

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

JUAN S. ARTEAGA and CARMEN	)	AB-7283
MARQUEZ)	
dba Zacatecas Bar	)	File: 48-291846
1912 East Ahaheim St.	)	Reg: 97041485
Long Beach, CA 90813,)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Sonny Lo
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	October 5, 2000
	)	Los Angeles, CA

Juan S. Arteaga and Carmen Marquez, doing business as Zacatecas Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their on-sale general public premises license for 20 days for furnishing an alcoholic beverage to a person exhibiting obvious signs of intoxication, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivisions (a) and (b), arising from a violation of

¹The decision of the Department, dated November 19, 1998, is set forth in the appendix.

Business and Professions Code §25602, subdivision (a).

Appearances on appeal include appellants Juan S. Arteaga and Carmen Marquez, appearing through their counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellants' license was issued on May 23, 1994. Thereafter, the Department instituted an accusation against appellants charging the illegal sale of an alcoholic beverage. An administrative hearing was held on September 28, 1998, at which time oral and documentary evidence was received.

Subsequent to the hearing, the Department issued its decision which determined that the allegations were proven.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the issue that there is no substantial evidence that appellants' bartender knew or should have known of the symptoms of intoxication the Department investigator observed.

DISCUSSION

The Department is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals.

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.² "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] and 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].)

Rene Guzman, a Department investigator, testified that he observed a patron seated at a chair, slumped forward with a side to side swaying. The patron thereafter arose and while walking in an unsteady and swaying manner, proceeded

²The 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].

to the restroom and later returned in the same walking manner. The patron's face was flushed and red, his eyes red and watery, his speech was slurred, and he had an odor of alcohol about him [RT 6, 8-10]. The patron for some unknown reason started to pound the wall with his two hands, and screaming "no" many times and in an extremely loud tone. A premises' security guard came to the patron and told him to stop or the patron would be ejected. Thereafter, the patron went to the fixed bar, had a conversation with the bartender, and was provided an alcoholic beverage [RT 11-13].

Business and Professions Code §25602, subdivision (a), states in pertinent part:

"Every person who sells, furnishes, gives ... any alcoholic beverage to any ... obviously intoxicated person is guilty of a misdemeanor."

The term "obviously" denotes circumstances "easily discovered, plain, and evident" which places 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 argue that the bartender was not in a position or had time sufficient to form an opinion as to the intoxication of the patron. The time

necessary to observe misconduct and act upon that observation requires some reasonable passage of time. However, the observer 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 Ballesteros case concerned members of a motorcycle club who entered a bar and sat at a table. The bartender knew some of those persons to be members of the club, and had checked the ages of some of the members of the club on prior occasions. However, on this occasion, a minor, who should have been excluded because he was a minor, entered with the club members and remained in the premises unknown to the bartender for about ten minutes before a police officer entered and discovered the unlawful presence of the minor. The court determined that the bartender, while very busy, "...was inactive or passive with respect to his affirmative duty to ascertain the age" of the minor.

The Appeals Board has previously grappled with this problem of a reasonable passage of time in order to correct or act upon known facts: Alfonso's of La Jolla, Inc. (1981) AB-4785 (a waitress had from five to ten minutes to observe the youthful appearance of a minor); Belfield, Inc. (1981) AB-4912 (a bartender had approximately three to five minutes to observe two patrons walk to the bar with a staggered gait); and Barry (1982) AB-4983 (an intoxicated employee was observed for five to ten minutes staggering, stumbling, exhibiting loss of balance and poor

coordination, and talking in a thick and slurred manner).

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].)

With the state of the record before us, we cannot say the bartender was diligent in his duties to ensure a properly managed premises.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.