

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

NATURAL NINE, INC. dba Sam's Hof Brau
1751 E. Olympic Blvd., Los Angeles, CA 90021,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
AB-7587

File: 47-307710 Reg: 99047047

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: October 5, 2000
Los Angeles, CA

ISSUED NOVEMBER 21, 2000

Natural Nine, Inc., doing business as Sam's Hof Brau (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 30 days for appellant's employees selling or furnishing alcoholic beverages to obviously intoxicated persons, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §25602, subdivision (a).

Appearances on appeal include appellant, Natural Nine, Inc., appearing through its counsel, Andreas Birgel, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated February 10, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on August 8, 1995. Thereafter, the Department instituted a three-count accusation against appellant charging that on April 23 and May 26, 1999, appellant's employees sold alcoholic beverages to obviously intoxicated persons.

An administrative hearing was held on January 11, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the violations noted above.

Subsequent to the hearing, the Department issued its decision which determined that the allegations in all three counts had been proved. Appellant's Petition for Reconsideration was denied by the Department.

Appellant thereafter filed a timely appeal in which it raises the following issues: (1) the findings are not supported by substantial evidence, and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends that there is no substantial evidence supporting the findings because the testimony of the officers involved was not credible, there were some symptoms of intoxication that the patrons involved did not display, and the intoxication of the patrons, if it existed, was not obvious to the bartenders.

Most of appellant's argument deals with the credibility of the officers who testified, listing minor inconsistencies between their reports and their testimony. The credibility of witnesses, however, is a determination to be made by the trier of fact, the

Administrative Law Judge (ALJ), not by this Board. (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 Board, with only the cold record to consider, is not in a position to second guess the ALJ, who observed the witnesses at the hearing. In addition, the inconsistencies cited by appellant are so minor as to make this contention verge on the frivolous.

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].)

Appellant argues that the patrons involved did not demonstrate some of the common symptoms of intoxication. This is true, but given the symptoms each of the patrons did demonstrate, it is irrelevant. Not all people will display all symptoms when intoxicated.

All three of the patrons displayed bloodshot eyes, slouching posture when sitting and walking, and unsteadiness. In addition, Frank Silva's face was flushed and he held on to the rail of the bar counter when he danced. Jose Correa's speech was slurred, he held on to the bar rail to maintain his balance, and he nearly fell down as he tried to part the curtains at the exit. Esteban Galindo also had

slurred speech and had to hang on to the bar rail for support. These symptoms, observed by the officers over 30 to 45 minutes, are clearly enough to warrant a conclusion that the patrons were obviously intoxicated.

Appellant argues that, even if the three patrons were intoxicated, there was no credible evidence that the bartenders knew they were intoxicated or that their condition was obvious to the bartenders.

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].)

As noted above, the patrons were observed for from 30 to 45 minutes by the officers and their symptoms of intoxication were obvious. They displayed those symptoms in the public part of the premises, not hidden in a corner or in a private room. From the descriptions given, one would not need to be close to the patrons to conclude from their obvious symptoms that they were intoxicated. There was no evidence that there were obstructions between the bartenders and the patrons; thus a reasonable inference is that the bartenders could have seen what the officers observed, and are charged with that knowledge. (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].)

In addition, the evidence shows that the bartenders were in sufficiently close proximity to the intoxicated patrons to clearly put them under “a duty to see what

[was] easily visible under the circumstances.” Correa was standing at the bar part of the time where the bartender waited on him. Galindo was sitting, slouched over, at a table about eight feet from the bartender, and when he went to the restroom, he walked along in front of the bar counter, using a handrail along the bar to steady himself on the way there and back. Silva was at the bar counter when he was yelling and dancing like a male stripper. All three of these patrons were served beer after they had displayed obvious, common symptoms of intoxication for a considerable period of time in full view of the bartenders who served them. The bartenders either saw or should have seen what was in front of them, and they violated the statute when they served these patrons.

II

Appellant contends the penalty is excessive. It’s argument, however, hinges on the Board finding in its favor on the preceding issue. Since we reject appellant’s argument above, appellant has no basis for this contention.

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

²This 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 order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.