ISSUED DECEMBER 22, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

QUIK STOP MARKETS, INC., MANINDER MALHAN and ANITA RANI dba Quik Stop Market #57 1510 East Washington Street Petaluma, CA 94952, Appellants/Licensees,	)	AB-6759
	)	File: 20-279237
	)	Reg: 96035145
	)	Administrative Law Judge at the Dept. Hearing: Sonny Lo
v.	)	
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	Date and Place of the Appeals Board Hearing: September 3, 1997 Sacramento, CA

Quik Stop Markets, Inc., and Maninder Malhan and Anita Rani, doing business as Quik Stop Market #57 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which ordered their off-sale beer and wine license suspended for 25 days, with 10 days thereof suspended for a probationary period of two years, for appellants' clerk having sold an alcoholic beverage (beer) to a 19-year-old police decoy, being contrary to the universal and generic public welfare and morals

[1] The decision of the Department dated October 31, 1996, is set forth in the appendix.

provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants Quik Stop Markets, Inc., and Maninder Malhan and Anita Rani, appearing through their counsel, George C. Boisseau; and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 17, 1992. Thereafter, the Department instituted an accusation alleging that on November 11, 1995, appellants' clerk, Lisa Marie Bonardi, sold an alcoholic beverage (beer) to Marsha Lynn Toupin, a 19-year-old police decoy working with the Petaluma Police Department.

An administrative hearing was held on July 9 and September 25, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the events surrounding the sale which formed the basis for the accusation, following which the Administrative Law Judge (ALJ) issued a proposed decision, thereafter adopted by the Department, in which he found the allegations of the accusation to have been established by the evidence.

Appellants filed a timely notice of appeal, and in their appeal raise the following issues: (1) the findings that the defense provided by Business and Professions Code §25660 had not been established, and that the Department's Rule 141 is not

applicable, are not supported by substantial evidence; and (2) the Department has proceeded in a manner prohibited by law by relying on enforcement efforts by the Petaluma police which were outrageous.

DISCUSSION

I

Appellants contend the record lacks substantial evidence in support of the finding that the defense provided by Business and Professions Code §25660 was not established, and the finding that Department Rule 141 did not apply.

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 U.S. 474, 477 [71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 747].)

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].

a. The §25660 issue.

The decoy testified she presented the license ultimately marked as Exhibit 4, which showed her true date of birth, November 9, 1976, and which contained a legend across its front, printed in red, stating she would not be 21 until 1997. She denied having any other identification with her.

Appellants contend the clerk relied on a California driver's license which purported to show the decoy was born in 1972, which would have made her approximately 24 years old. Lisa Bonardi, the clerk, denied she had been shown Exhibit 4, the actual driver's license, which Toupin found in her things a week after the first hearing, when she thought she had returned it to the Department of Motor Vehicles..

Appellants challenge the ALJ's acceptance of Toupin's testimony, arguing that she testified inconsistently under oath regarding the whereabouts of the license. Appellants also attack the use of an expired driver's license by the decoy. It had expired two days earlier.

The ALJ weighed Toupin's testimony and that of Bonardi, and found the variations in Toupin's responses, as to when and whether she had surrendered her license to the DMV, to be the product of confusion rather than intentionally false testimony reflecting bias, interest or motive. The ALJ rejected Bonardi's testimony that the license shown to her indicated Toupin's year of birth as 1972. Although he did not

so state, it is clear from the context that the ALJ also considered Bonardi's bias, interest and motive, she and her employer having been charged with a violation of the Alcoholic Beverage Control Act, their second in seven months.

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].)

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].)

This Board sees no error in the ALJ's decision to accept the testimony of Marsha Toupin even though it contained some inconsistencies as to when or whether she had given her driver's license to the DMV. It is apparent from the fact that she produced it at the second hearing that she had not, and our review of her testimony indicates the ALJ's assessment of her testimony as the product of confusion is a reasonable one.

Bonardi had a clear motive to be less than truthful about what she had been shown. She was cited for having made the sale, and had already had to pay a fine for an earlier sale to a minor. In addition, her boyfriend is a brother of the licensee, and also works in the store.

The ALJ saw and heard the witnesses, and made the initial determination as to their credibility. His findings as to relative credibility are entitled to great weight, and there is no basis on this record upon which the Appeals Board could properly set them aside.

b. The rule 141 issue.

