Sagastume"), was dismissed.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) there is not substantial evidence in light of the whole record in support of the findings; (2) there is insufficient evidence to support a finding that Business and Professions Code § 25602, subdivision (a), was

violated; and (3) the penalty is excessive. Issues (1) and (2) are interrelated, and will be discussed together.

DISCUSSION

I

Appellant contends that there is not substantial evidence to support the Department's findings, and that there is insufficient evidence to support a finding that Business and Professions Code §25602, subdivision (a), was violated.

"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].)

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].)

With these principles in mind, we have reviewed the testimony of officer Dominguez and have concluded that there was sufficient, and substantial, evidence to support the findings of the Administrative Law Judge.

Officer Dominguez testified that the three patrons were seated together at the bar. His attention was drawn to Orozco within a minute after he entered the bar. Orozco was seated approximately five feet from him, and was yelling and singing "out of tune and out of time." She had red and bloodshot eyes, which drooped a little, and her speech was slow and slurred, out of pace with the music. Garcia, who was standing next to Orozco, was having a hard time maintaining his balance, at times placing his hand on the bar counter or on Orozco's shoulder to maintain his balance. When Orozco would turn away, Garcia would remove his hand, but then return it to her shoulder. Garcia's eyes were also bloodshot and watery, and he swayed an inch or two from side to side.

Sagastume also displayed bloodshot eyes, according to Dominguez, and would occasionally raise his head and start yelling and singing out loud.

Dominguez testified that Toscano was standing about four feet away, watching the three patrons the entire time he himself was watching. At one point Toscano approached the three and held her finger to her mouth as if to quiet them. In response, they laughed and yelled at her, to the point where another patron complained of the noise. Toscano then approached the three, had a brief

conversation, went behind the bar, opened three bottles of beer, and served a bottle of beer to each of the three patrons, who paid for them. At this point, Dominguez signaled to his partners for backup. Dominguez initially estimated that two or three minutes elapsed between the time of his first observation of the three and the time he concluded they were intoxicated. On cross-examination, he testified that seven minutes elapsed.

Appellant describes as “startling” Dominguez’s testimony that he observed the three patrons for only two or three minutes. Appellant also recites a number of symptoms of intoxication that Dominguez did not claim to have seen, and did not mention in his report, suggesting that their absence precludes any finding of intoxication.

The determination whether a person is obviously intoxicated is made by reference to the symptoms exhibited by that person. As stated in People v. Johnson (1947) 81 Cal.App.2d Supp. 973, 975-976 [185 P.2d 105], overruled on other grounds, Paez v. Alcoholic Beverage Control Appeals Board (1990) 222 Cal.App. 3d 1025, 1027 [272 Cal.Rptr. 272]:

“The use of intoxicating liquor by the average person in such quantity 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.”

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].)

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].)

The time necessary to observe misconduct and act 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].)

According to Dominguez, Toscano was only a few feet away from the three patrons, and was observing their actions during the same time he was observing them. She would have had ample opportunity to determine the state of their sobriety.

Appellant's attack of officer Dominguez's credibility is unavailing. The Administrative Law Judge heard his testimony and adjudged it credible. It is not the Board's function to second guess the ALJ on the issue of credibility. (See 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], supra.)

II

Appellant contends that the penalty - revocation - is excessive.

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 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].)

Department counsel recommended that appellant's license be revoked because of his extensive disciplinary record, citing three previous instances of discipline in the past three years, and a total of seven in the past ten years, four of which were the same type of violation - sale to intoxicated person - as in this case.

The ALJ found that, on the record before him, appellant has "recorded his sixth and seventh violation of Business and Professions Code §25602(a) since 1990. The recommended penalty of revocation on the part of the complainant is appropriate for the protection of the consuming public."

Given appellant's substantial disciplinary history, and the repeat character of the offenses, we do not believe it can be said that the Department abused the discretion given it by law.

ORDER

The decision of the Department is affirmed.²

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

² 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.