ISSUED JUNE 23, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MIKE GARDY, dba Sam's Super Foods 4111-A Home Avenue San Diego, California 92105, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6665 File: 20-282798 Reg: 95033328 Administrative Law Judge at the Dept. Hearing: John A. Willd Date and place of the Appeals Board Hearing January 8, 1997 Los Angeles, CA

Mike Gardy, doing business as Sam's Super Foods (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered his off-sale beer and wine license suspended for 45 days, with 25 days of said suspension stayed for a probationary period of three years, for having violated conditions on his license governing sizes and quantities of alcoholic beverages to be sold, for exceeding the permitted amount of window coverage, and for failing to provide books and records

[1]The decision of the Department, dated May 2, 1996, is set forth in the appendix.

requested by the Department, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§23804; 25612.5; subdivision (c) (7), and 25753.

Appearances on appeal include appellant Mike Gardy, appearing through his counsel, John W. Stump; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was originally issued in 1991, subject to a number of conditions. Appellant acquired the license on March 22, 1993, agreeing to be bound by those conditions. Thereafter, the Department instituted an accusation on July 18, 1995, alleging that on two occasions appellant sold alcoholic beverages in quantities not permitted by his conditional license, that appellant failed to provide a Department investigator records of his annual sales of all products offered for sale at the premises, and that appellant exceeded Business and Professions Code limitations on the amount of square footage of windows and clear doors covered with advertising or signs. Appellant requested an administrative hearing, which took place on November 16, 1995.

At that hearing evidence was introduced concerning the charges in the accusation. Thereafter, the Administrative Law Judge (ALJ) entered an order finding

that appellant made sales of alcoholic beverages in violation of a condition on his license, in violation of Business and Professions Code §23804; exceeded limits on the coverage of windows of the premises, in violation of Business and Professions Code §25612.5, subdivision (c)(7); and violated Business and Professions Code §25753 by failing to produce sales records demanded by the Department. The ALJ's proposed decision was adopted by the Department on May 2, 1996. Appellant thereafter filed a timely notice of appeal.

In his appeal, appellant raises the following issues: (1) the Department's delay in the issuance of its decision deprived him of due process; (2) the decision and findings are not supported by substantial evidence; and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends that he was deprived of due process as a result of the Department's failure to issue its decision in a timely fashion. He argues that the delay prevented him from operating his business without threat of sanctions as a result of further violations involving sales claimed to violate his conditional license, i.e., selling alcoholic beverages in certain sizes.

The administrative hearing was held on November 16, 1995, and, following the filing of post-hearing briefs, was declared closed on December 22, 1995. The ALJ's decision was not issued until March 29, 1996. The Department adopted the decision

as its own on May 2, 1996, 34 days later. In the interim, on April 22, 1996, appellant filed a motion to dismiss, contending that the Department had failed to comply with the 100-day limitation contained in Government Code §11517, subdivision (d).

Appellant appears to have misread the applicable statute. He has apparently read the 100-day time limit within which the Department must elect whether to issue its own decision or to accept the decision of the ALJ by default, set forth in Government Code §11517, subdivision (d), as being an overall limitation that commences at the close of the hearing. Such is not the case. The 100-day period commences, at the earliest, upon the delivery of the proposed decision to the Department. Government Code §11517, subdivision (b), states that the Administrative Law Judge shall prepare a proposed decision within 30 days after the case is submitted. However, we read that provision as directory, and not mandatory. (See Outdoor Resorts/Palm Springs Owners' Association v. Alcoholic Beverage Control Appeals Board (1990) 224 Cal.App.3d 696, 702-703 [273 Cal.Rptr.748].)

In an ancillary argument, appellant contends that the Department's decision to ignore his motion to dismiss, which was based on his contention that the Department's decision was untimely, disadvantaged him by imposing a penalty in transcript costs. This contention is without merit. The transcript cost to appellant is governed by Government Code §69950 and Business and Professions Code §24310. The alleged delay by the Department had nothing to do with appellant's transcript costs.