Appellants contend the Petaluma police violated rule 141 and their own guidelines by failing to bring the decoy back into the store to confront the clerk accused of having made the sale, asserting the ALJ had made a finding the officers had not done so. Appellants acknowledge that Rule 141 did not become effective until February 1, 1996, but argue that it should be given application to any hearing occurring after that date.

In light of the fact that the Board has consistently ruled that rule 141 does not apply retroactively, resolution of this apparent conflict in the testimony (appellants' witnesses denied Toupin was brought back into the store to identify the clerk) and ambiguity in the decision is unnecessary. Moreover, Bonardi has never denied she was

the clerk who made the sale. Hence, appellants have not been prejudiced from any lack of a confronting identification.

The Board and the Department have uniformly stated that, prior to February 1, 1996, the only rule governing decoy operations was that laid down in Provigo v. Alcoholic Beverage Control Appeals Board (1994) 7 Cal.4th 561 [28 Cal.Rptr.638]. Provigo pointed out the guidelines were merely suggested police procedures, and that failure to follow them did not constitute a violation of due process or grounds for reversal.

There is nothing presented by the facts of this case which warrants reconsideration of the Board's earlier rulings on this issue.

The ALJ's decision contains the following statements (Finding VII):

> "The clerk explained that the decoy had shown a driver's license indicating she was born in 1972, and asked that the officers bring the decoy back into the store. The officers did not bring the decoy back into the store. They also did not search the decoy to see if she had another license. They did ask to see her driver's license, and she showed it to them."

There is testimony in the record from officers Danny Fish [I RT 17, 26, 30] and Roy Toupin (Toupin's uncle) [II RT 38-39] and from Toupin herself [I RT 65-67], in which each stated she was taken back into the store to confront the clerk, and was then told to leave the store. The refusal to bring her back into the store that the ALJ referred to, the record indicates, apparently occurred after she had gone back outside. We do not read the ALJ's finding as a finding there was no confronting identification.

Appellant argues to this Board that the rule requires that the seller be permitted to confront the decoy, especially in circumstances such as those in this case, where the seller claims misconduct on the part of the decoy. However, there is nothing in the language of Rule 141, or of any other rule of which we are aware, that, read in a reasonable manner, suggests that it is a purpose of the rule to permit the seller to challenge the decoy's conduct at the time of the sale.

II

Appellants contend the Petaluma police acted outrageously, thus denying them due process, in conducting the decoy operation while knowing the decoy's license had expired (two days earlier); that they failed to search the decoy for possible false identification after Bonardi claimed to the arresting officer that she had been presented some other identification than the expired license; that they employed as a decoy a person who was a relative of one of the officers; and, presumably, although not mentioned, their alleged failure to have the decoy confront the seller.

This Board sees no merit in any of these contentions. We do not see how appellants' clerk could have been misled in any way by the fact that Toupin's driver's license had expired two days earlier. It still set forth Toupin's correct age, and still bore the legend "Age 21 in 1997."

In cases raising the defense under Business and Professions Code §25660 that the seller relied on bona fide evidence of identification such as a driver's license, the

Board has indicated that the length of time the document had expired is a relevant consideration in assessing whether the seller was reasonably prudent. Here, however, the clerk is denying she relied on the license in question, claiming instead that she relied on a different driver's license which showed Toupin to be 24. However, Toupin and the police officers all denied the existence of any other license, and the only evidence to the contrary is Bonardi's claim to that effect. Consequently, the fact that the license had expired two days earlier seems to be of no real significance.

The failure of the police officers to search the decoy is simply one of a number of items the ALJ had to consider in weighing the conflicting testimony about the existence of a second license, one which allegedly showed the decoy to be older than her true age. A conclusion that a search would have produced a second license would necessarily mean the police officers and the decoy conspired to falsely charge appellant and other licensees. Given the absence of any real evidence in support of such a theory, any failure to conduct a search is also of little or no significance.

Toupin was the niece of one of the police officers. Appellants contend the decision to use her as a decoy was outrageous police conduct, since it resulted in the police officers vouching for the testimony of a family member. Again, this goes to the weight to be given the testimony of the witnesses, taking into account the various factors of bias, interest and motive to falsify. This analysis was the ALJ's responsibility, and it is not the Board's prerogative to substitute its own views as to

credibility for those of the ALJ, even if it were so inclined.

CONCLUSION

The decision of the Department is affirmed.[2]

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

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[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 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.