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

AB-7853
File: 47-294629 Reg: 01050391

MARAFRANDO, INC. dba Yankee Doodle
21870 Victory Boulevard, Woodland Hills, CA 91367,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: June 4, 2002
Los Angeles, CA

ISSUED AUGUST 8, 2002

Marafrando, Inc., doing business as Yankee Doodle (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 20 days for appellant's employees selling or furnishing alcoholic beverages to obviously intoxicated patrons, 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 Marafrando, Inc., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

---

[1]The decision of the Department, dated June 21, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on June 9, 1994. Thereafter, the Department instituted a two-count accusation against appellant charging that on December 15 and 29, 2000, waitresses in appellant's premises sold alcoholic beverages to obviously intoxicated patrons.

An administrative hearing was held on May 18, 2001, at which time documentary evidence was received, and testimony concerning the violations was presented by Los Angeles Police Department (LAPD) officers Anthony Ljubetic, Kathleen Burns, and Jesus Puente; LAPD criminologist Jeffrey Lowe; and appellant's waitresses Corene McWilliams and Monica Iturralde.

COUNT 1

On December 15, 2000, officer Ljubetic entered appellant's premises and went to the second floor. There were around 20 to 25 patrons on the second floor of the premises on this weekend night, although during the 20 to 25 minutes that Ljubetic was there, the number dwindled to ten or fewer. Corene McWilliams was the only waitress on the second floor, and she had to go to the downstairs bar to obtain the drinks ordered by patrons. She estimated she would be gone from the second floor for about 10 minutes when she had to go downstairs to get drink orders filled.

After entering the second floor of the premises, Ljubetic was walking through a group of people when patron Mark Franklin blocked his way, apparently oblivious to Ljubetic's presence. While face to face with Franklin, Ljubetic noticed that Franklin's eyes were red and bloodshot, his speech was slurred, he was swaying, and there was the odor of alcohol on his breath. Continuing to observe Franklin after getting by him, Ljubetic saw him staggering, taking slow, deliberate steps, and struggling to maintain

his balance. Occasionally, people would have to catch Franklin as he stumbled toward them, and when he stopped, he would sway in a circular motion. During this time that Ljubetic was observing Franklin, he also saw McWilliams going in and out of the area, clearing tables and taking drink orders.

After a while, Ljubetic observed Franklin walk to the restroom, staggering and almost losing his balance on the way. While Franklin was in the restroom, McWilliams came with two beers for Franklin. She put the beers on a table and sat down to wait for Franklin to return. As Franklin returned from the restroom, he was staggering and swaying. One of his friends told Franklin that his drinks had arrived, but Franklin did not respond until the friend took Franklin's shoulder, turned him toward where McWilliams was waiting, and told him again that his drinks were there. Franklin then walked the five to seven feet to where McWilliams was waiting, and stood there swaying, two or three feet from her. McWilliams told him how much the drinks were. When he reached into his pocket to pay for the beers, he almost fell, and McWilliams put her hands up on his chest to keep him from falling forward and pushed him back. Franklin and McWilliams then engaged in conversation for two or three minutes, while he struggled to get the correct amount of money out of his wallet. McWilliams then asked Franklin if he was okay and if he wanted anything to eat. Franklin said "no," and McWilliams left.

COUNT 2

On December 29, 2000, officer Burns observed Paul Greff near the pool tables in appellant's premises for 40 to 60 minutes. Greff exhibited a flushed face, bloodshot eyes, an unsteady gait, and slurred speech. He played some pool, leaning unsteadily on the pool table while awaiting his turn, and periodically he spoke with his son, Jeff Greff, who was the bar manager. Burns attempted to converse with Paul Greff, but his

speech was too slurred to be understandable.

Monica Iturralde was the waitress serving patrons in that area, but from time to time she would converse with Paul and Jeff Greff. She returned to their table from four to six times during the time Burns was observing Paul Greff.

At some point, Jeff Greff ordered drinks which Iturralde brought to the table. She then went over to Paul Greff at the pool table and told him his drink was on the table. He returned to the table and drank from his beer. Later, Iturralde told Sgt. Puente that she knew Paul Greff was drunk and only served him because he was the bar manager's father.