II

Appellant contends that the Administrative Law Judge's findings that he made sales of alcoholic beverages in violation of a condition of his license, that his window signage exceeded the lawful limit, and that he failed to produce business records when demanded are without substantial evidentiary support in the record.

"Substantial evidence" is relevant evidence which reasonable minds would accept as 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 conflict[s] 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. 658].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the

Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (substantial evidence supported both the Department's and the license-applicant's position); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; Gore v. Harris (1964) 229 Cal.App.2d 821 [40 Cal.Rptr. 666].)

(a) Beverage sales - 32-ounce and 40-ounce bottles of Miller's Genuine Draft

The ALJ found that on March 9, 1996, appellant sold Department investigators a 32-ounce bottle of Miller's Genuine Draft beer, a malt beverage, in violation of condition J of his license. Condition J provides that appellant shall sell "no malt beverage products in less than six-pack quantities."

The ALJ also found that on May 10, 1996, appellant sold a 40-ounce bottle of Miller's Genuine Draft beer, again in violation of condition J.

Appellant contends that the condition did not reasonably extend to malt beverage products which were not customarily packaged in quantities of six. The ALJ found that appellant sincerely believed, in connection with the sale which took place on March 9, 1996, that the license condition did not extend to the 32-ounce size container.[2] Appellant's good faith "while it may not be a complete defense" was found to be a

[2] Appellant testified that when his license was issued in 1993, he was told by licensing representative Carolyn Wilder that he was permitted to sell malt beverages in individual containers of 32-ounces and 40-ounces [RT 98-99].

mitigating factor by the ALJ.

However, such was not the case with respect to the second sale. The ALJ found that, as a result of conversations which took place between appellant and Department investigator Gary Searles on April 11, 1996 [RT 14-15, 33, 121], and the Department's District Administrator Gene Barnes the following day, April 12, 1996 [RT 51], appellant clearly was placed on notice that his interpretation of the license condition regarding sizes was incorrect. Appellant denies gaining such an understanding, claiming that he did not learn the Department's interpretation of the meaning of the condition until the time he was charged with the second violation. The ALJ found for the Department on this issue, based upon the testimony of witnesses Searles and Barnes.

The condition in question is identical to that involved in the recent appeal of Naemi (1997) AB-6566, where we held that the Department's application of the condition to sales of containers in sizes other than those customarily marketed in pre-packed groups of six was unreasonable and in excess of its jurisdiction. Naemi, in turn, followed our decision in Hawamdeh (1996) AB-6518, where we said, with respect to an essentially identical condition, that such an interpretation went beyond the perimeter of reason.

Here, however, the Department contends that the issue of vagueness was resolved by appellant having been told after the first alleged violation that his

understanding of the meaning of the condition was incorrect, and that the Department intended the condition to reach sales of individual containers of all sizes, except, possibly, kegs. (See Dept.Br., p. 3). According to the Department, this "specific advice and interpretation" suffices to distinguish this case from other cases cited by appellant where more specific language was used to spell out the Department's objectives with regard to restrictions on single container sales. But what we said in Naemi applies here as well:

> "What the Department is trying to do here is to re-word and extend the condition simply by the Department's unilateral interpretation, without having to go through the statutory process for modifying conditions. This it cannot do. The Department has used "container-specific" language in many other cases, clearly restricting sales of various sizes of single containers. We have been given no reason, and can see none, for assuming that in this case the Department used "container-specific" language to indicate a "container-general" meaning. We must assume that, as in other cases, the Department used "six-pack" advisedly to refer to containers that come in six-packs and that the condition did not apply to other containers not specified.
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> "The wording of the condition clearly prohibits breaking a six-pack to sell individual containers, but there is no reference to containers other than those sold in six-packs. Such wording cannot be reasonably be extended by unilateral interpretation to include all other containers that might be marketed from time to time."[6]
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> [6] The Department is not left without ability to control a change of marketing or area conditions. Violations can invoke the application of §23800, subdivision (b), and problems generated outside the premises by the use of the license, can be controlled by §24200, subdivision (f)."

