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

AB-7697
File: 23-329938 Reg: 00048294

NEWPORT AVENUE BAR & GRILL, INC. dba Newport Avenue Bar & Grill
4935 Newport Avenue, San Diego, CA 92107,
Appellant/Licensee
v.
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: June 7, 2001
Los Angeles, CA

ISSUED AUGUST 16, 2001

Newport Avenue Bar & Grill, Inc., doing business as Newport Avenue Bar & Grill (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 35 days for appellant's bartender selling and furnishing an alcoholic beverage to a person under the age of 21 years, and appellant's corporate president resisting, delaying or obstructing a police officer in the performance of his duties, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivisions (a) and (b), arising from violations of Business and Professions Code §25658, subdivision (a), and Penal Code §148.

Appearances on appeal include appellant Newport Avenue Bar & Grill, Inc., appearing through its counsel, William R. Winship, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Michele Wong.

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[1]The decision of the Department, dated August 31, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's small beer manufacturer's license was issued on May 27, 1997. Thereafter, the Department instituted an accusation against appellant charging the illegal sale and resisting a police officer.

An administrative hearing was held on May 25, 2000, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violations had occurred.

Appellant thereafter filed a timely notice of appeal.

The Appeals Board on March 6, 2001, notified appellant in writing, of the opportunity to file briefs. However, no brief has been filed by appellant. The Appeals Board is not required to make an independent search of the record for error not pointed out by appellant. It is the duty of appellant to advise the Appeals Board that any claimed error exists, with some precision. Without such assistance by appellant, the Appeals Board may deem the general contentions waived or abandoned. (Horowitz v. Noble (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710] and Sutter v. Gamel (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].) We have reviewed the notice of appeal which in non-specific terms, raises the issues of lack of substantial evidence to support the decision of the Department, and the penalty is excessive. We cannot determine from the notice of appeal which issues raised are not supported by substantial evidence. However, we have reviewed the record in its totality, and determine the decision of the Department should be affirmed.

DISCUSSION

The Department is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the

Department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals.

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, and whether the Department's decision is supported by the findings.[2]

"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 [95 L.Ed. 456, 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].)

I

Appellant contends the decision of the Department is not supported by substantial evidence.

A. Issue concerning the sale and furnishing of an alcoholic beverage to a

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[2]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].

person under the age of 21 years.

Detective Kerry Mensior, detective Larry Darwent, and police intern Radford Pajita, while on another assignment, looked into appellant's premises and saw patrons drinking what appeared to be beer, with some of the patrons appearing to be underage. The detectives entered the premises and approached a patron named Nicole Grodesky, who appeared underage and appeared to be drinking beer. After first telling the detectives she was 23 years of age, she admitted she was 20 years of age [RT 17-22].

Nicole Grodesky testified that the bartender without asking her for identification, served a companion and her, two different brands of beer, a portion of which she consumed from each [RT 8-12].

The record seems substantially sound as to the issue of the underage service and consumption.

B. Issue concerning interference with the detective's investigation.

Detective Mensior testified:

> "... Mr. Jarvis (appellant's corporate president) began yelling, and he was coming up from behind and from my right ...As I looked to my right, I saw that he was coming up. He pushed past me, and he made contact with the right side of my body. He continued on in front of me, pretty much pushed me out of the way as he rushed forward ... As he was moving forward, I grabbed his left arm and tried to get him to calm down. He was waiving his arms around. He was yelling ... I held on to his left arm. I was trying to reason with him. Nothing was working. He was yelling, 'No, no, no,' that we weren't going to take a picture (of the under age person and the bartender) ... he began to get worse because he was continuing to become more uncooperative and more animated in his actions and body movements. My partner, Detective Darwent, grabbed on to his right arm and tried to get him to calm down ... I brought his left arm behind his back. Detective Darwent brought his right arm behind his back. I was finally able to cuff him, and I placed him under arrest" [RT 27-29].

Penal Code §148 states in pertinent part:

> "Every person who willfully resists, delays, or obstructs any ... peace officer ... in the discharge or attempt to discharge any duty of his or her office or employment [is guilty of a crime]."

Jarvis testified to the incident from a different point of view [RT 42-45]. 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] (a case where 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].)

It is apparent from a reading of the decision of the Department that the Administrative Law Judge (ALJ) believed the testimony of the detective rather than Jarvis.

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].)

Despite the inconsistencies in the testimony which are expected from the participants in a melee that lasted only seconds or minutes, there is nothing in the testimony of the arresting detective which could be said to be so inherently incredible that the Board would be justified in substituting its own view of the evidence for that of the ALJ.

In Lopez (1998) AB-7001, the Board found that abusive language toward a

peace officer was not a violation of the law. But pushing the officer out of the door when appellant knew that person was police officer, came within the prohibited conduct set forth in the statute.

In Blundell (1998) AB-6821, the Board found no violation of the statute where the only conduct was verbal, and the physical actions of the appellant were not directed at the police officers. The Board cited People v. Quiroga (1993) 16 Cal.App.4th 961, 966 [20 Cal.Rptr.2d 446] for the proposition that First Amendment rights to dispute the actions of a police officer are not to be abridged.

In Hometown Concepts, Inc. (1997) AB-6659, the Board found that while the statute was "not violated by the guards' verbal obstruction or by their initial refusal to provide identification, the 10-minute delay in the investigation was, technically, sufficient to constitute a violation" of the statute.

In Talia (1996) AB-6524, the Board found a violation of the statute from evidence that while a Department investigator was trying to place a clerk into a police car for a violation of law, another clerk began to pull the investigator away from the arrested clerk then partly in the car, but was prohibited by a police officer who pulled the second clerk away from the investigator.

The record supports the violation.

II

Appellant contends the penalty 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].) The Department had the following factors to consider: (1) the violation of selling an alcoholic beverage to the underage person was a second same-type offense, which in the present matter generally evokes a 25-day suspension, and (2) the delaying of a peace officer in the discharge of his duties by Jarivs is a very serious and unacceptable act. Considering such factors, the appropriateness of the penalty, a 35-day suspension, should be left to the discretion of the Department. The Department having exercised its discretion reasonably, the Appeals Board will not disturb the penalty.

ORDER

The decision of the Department is affirmed.[3]

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

[3]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 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.