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

AB-8067
File: 47/58-259966 Reg: 01050330

COURTNEY ROBERTS dba Club West
535 5th Street, Eureka, CA 95501,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Arnold Greenberg

Appeals Board Hearing: November 13, 2003
San Francisco, CA

ISSUED DECEMBER 23, 2003

Courtney Roberts, doing business as Club West (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 45 days for violations of Business and Professions Code sections 23804 (noise audible beyond area under control of licensee), 25755 (refusal to permit inspection by Department investigator), and Penal Code section 148 (obstruction of Department investigator).

Appearances on appeal include appellant Courtney Roberts, appearing through his counsel, Donald J. Putterman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license and caterer's permit were issued on July 9, 1991. On February 5, 2001, the Department instituted an accusation

[1]The decision of the Department, dated November 22, 2002, is set forth in the appendix.

against appellant charging that, on December 2, 2001, appellant interfered with and obstructed a Department investigator in the performance of his official duties (count 1), refused to permit an inspection of the licensed premises (count 2), and permitted entertainment to be audible beyond the area under the control of the licensee, in violation of a condition on the license (count 3).

An administrative hearing was held on August 22, October 15, October 16, and December 18-20, 2001, at which time oral and documentary evidence was received.

Subsequent to the hearing, the administrative law judge (ALJ) issued a proposed decision in which he sustained only that count relating to the entertainment audible beyond the area under the licensee's control, and ordered a 10-day suspension. The Department subsequently issued its own decision pursuant to Government Code section 11517, subdivision (c). In so doing, the Department adopted certain of the findings of fact and determinations of issues in the proposed decision, added factual findings and issue determinations of its own, sustained all three counts of the accusation, and ordered a 45-day suspension.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant contends that there is no substantial evidence to support the new findings made by the Department in the decision it issued pursuant to Government Code section 11517, subdivision (c). He also contends the Department is driven by an improper motive, to retaliate against appellant for filing a federal court action against the Department investigators who were involved in the matters which led to the charges leveled by the Department against appellant. Appellant's principal attack on the evidence in support of the Department's findings is directed at the testimony of investigator Scott Warnock,

which it describes as “contradicted, unreliable and perjured.” (App.Br., page 2.)[2]

INTRODUCTION

The issue in this appeal is whether appellant, by his conduct on the night in question, willfully resisted, delayed, or obstructed two Department investigators in the attempted discharge of their duty, and refused to permit them to inspect the premises of the licensee. The ALJ, in his proposed decision, concluded that Appellant did neither. Appellant contends that there is not substantial evidence in support of key findings made by the Department in its decision to the contrary under Government Code section 11517, subdivision (c).

The Board may consider only the evidence in the record, and the scope of its review is limited. 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.

“Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (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

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[2] Appellant has not appealed the determination that a condition on the license which prohibited entertainment audible beyond the area under the control of the licensee was violated.

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 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.[3] Factual findings of the Department cannot be overturned merely because a contrary finding is equally or more reasonable. (See *Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 7 Cal.3d 433, 436 [102 Cal.Rptr.857].

The evidence in this case is replete with conflict and contradiction, and the task confronting the Board is to determine whether the findings of the Department are supported by substantial evidence in light of the entire record.

DISCUSSION

Penal Code section 148 punishes one who “willfully resists, delays, or obstructs any ... peace officer ... in the in the discharge or attempt to discharge any duty of his or her office or employment ... .” Business and Professions Code section 25755, subdivision (a), identifies as peace officers persons employed by the Department for the enforcement of the provisions of the Alcoholic Beverage Control Act, and in subdivision (b) empowers those officers to visit and inspect the premises of any licensee at any time during which the licensee is exercising the privileges authorized by

[3]The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

his or her license.

On the night in question, Department investigators Scott Warnock and Anthony Corrancho were parked in an unmarked vehicle approximately 200 feet from the premises. Inside the premises were two undercover investigators, Rick Zamora and David Bailey, checking for underage drinkers and violations of license conditions. There were 300 patrons in the premises, and a disk jockey was playing loud music. It was prearranged that, if summoned by a page, Warnock and Corrancho were to enter the premises, either to assist the undercover investigators or apprehend underage drinkers. They were paged by investigator Bailey, but the page did not indicate whether he needed assistance or had simply observed violations. When Warnock and Corrancho entered the premises, they were wearing raid jackets with embroidered badges on the front, patches on the shoulders, and the word "POLICE" emblazoned on the back in gold letters. Warnock testified that his badge was on a chain around his neck, outside his raid jacket. Corrancho confirmed that, and testified his own badge was fastened to his belt. The two wore utility belts around their waists with duty weapons and equipment. Whether the equipment was exposed was the subject of much conflicting testimony. The Department accepted the testimony of Warnock and Corrancho that their raid jackets had been tucked in so that the weapons and other equipment would have been exposed.[4] After entering, the two located undercover investigator Zamora, who surreptitiously pointed out to them certain youthful-looking individuals whom he suspected of being under age. A check of the identification of those individuals determined they were of legal drinking age.