For these reasons, we conclude that the Department's findings and determinations with respect to the sales of the 32-ounce and 40-ounce containers must

be reversed.

(b) Beverage sales - four-packs of "coolers"

Department investigators made purchases on March 9, 1995, and May 10, 1995, of four-packs of "coolers," in one case a Seagrams product and in the other a Bartles & James product. The coolers were sold in packages of four, as marketed by the manufacturer. Appellant testified he thought the coolers were a wine product which he was permitted to sell in packages of four.[3] However, both manufacturers had reformulated their products to incorporate a malt beverage base, and appellant was, at least initially, unaware of this change. According to the testimony of District Administrator Barnes, the Department first became aware of the change in the first quarter of 1995 [RT 60].

The ALJ accepted appellant's testimony concerning his good faith belief that the coolers he sold were wine-based, and therefore did not fall within the condition J limitation on sales of malt beverages in less than six-pack quantities, as mitigation, but not as a complete defense with respect to the March 9 sale. Again, however, the ALJ found that having been put on notice that the coolers were, in fact, a malt beverage

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[3] Appellant's license includes a condition (condition H) providing that "no wine or distilled spirits shall be sold in containers less than 750 milliliters in size." Appellant testified that the total contents of the four-pack were 1152 milliliters [RT 99]. There is nothing in the record to suggest appellant justified his sales of the coolers with this calculation. There is, however, evidence in the record of conditions in other licenses where a clause has been added permitting the sale of wine coolers in not less than 4-pack quantities [RT 68; Exhibit A-1].

product, appellant's sale on May 10 was a clear violation of the condition.

Our concern with this aspect of the case does not turn only on the fact that appellant was selling the coolers in the package configuration supplied by the manufacturer, and that the product, but for the recent change in formulation, was within the technical scope of condition H. It turns as well on the fact that, as a result of the decision ultimately adopted by the Department, appellant is now permitted to sell the very product, in the very form, for which at least some portion of the penalty was presumably allocated. This is the result of the ALJ's sua sponte recommendation, which the Department accepted that as part of a new condition to be imposed on appellant's license, he be permitted to sell beer or malt beverage products (which would include the coolers) in "containers 16 oz. or smaller ... in six-pack quantities or four-pack quantities as pre-packaged by the manufacturer."

We find it anomalous for appellant to be disciplined for selling a product the Department apparently sees no harm in his selling, since the Department intends to permit appellant to do so in the future, and when one of the two sales for which he is to be disciplined occurred at a time when even the Department had only recently become aware of the change in formulation. It is true that the second sale followed verbal warnings, but, from what this Board can discern, the warnings were focused for the most part on the large bottles of beer sold in single lots. It is somewhat difficult for us to comprehend the utility of a penalty in such circumstances.

We must accept the Department's findings to the effect that appellant was warned in April that the cooler four-packs were a malt beverage product, and, therefore, were subject to the six-pack limitation in condition J. We question, however, whether it is reasonable to include the product within the reach of condition J.

To a large extent, our reasoning is influenced by our decision in Naemi, which we have already discussed. The evil at which we understand the six-pack limitation to be targeted was the breaking of the pre-packaged containers to permit sales of individual units of the sizes ordinarily marketed in six-pack quantities. We did not understand it to be aimed at other configurations of multiple container packages. Technically, a sale of a pre-packaged four-pack is a sale in less than six-pack quantities. But is this the evil targeted? Is it reasonable to construe condition J to reach such a sale?. We think this question is answered by our reasoning in Naemi. Moreover, if a four-pack sale is of any real concern to the Department (if condition J was really intended to embrace such a transaction), then why would the Department permit it in the new condition imposed as part of its decision?

Unfortunately, we have not had the benefit of the Department's thinking with respect to its objectives in including in the new condition permission to sell the very product for which, with respect to one or both of the earlier sales, at least some portion of the suspension may have been allocated. The Department's decision does

not explain the reason for this paradox.

