

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

AB-7770

File: 21-333472 Reg: 00049237

MAZIN TALIA dba Pacific Liquor House
2931 El Cajon Boulevard, San Diego, CA 92104,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: October 4, 2001
Los Angeles, CA

ISSUED DECEMBER 12, 2001

Mazin Talia, doing business as Pacific Liquor House (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 20 days for appellant's employee selling an alcoholic beverage 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 Mazin Talia, appearing through his counsel, John J. McCabe, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on December 23, 1997.

Thereafter, the Department instituted an accusation against appellant charging that, on

¹The decision of the Department, dated March 1, 2001, is set forth in the appendix.

April 12, 2000, appellant's employee, Loutfi Kaddis ("the clerk"), sold an alcoholic beverage, vodka, to Sherman Fuller, who was obviously intoxicated.

An administrative hearing was held on January 11, 2001, at which time documentary evidence was received, and testimony was presented by Ted Kasinak, an officer with the San Diego Police Department; by the clerk, Kaddis; and by Fuller, the patron alleged to be obviously intoxicated.

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

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) substantial evidence does not support the finding that the patron was obviously intoxicated, and (2) the penalty is excessive.

DISCUSSION

I

Appellant states this issue in terms of the Administrative Law Judge (ALJ) abusing his discretion in accepting the testimony of the officer and rejecting, without explanation, the testimony of appellant's witnesses.

"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]; 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].)

Conflicts in the evidence must be resolved by the ALJ. 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].)

To some extent the credibility of witnesses must affect the ALJ's resolution of conflicts in the evidence. 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]; Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

In the present case, the ALJ reviewed the testimony of the three witnesses and then stated that he based his finding of a violation on "[t]he preponderance of the credible evidence" (Finding IV.)

Officer Kasinak testified that he noticed Fuller walking "slowly and in an unsteady manner" down the street. Inside the premises, Kasinak observed Fuller standing at the counter, swaying back and forth, with disheveled and unkempt clothing. When Kasinak stood near Fuller, he noticed the odor of alcohol coming from Fuller and that Fuller's speech was slow and slurred. When Fuller paid for the alcoholic beverages, he fumbled with his money and finally threw some on the counter, which the clerk picked up. During this time, Fuller was within about two feet from the clerk. (Finding III-A.)

The clerk testified that he did not think Fuller was intoxicated when he sold him the alcoholic beverages. He said that he did not see Fuller swaying or unsteady on his feet, that Fuller's clothes were clean and not disheveled, that he did not notice the odor

of alcohol from Fuller, and that Fuller did not fumble with his money when paying. [RT 100, 102, 105-106, 107, 111.]

Fuller testified that he is a recovering alcoholic [RT 120], that a beer does not particularly affect him, but if he adds something like tequila, "it hits [him] pretty quick," but it does not make him drunk [RT 123]. The ALJ, in Finding III-D, stated, erroneously, that Fuller testified "that hard liquor 'hits him bad,'" Fuller also testified that he had consumed one beer and shot of tequila about an hour before entering the premises to purchase alcohol [RT 124]. He acknowledged that after drinking tequila, one smells like an alcoholic beverage [RT 139].

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].) It is not necessary for all of the signs described to be present in order to find that a person is obviously intoxicated, but there must be sufficient indications "to cause a reasonable person to believe that the one with whom he or she is dealing is intoxicated." (Schaffield v. Abboud (1993) 15 Cal.App.4th 1133, 143 [19 Cal.Rptr.2d 205].)

The ALJ found the officer more credible than the clerk, and, it appears, found some confirmation of the officer's testimony in the testimony of Fuller. While it may be that he misstated some of Fuller's testimony, the testimony of the officer and the actual testimony of Fuller are enough to support the finding that Fuller was obviously

intoxicated and the clerk was in a position where he should have noticed Fuller's condition and refused to sell to him.

The ALJ resolved the conflicts in favor of the officer's testimony, and it appears that substantial evidence supports the findings. There was no abuse of discretion by the ALJ.

II

Appellant contends the ALJ abused his discretion in setting the penalty by failing to take into account the length of time appellant was licensed without prior discipline, the absence of post-misconduct discipline, appellant's reputation in the industry, and the totality of the circumstances.

Appellant was licensed on December 23, 1997; the violation occurred on April 12, 2000. A ten-year, or even, perhaps, a five-year period since licensing without discipline might merit some consideration in mitigation. A period of just over two years without discipline is not such a long period that it compels mitigation.

No evidence was presented regarding the absence of post-misconduct discipline or of appellant's reputation in the industry. Therefore, there was no occasion for the ALJ to take such matters into consideration.

As for "the totality of the circumstances," appellant fails to explain what he means by that, and it is certainly not apparent from the record that the circumstances were ignored in setting the penalty.

The penalty is not unusual for this kind of violation, and it cannot be said that the Department abused its discretion in ordering a 20-day suspension in this instance.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
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.