Subsequent to the hearing, the Department issued its decision which determined that the violations occurred as charged in the accusation.

Appellant thereafter filed a timely notice of appeal in which it raises the following issues: (1) the decision is not supported by the findings and the findings are not supported by substantial evidence, and (2) the Department failed to prove that any of the beverages involved were alcoholic beverages.

DISCUSSION

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. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded

relevant evidence at the evidentiary hearing.[2]

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corp. v. Labor Board (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales U.S.A., 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].) 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] (in which 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].)

---

[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].

I

Appellant contends that there is not substantial evidence to support the findings because the Department did not prove that the patrons involved were "obviously intoxicated."[3] It contends that a reasonable person in the circumstances under which appellant's waitresses were operating, using normal powers of observation, would not be able to recognize sufficient symptoms in the patrons that would plainly indicate the patrons were intoxicated.

Appellant argues that, since it took the officers, who are experts at determining whether someone is intoxicated, a considerable length of time of constant observation to conclude that the patrons involved were intoxicated, it is unreasonable to expect either waitress, while busy serving other customers, to have observed the symptoms seen by the officers. Both waitresses, in their testimony, denied having seen any symptoms of intoxication in Franklin or Greff.

Appellant's argument is little more than an attempt to have the Board retry the case. It is apparent, however, that the Administrative Law Judge (ALJ) chose to accept the testimony of officers Ljubetic and Burns over that of waitresses McWilliams and Iturralde, rejecting the denials of McWilliams and Iturralde that either patron exhibited any sign of intoxication.

In sum, the issue was one of credibility, and it is well-established that 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)

---

[3]Business and Professions Code §25602, subdivision (a), provides:
"(a) Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor."

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].)

Business and Professions Code §25602, subdivision (a), makes it a misdemeanor for one to sell or furnish an alcoholic beverage to "any obviously intoxicated person." 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], overruled on other grounds, Paez v. Alcoholic Beverage Control Appeals Board (1990) 222 Cal.App.3d 1025, 1026 [272 Cal.Rptr. 272]. 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 opportunity to observe misconduct and act upon that observation requires some reasonable passage of time. However, the licensee must not be passive or inactive in regards to his or her duty, but must exercise reasonable diligence in controlling prohibited conduct. (Ballesteros v. Alcoholic Beverage Control Appeals Board (1965) 234 Cal.App.2d 694 [44 Cal.Rptr. 633].)

The officers' testimony indicates that McWilliams and Iturralde had ample time and opportunity to observe the intoxicated conditions of Franklin and Greff. The argument that the waitresses are being held to too high a standard is unavailing. The experience and expertise of the officers simply was not necessary to identify an obviously intoxicated individual; nothing more was required than the most rudimentary, commonplace experience and the willingness to see what was plainly in front of one. In any case, both waitresses had extensive experience and training in serving alcoholic beverages, and professed to have identified many obviously intoxicated patrons before.

The ALJ weighed and considered the evidence that the waitresses were serving other patrons, that the lighting was poor in certain areas, and that it was sometimes difficult to observe what was going on, yet concluded that the symptoms of obvious intoxication were "easily observable" by the two waitresses at the time they served the patrons. Given the state of the record, the findings and decision are supported by substantial evidence.

II

Appellant contends the Department failed to establish that any of the beverages served were alcoholic beverages. It argues that both the expert testimony about testing the beverages and the testimony as to the chain of custody were deficient.

Appellant, in its statement of facts, notes that the LAPD biochemist was unable to say, of his own personal knowledge, when the samples he tested were seized, where they had been between the time they were seized and the time he tested them, or how they got to the toxicology lab. Appellant also notes the biochemist's inability to explain the purpose of certain "protocols" used in the testing and whether the computer that read and reported the data from the gas chromatograph had been checked for

accuracy.

Appellant's arguments are irrelevant. Even if no expert had testified, both waitresses testified that the beverages they furnished were alcoholic beverages.

ORDER

The decision of the Department is affirmed.[4]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[4]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.