ISSUED NOVEMBER 2, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

TBD ENT., INC. dba Schoonerville 7279 Foothill Boulevard Tujunga, CA 91042, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7273 File: 41-324700 Reg: 98043608 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: September 2, 1999 Los Angeles, CA

TBD Ent., Inc., doing business as Schoonerville (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its on-sale beer and wine public premises license for 20 days for its bartender, David Lee Youngblood ("Youngblood") having sold or furnished alcoholic beverages (beer) to Gregory E. Cummings ("Cummings") and Kevin W. Watson ("Watson") at a time when each of the two was obviously intoxicated, being contrary to the

[1]The decision of the Department, dated November 5, 1998, is set forth in the appendix.

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 TBD Ent., Inc., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on December 9, 1996. Thereafter, the Department instituted an accusation against appellant charging that appellant's bartender sold or furnished alcoholic beverages to three patrons, two of whom were Cummings and Watson,[2] who were then obviously intoxicated.

An administrative hearing was held on August 28, 1998, at which time oral and documentary evidence was received. At that hearing, Los Angeles police officer Gregory Fuqua testified about his observations of the behavior of patrons Cummings and Watson and his conclusion that both were obviously intoxicated at the time they were sold or furnished alcoholic beverages by appellant's bartender.

According to Fuqua, when he and his fellow officer, Gregory Houser ("Houser"), first entered the premises, they noticed Cummings and Watson drinking from schooners. The two were seated at a table with twelve empty schooners in

[2] The Department found the charge not established as to the third patron. See infra, page 4.

front of them. Their table was about ten feet away from the table where the officers were seated. Cummings and Watson were loud and boisterous, "and seemed ... to be intoxicated" [RT 11]. Both displayed slurred speech, flushed faces, and bloodshot, watery eyes [RT 11-12, 13].

Fuqua watched as Cummings got up and went to the rest room. Cummings was unable to maintain his balance, using several chairs and a pool table for assistance [RT 15]. Upon returning to his table, Cummings was heard to ask Watson if he would like another beer. Watson said he would. Cummings, still with balance problems, went to the bar, withdrew some money from his pocket, threw it on the bar, and was given two schooners of dark, amber beer by Youngblood, the bartender [RT 16]. While returning to the table, still with balance difficulty, Cummings poured beer on himself and on the ground [RT 16].

About 35 minutes later, Fuqua watched Watson as Watson walked to the bar [RT 17]. Watson was unable to maintain his balance, having to use his chair, almost falling over several times, and leaning against other patrons [RT 13]. When he got to the bar, according to Fuqua, Watson said to the bartender "'Get me a beer'" [RT 18].

Fuqua testified that Youngblood was behind the bar the entire time, that there was nothing to obstruct his view of the table where Cummings and Watson were seated [RT 18], and that Youngblood was looking in their direction at the times each had walked to the bar [RT 18].

On cross-examination, Fuqua conceded that it was necessary to see at least

three symptoms to determine whether a person was intoxicated in a public place. He also acknowledged that he did not know who might have consumed the beverages in the twelve empty schooners, and had not seen either Cummings or Watson actually fall.

Both Fuqua and Houser testified to similar, but less pronounced behavior on the part of John Slater ("Slater"), the subject of the third count of the accusation.

David Youngblood testified that he had been a bartender for eleven years. Based upon his experience, he has learned to "cut them off" if patrons display incoherency, slurred speech, balance and reflex difficulty, or belligerence [RT 49]. He has been able to do this without reluctance [RT 49]. He would not conclude merely from the fact a patron was loud and boisterous that the patron was intoxicated, because the bar itself is noisy. Nor would observing a patron with watery or red eyes lead him to such a conclusion, since that could be caused by people who were smoking in the bar [RT 51]. Similarly, a patron's red face might be explained by sunburn [RT 52]. Youngblood recalled Cummings and Watson being loud on the night in question, but denied seeing them stagger or display bad balance to the extent they needed support from tables or chairs [RT 52].

Subsequent to the hearing, the Department issued its decision which determined that the charges with respect to Cummings and Watson had been established, but not as to Slater, and ordered appellant's license suspended for 20 days.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant

raises the following issues: (1) the decision is not supported by the findings and the findings are not supported by the evidence; appellant was denied due process because the hearing was conducted by an administrative law judge appointed by the Department; and (3) the penalty is so excessive as to constitute cruel and unusual punishment.

DISCUSSION

I

Appellant contends that the decision is not supported by the findings and the findings are not supported by the evidence.

Appellant's argument is little more than an attempt to have the Board retry the case.

Appellant argues that its bartender could not have known the two patrons were intoxicated, because their red, watery, bloodshot eyes, loud and boisterous activity, and difficulty moving about the premises, could have been due to the noise and smoke in the bar. Since Youngblood was an experienced bartender, accustomized to scrutinizing patrons to detect symptoms of obvious intoxication, he would not have served Watson and Cummings if they were, in fact, intoxicated, argues appellant.

It is apparent, however, that the Administrative Law Judge chose to accept the testimony of officer Fuqua over that of bartender Youngblood, rejecting Youngblood's speculation that Watson and Cummings might have been reacting to smoke, sunburn, and noise, among other things.

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) 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].)

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], 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 so controlling prohibited conduct. (Ballesteros v. Alcoholic Beverage Control Appeals Board (1965) 234 Cal.App.2d 694 [44 Cal.Rptr. 633].)

The testimony indicates that Youngblood had ample time and opportunity to

observe the intoxicated condition of Cummings and Watson.

Given the state of the record, the findings and decision are supported by substantial evidence.

II

Appellant contends the proceeding suffers from a constitutional infirmity, based upon the fact the administrative law judge was appointed by the Department, pursuant to Business and Professions Code §24210.

Appellant's contention equates to an attack on the constitutionality of §24210. The Appeals Board, as with other administrative agencies of the State, lacks the power to declare an act of the Legislature unconstitutional. California Constitution, article 3, §3.5.

Therefore, in accordance with the Board's usual practice, we decline to address this issue.

III

Appellant contends the penalty is so excessive as to amount to cruel and unusual punishment.

The penalty, a mere 20-day suspension for serving alcoholic beverages to two obviously intoxicated patrons, can hardly be considered cruel and unusual punishment. It is the customary penalty for this type of offense; the fact that there were two patrons who were served alcoholic beverages in spite of their inebriated state demonstrates that the Department acted within its discretion.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3] 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.