

ISSUED OCTOBER 19, 2000

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

| | | |
|-------------------------|---|--------------------------|
| JOSE CORONA |) | AB-7329 |
| dba El Prado Café |) | |
| 3144 East First Street |) | File: 40-016591 |
| Los Angeles, CA 90063, |) | Reg: 98042264 |
| Appellant/Licensee, |) | |
| |) | Administrative Law Judge |
| v. |) | at the Dept. Hearing: |
| |) | Sonny Lo |
| |) | |
| DEPARTMENT OF ALCOHOLIC |) | Date and Place of the |
| BEVERAGE CONTROL, |) | Appeals Board Hearing: |
| Respondent. |) | August 3, 2000 |
| |) | Los Angeles, CA |

Jose Corona, doing business as El Prado Café (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his on-sale beer license for 40 days, with 15 days thereof stayed for a one-year probationary period for his waitress 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).

¹The decision of the Department, dated December 17, 1998, is set forth in the appendix.

Appearances on appeal include appellant Jose Corona, appearing through his counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on September 16, 1968. On January 14, 1998, the Department instituted an accusation against appellant charging that an employee, Sol Idalia Ruiz ("Ruiz"), sold, furnished or gave an alcoholic beverage to Sebastian Bernal ("Bernal"), who was then obviously intoxicated.

An administrative hearing was held on May 11, 1998, and November 5, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Jerry Vergara ("Vergara"), a Los Angeles police officer, and by Ruiz, the employee. The hearing was conducted over two days, six months apart. Vergara testified on both days, and was cross-examined on both occasions. Ruiz testified on the second day of the hearing.

Vergara testified that he and his partner visited appellant's premises in the course of an undercover investigation. Upon entering the premises, Vergara's attention was immediately drawn to Bernal, who appeared to be having difficulty placing a beer bottle on a table two feet from him. [I RT 10-11.] Bernal's eyes were very red, and his face appeared relaxed. Vergara saw one of the barmaids, whom he identified as Ruiz, approach Bernal and converse with him. Vergara saw nothing unusual as this occurred. Ruiz returned a few minutes later, with three bottles of beer, one of which she placed in front of Bernal. Bernal appeared to have nodded off, and "it appeared that [Ruiz] had to kind of wake him up before placing the

beers on the table.” [I RT 14.] After Ruiz left, Bernal picked up the beer and drank from it. When Ruiz returned to collect for the beers, which were paid for by another patron who had returned to the table, Bernal “continued with the same objective symptoms,” which, according to Vergara, included swaying back and forth, holding a conversation with his friends, but appearing “out of it ... not concentrating on the individuals, just kind of looking around.” [RT 15.]

Ruiz denied she was the person who served Bernal, and denied observing any of the symptoms described by Vergara. However, she admitted that, after she was informed she would be cited, and brought over to view Bernal, that Bernal was intoxicated.

Subsequent to the hearing, the Department issued its decision sustaining the charge of the accusation, and this timely appeal followed. Appellant now contends: (1) that there was no substantial evidence that Bernal displayed any symptoms of obvious intoxication at the time he was served the beer; (2) that there were no admissions by the waitress that Bernal was obviously intoxicated when she served him; and (3) that the penalty reflects the Administrative Law Judge’s (ALJ’s) misunderstanding of the Department’s penalty recommendation. Issues 1 and 2 will be discussed together.

DISCUSSION

I

Appellant contends that Bernal did not display symptoms of obvious intoxication prior to the time he was served the beer, and further, that it was not Ruiz who served him. Appellant relies heavily on an exchange which took place during Vergara’s initial appearance:

Q. Did you see him, Mr. Bernal, drink anything else that night?

A. Yes, from the beer bottle prior to when we walked in.

Q. But you say – he didn't appear to be intoxicated prior to the ... bottle being placed before him [by Ruiz]?

A. Correct."

Later, however, during that same appearance, Vergara enlarged upon what he again referred to as "objective symptoms" - "the bloodshot eyes, the swaying back and forth. Initially when I saw him trying to place the beer bottle, you know, I did not conclude at that point that he was drunk. Maybe I wanted to continue and follow that incident." [I RT 24-25.] It appears that what Vergara was saying was that the inability to place the bottle on the table, by itself, did not lead him to think Bernal was intoxicated, but that he might be, and that further observation was in order.

Appellant also argues that, despite Vergara's testimony, there was no evidence that Ruiz had observed any of those objective symptoms. Appellant disputes the finding by the ALJ that Ruiz had to wake Bernal when she served him the beer, contending she touched him only to get his attention. However, Vergara's testimony that Bernal was nodding heavily, as if dozing off [I RT 14], is consistent with the ALJ's finding as to the purpose for which Ruiz touched Bernal.

As the Department correctly observes, not all individuals manifest exactly the same symptoms of intoxication. Here, Bernal was swaying back and forth, his eyes were bloodshot, and he was falling asleep. His bloodshot eyes would presumably have been visible to anyone near, as would his swaying back and forth. But, most significantly, the need to wake a patron to tell him he has been served a drink

ought to be a strong signal to the server that the patron has had at least one too many, and should not have yet another.

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].)

It was the duty of the ALJ to sift through the conflicting testimony, and he fulfilled that duty. 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].)

II

At the conclusion of the hearing, Department counsel recommended a suspension penalty of 30 days, with "a 15-day stay." The ALJ, however, imposed a 40-day suspension, with 15 days stayed. Appellant suggests the discrepancy reflects the ALJ's mistaken understanding of the Department's recommendation.

The Department contends that the question of appropriate discipline is a matter within the broad discretion of the Department, and the penalty may not be overturned in the absence of an abuse of discretion.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) To that extent, the Department's position is correct. However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

This Board has also said on various occasions that it views the Department's penalty recommendations as representing the Department's best thinking at that particular time, and, where an ALJ departs upwardly from the recommendation, he or she should explain why. Judge Lo did not provide any reasons for his enlargement upon the recommendation of Department counsel.

Our review of the record does not reveal any unusual circumstance or matter of aggravation which would not already have been known to the Department. The Department's defense on this appeal of the increased penalty, that it reflects prior disciplines, is unpersuasive, since that same explanation was offered to Judge Lo with the Department's original recommendation.

We are not in a position to know whether Judge Lo, as appellant suggests, was simply mistaken as to the recommendation by Department counsel, or whether he simply disagreed with the recommendation. Consequently, consistent with a

practice the Board has followed in the past, we think the penalty portion of the decision should be reversed and the matter remanded to the Department for reconsideration of the penalty. Given that attention has now been focused on the matter, we are confident that any departure from the Department's original penalty recommendation will not be the product of oversight or misunderstanding. If the penalty reflects a misunderstanding, we are confident the Department will correct it upon remand. If the upward departure was intended, appellant will know that by the action the Department takes.

ORDER

The decision of the Department is affirmed except as to penalty. The penalty is reversed and the case is remanded to the Department for further proceedings in light of the comments herein.²

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

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.