

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

AB-7857

File: 40-343033 Reg: 01050480

MARIA VICTORIA HERNANDEZ and MARTIN HERNANDEZ MURILLO dba Dino's Bar
646 North Avalon Boulevard, Wilmington, CA 90744,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: May 9, 2002
Los Angeles, CA

ISSUED JULY 26, 2002

Maria Victoria Hernandez and Martin Hernandez Murillo, doing business as Dino's Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 40 days, 10 days of which were conditionally stayed for one year, for their bartender having served an alcoholic beverage to an obviously intoxicated patron, 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 appellants Maria Victoria Hernandez and Martin Hernandez Murillo, appearing through their counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

¹The decision of the Department, dated July 5, 2001, is set forth in the appendix.

Appellants' on-sale beer license was issued on July 9, 1998. Thereafter, the Department instituted an accusation against appellants charging that, on December 16, 2000, their bartender, Marabel Ayala, served an alcoholic beverage to an obviously intoxicated patron. The accusation also alleged a previous violation of §25602.

An administrative hearing was held on May 24, 2001, at which time oral and documentary evidence was received. At that hearing, Los Angeles police sergeant Juan Gonzalez related his observations of the behavior of a patron whose last name, coincidentally, was also Gonzalez, which led him to conclude that patron Gonzalez was intoxicated when the bartender served him a beer. The officer's testimony was fairly summarized in the proposed decision as follows (Findings of Fact II and III):

“Prior to the beverage service patron Gonzalez had displayed symptoms of obvious intoxication, including having red eyes, nodding his head as if drifting off and showing unsteadiness as he sat on his barstool. The unsteadiness exhibited by patron Gonzalez included slight swaying of his upper torso as if constantly losing and regaining his balance and his elbow slipping off the fixed bar counter on more than one occasion.

“The above symptoms were displayed at the fixed bar counter in the above-described licensed premises. During the 20-30 minutes Gonzalez was under observation by Los Angeles Police Department Sergeant Juan Gonzalez, patron Gonzalez nodded his head up and down, as if sleeping. As his head nodded up and down, the upper torso of patron Gonzalez swayed back and forth about one inch, as he appeared to both lose and then regain his balance. The nodding of the head was at first slow, then the head rose abruptly to the ‘normal’ position. Patron Gonzalez requested a beer from bartender Ayala both verbally and using some sort of hand gesture. Bartender Ayala served Gonzalez a bottle of Budweiser beer. Patron Gonzalez removed some crumpled up currency from a pocket and took between 30 and 45 seconds to count enough to pay Ayala for the beer. Gonzalez was seen to drink from the bottle of beer.”

The bartender, Marabel Ayala, admitted that patron Gonzalez's eyes were red, and that he stuttered when he spoke, but said she had seen him this way on other occasions. She denied observing any of the other symptoms described by Sergeant

Gonzalez. Martin Murillo, one of the owners, testified that he observed patron Gonzalez enter and leave the premises, each time walking normally. Murillo also denied seeing patron Gonzalez display the symptoms described by Sergeant Gonzalez. Each denied thinking patron Gonzalez was intoxicated.

Subsequent to the hearing, the Department issued its decision which determined that patron Gonzalez was intoxicated when he was served beer by Ayala, and that Ayala had sufficient opportunity to observe the symptoms of intoxication before she served him the beer.

Appellants thereafter filed a timely appeal in which they contend that there was no substantial evidence that appellants were on notice that the patron was obviously intoxicated.

DISCUSSION

I

Appellants contend the decision is not supported by substantial evidence. They argue that the Administrative Law Judge (ALJ) "surmised" that there was no evidence that appellants' bartender had ever seen the patron when he was known to be sober, when he, the ALJ, concluded the patron was always intoxicated when he exhibited the red eyes and stutter that the bartender claimed to have observed on 15 or so prior occasions.

"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 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].)

Appellants make no attempt to refute the testimony of the police officer that formed the basis for Findings of Fact II and III. They simply argue that the bartender did not see the patron enter, so could not have observed his unsteady gait.

The ALJ made no reference in his findings to the patron's unsteady gait. He did, however, rely on the officer's testimony regarding the balance problems displayed by the patron while seated at the bar. Given the amount of time the patron was under observation, or, in the case of the bartender, should have been under observation, the

combination of classic symptoms of intoxication were sufficiently obvious as to constitute substantial evidence.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
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.