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[4] The ALJ had found (Proposed Decision, Finding of Fact V(I)) that "[c]ontrary to Warnock's assertion that his Raid jacket was tucked into his belt, the video camera (Exhibits B and B1) shows Warnock entering the premises with the skirt of his Raid jacket extending below his belt."

As Warnock and Corrancho resumed their way through the premises in their search for investigator Bailey, they were confronted by appellant, who asked them for their identification. The descriptions of what followed varied substantially. In sum, appellant testified that Warnock arbitrarily refused to produce any identification when asked to do so, and, without provocation, grabbed his wrist, declared him under arrest, wrestled him against a nearby air hockey table, handcuffed him, and removed him from the premises. Warnock testified that appellant refused to accept Corrancho's offer to produce identification after he and Warnock completed their investigation, and, not heeding Corrancho's warning that he was interfering with their investigation, approached within one and one-half feet of Warnock in an agitated manner, with a puffed up chest, screwed up face, and bulging blood vessels.

In his proposed decision, the ALJ's conclusion that appellant did not violate Penal Code section 148 was premised, in part, upon his determination that some of investigator Warnock's testimony was not credible:

> Investigator Warnock's assertions that he was primarily concerned with the safety of Investigator Bailey and therefore did not spend the few seconds necessary to produce his identification card for Respondent's inspection is not credible. Otherwise, why would Warnock, prior to his discovery of Bailey, spend the time inspecting the identification of potential underage violators prior to the encounter with Respondent? The only remaining viable motivation for Inspector [sic] Warnock's refusal was his umbrage at Respondent's request. Warnock could have obviated any delay occasioned by Respondent's request for identification cards by merely reaching into his rear pocket and producing the card. Any delay caused by Respondent's request for further identification was minimal at best. The Respondent's request did not constitute obstruction to investigation or inspection, nor was it a violation of Penal Code Section 148.

The Department found that appellant, after being told by Corrancho that he would be shown identification after the two investigators completed their investigation, stepped in front of them to block their forward movement, became physically aggressive, presented a physical threat to the investigators, and offered substantial

resistance to the arrest, and that, "given the circumstances, the Respondent reasonably should have known that Warnock and Corrancho were investigators for the Department, and that his actions were delaying and obstructing the investigators." (Dept. Findings of Fact I, J, and K.)

The bulk of appellant's brief and argument is devoted to an interpretation of the evidence that argues that Warnock's actions were unprovoked and unwarranted, and that appellant's insistence that the investigators produce identification was justified in spite of the fact that the two were wearing raid jackets and badges that showed them to be peace officers. Appellant disputes the Department's findings that the investigators were concerned about potentially hostile patrons and about the welfare of a fellow investigator, contending that the evidence does not support such findings.

Appellant cites the decision in *People v. Quiroga* (1993) 16 Cal.App.4th 961 [20 Cal.Rptr.2d 446] for the proposition that appellant's demand for identification was protected by the First Amendment: "The First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." (*Quiroga*, supra, at 16 Cal.App.4th 966.) The Department argues that *Quiroga* did not involve any movement by the defendant to prevent the police from continuing their work. Appellant claims there is no credible evidence in the record that he physically blocked, impeded, or otherwise engaged in any physical conduct other than stepping up to the officers to verbally request identification. However, that contention ignores the testimony of Warnock that an agitated appellant, displaying apparent anger, came within a foot and one-half of him. Additionally, Warnock testified that appellant moved from side to side to prevent him from moving forward.

It is important to keep in mind that the officers were responding to a page that

could have meant that undercover officers inside the premises needed assistance. Therefor, it seems reasonable under the exigent circumstances that the investigators' progress not be impeded. Roberts' interference with their ability to move forward was, therefore, improper.

If the case were being heard by the Board sitting as a trier of fact, we might well accept appellant's interpretation of the evidence. There is much that favors such an interpretation. For example, the Board might well question whether six feet, seven inch, 260 pound Warnock was so intimidated by five feet, 10 inch, 190 pound appellant as to fear imminent physical assault, or that he could have prevented the two investigators from moving forward. However, the Board is not the trier of fact. The Department chose to believe Warnock's testimony on the issue, and there is evidence in the record, if believed, that supports those findings.

We address appellant's contention that the Department's decision is in retaliation for appellant's having filed a federal civil rights action against the department investigators only to note that there is no evidence in the record to support the claim.

ORDER

The decision of the Department is affirmed.[5]

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5] 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.