The case of Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr.836], discussed the importance of administrative findings being supported by the agency's analysis:

> "Our ruling ... finds support in persuasive policy considerations ... the requirements that administrative agencies set forth findings to support their adjudicatory decisions stems primarily from judge-made law and is 'remarkably uniform in both federal and state courts. As stated by the United States Supreme Court, the 'accepted ideal ... is that the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.'
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> "Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis.
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> "Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of actual and legal conclusions supported the ultimate order or decision of the agency. Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review. They also serve a public relation function by helping to persuade the parties that administrative decision-making is careful, reasoned and equitable." (Citations and footnotes omitted.)

Our consideration of all of these factors and our decision in Naemi leads us to conclude that appellant's sales of the four-packs of coolers is not a violation of the six-pack condition. The four-packs of "coolers" are marketed in an industry-standard configuration, and appellant did not alter the packaging before making the sale to the

investigators.

(b) Signage

The ALJ accepted the testimony of witnesses Searles and Streeter regarding the Department's contention that appellant's windows were covered in excess of the 33 and 1/3 percent permitted by Business and Professions Code §25612.5, subdivision (c)(7). Appellant challenges the ALJ's acceptance of their estimates of the degree of coverage. However, the ALJ was also shown photographs which leave little doubt as to the degree of coverage. Appellant relies on a Board decision in Abdizadeh & Morschauser (1994) AB-6440, which did not accept the investigators' estimates. However, that was a case involving the application of Rule 61.4, where an estimate that the distance involved was less than 100 feet was enough to shift the burden of proof. That was not the case here, where the estimates were well-supported by the photographic evidence.

(c) Records

Appellant contends that the ALJ should not have found that the Department investigator presented appellant with a letter demand for business records, because the Department was still in possession of the letter at the time of the hearing and offered it into evidence. The Department states that the document presented at the hearing was a copy of the letter. The ALJ chose to accept the testimony of the Department's investigator that he personally handed the letter to appellant, and expressly rejected

appellant's denial of its receipt. While we may disagree with Department counsel's view of the preferred method of serving important documents (see RT 130-131), especially where controversy is likely, we are nonetheless bound by the ALJ's finding. We fully appreciate the importance to the Department's enforcement responsibilities that it be afforded access to those records properly within its jurisdiction, and that it be given broad latitude in its efforts to enforce compliance. It is not our experience that the claim of non-receipt of a Department demand for documents arises with any degree of frequency. Nonetheless, a writing mailed to a licensee confirming an earlier face-to-face demand which was given verbally or in a hand-delivered letter, will eliminate all doubt, especially in those cases where there is more tension than in the usual case.

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].). In this case the ALJ saw and heard both witnesses. We cannot say that the ALJ abused his discretion in accepting the testimony of one and rejecting that of the other.

III

Appellant contends that the penalty - a 45-day suspension, with suspension of 25 of those days stayed, for a net suspension of 20 days - is excessive. He argues that any penalty in excess of that imposed for sales to minors or to obviously

intoxicated persons is abusive of police power.

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].) 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].)

In light of our decision on the merits of appellant's appeal, we do not need to discuss at any length appellant's contention that the penalty is excessive. There is no indication in the Department's decision as to what portion of the penalty relates to each of the specific violations which were found. Therefore, since we are reversing the Department's decision with respect to the malt beverage transactions, we must also reverse the penalty portion of the decision. We are confident that on remand the Department will reconsider the penalty and take into account our reversal of major portions of its decision.

CONCLUSION

The decision of the Department is reversed with respect to count 1 (sale of 32-ounce bottle of Miller Genuine Draft beer, count 2 (sale of four-pack of Peach Coolers), and count 3 (sale of 40-ounce bottle of Miller Genuine Draft and four-pack of Bartles & James Premium Coolers) of the accusation, involving alleged violations of a license

condition, and affirmed with respect to count 4 (violation of Business and Professions Code §25612.5, subdivision (c) (7)), involving signage, and count 5 (violation of Business and Professions Code §25753), involving production of records. The penalty portion of the decision is also reversed, and the case is remanded to the Department for appropriate reconsideration of the penalty in accordance with our comments herein.[4]

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

[4] This final order is filed as provided in Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.