ISSUED APRIL 2, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

HAI TRUONG dba Victoria Market 4029 East Seventh Street Riverside, California 92507, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6790 File: 20-309559 Reg: 96036447 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: January 7, 1998 Los Angeles, CA

Hai Truong, doing business as Victoria Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered his off-sale beer and wine license suspended for 25 days, with 10 days thereof suspended for a probationary period of one year, for failing to provide a security guard for the parking lot of the premises during the hours specified in a condition on the license, on three separate occasions in April 1996, 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 §23804.

[1] The decision of the Department, dated December 19, 1996, is set forth in the appendix.

Appearances on appeal include appellant Hai Truong, appearing through his counsel, Ralph Barat Saltsman; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 21, 1995. Thereafter, the Department instituted an accusation alleging that appellant failed on three separate occasions to post a security guard in the parking lot of his premises during specified hours, as required by a condition on his license.[2]

An administrative hearing was held on November 8, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented by way of stipulation that a Department investigator visited the premises on three different days in a single week in April 1996 and did not find a security guard on duty. Another Department investigator testified that she drives by appellant's store five times a week, during the hours a security guard is required, and has never seen anyone in the parking lot who appears to be a security guard.[3]

Department investigator Lloyd Harris also testified that on his third visit, he spoke to appellant, and was told, through a person who was acting as appellant's

---

[2] The condition in question states as follows: "Petitioner(s) shall provide one (1) security guard between the hours of 7:00 a.m. to 11:00 p.m., in the parking lot and shall maintain order therein and prevent any activity which could interfere with the quiet enjoyment of their property by nearby residents."

[3] This investigator conceded she had never driven into the parking lot nor entered the store.

interpreter, that appellant had hired a security guard in March. Appellant produced what purported to be a time card covering the week in question, with entries by the person so employed. The entries did not indicate whether the time entry was a.m. or p.m. Harris admitted that, during his visits, he saw no activity in the parking lots which might interfere with the quiet enjoyment of any nearby residences

Department investigator Ramos also testified. He interviewed Otis Clements, the person appellant said had been hired as a security guard. According to Ramos, Clements denied being a security guard, although he acknowledged that he was hired to be one. Clements told Ramos he would not accept that role, and instead assisted appellant with cleaning, stocking, and acting as a cashier. Ramos also interviewed Marie Cree, who also identified herself as an employee, and whose duties, according to Ramos, included acting as cashier and security. However, she told Ramos there was no formal security at the store. Neither Clements nor Cree testified at the administrative hearing.

Appellant testified on his own behalf. He stated that Clements had been hired mainly to provide security, but would sometimes help put merchandise away one or two times a week. He also stated that his store was open from 8:00 a.m. to 10:00 p.m., and Clements had been hired to work from 8:00 a.m. to 11:00 p.m. When shown Clements' time card with the "6:00" entry, appellant testified that meant 6:00 a.m., because Clements came in early to clean the parking lot. Finally, appellant testified that Clements also worked Saturdays and Sundays, and was working on the nights investigator Harris claimed there was no security guard on duty.

Gilbert Hernandez also testified on behalf of appellant. He stated that he was employed as a security guard, beginning in May, charged with patrolling the parking lots to make sure there was no drinking or panhandling. Hernandez testified he wore a shirt with "security guard" patches on each sleeve. He works from 4:00 p.m. to 11:00 p.m., Monday through Saturday. To his knowledge, there is no one else employed as a security guard.

Subsequent to the hearing, the Department issued its decision which determined that appellant had failed to employ a security guard during the hours specified in the condition on his license, and suspended appellant's license. In his proposed decision, adopted by the Department, the Administrative Law Judge (ALJ) questioned the "truthfulness of [appellant's] inconsistent testimony," and found it unreliable, stressing appellant's inconsistent testimony about Clements' hours of employment and his own difficulty in accepting appellant's testimony that Clements worked 17 hours a day, seven days a week, and, finally, the contradictory testimony of Hernandez that he only worked from 4:00 p.m. to 11:00 p.m. and knew of no one else employed as a security guard. Finally, the ALJ found the condition sufficiently clear to put appellant on notice that he is required to provide a security guard "in the parking lot" between the hours of 7:00 a.m. and 11:00 p.m.

Appellant filed a timely notice of appeal, and claims that there is not substantial evidence to support the ALJ's finding that the condition was violated, and that the ALJ's determination is not supported by his finding. Appellant also attacks the penalty, contending it is an abuse of discretion.

DISCUSSION

I

Appellant contends that the finding that appellant failed to provide a security guard in the parking lot of his premises during the hours required by the condition on his license is not supported by substantial evidence. Appellant claims he did employ a security guard, citing his testimony that there was a security guard when the store was open, and earlier in the day as well. Appellant argues that the condition should be interpreted reasonably, and that it is unreasonable to require that the guard be present sixty minutes of every hour, adding that, at the times the investigators claimed no security guard was present, there was no activity occurring which might interfere with residential quiet enjoyment.

Appellant also challenges the ALJ's determination that the condition was violated, contending there is no testimony from any source that there was no security guard for the entire time a security guard was to be present. Appellant asserts that the only evidence in the record establishes that there was a security guard present from at least 6:00 in the morning until at least 10:30 in the evening, and sometimes past 11:00 p.m.

"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 [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].)

Appellate review does not "resolve conflicts 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.2d 658].)

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] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); 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]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The problem with appellant's arguments is that they rest on testimony and evidence the ALJ expressly found unreliable.

It is clear from the ALJ's proposed decision that he did not believe appellant's testimony, and that he instead accepted the testimony of the Department investigators that there was no security guard on the occasions about which they testified, giving rise to an inference there was none generally. The ALJ also had the testimony of Hernandez, first employed a month after the alleged non-compliance, demonstrating that even after the visit by the Department representatives and their inquiries about security, appellant still did not employ a security guard for the entire time period covered by the license condition.

In our view, there is ample evidence to support the finding the condition was violated, and that appellant failed to employ a security guard for the prescribed time periods.

That nothing untoward occurred during the periods of time the Department investigators observed the absence of security is irrelevant. Something could well have happened, and there would have been no one in place to prevent it.[4]

II

Appellant challenges the penalty as an abuse of discretion. Appellant argues that the evidence in support of the violation is weak, that it is unreasonable to expect literal

[4] If as appellant argues, it is really unnecessary for a security guard to be in the parking lot, he should petition the Department to revise or eliminate the condition, at which time the need for such a requirement could be addressed. With the condition in place, appellant has no choice but to comply with it.

compliance with the condition, and that the purpose of the condition, to protect nearby residents from conduct which might interfere with their quiet enjoyment, had been satisfied, since there were no reported incidents during the time periods there was allegedly no security guard on duty.

Appellant's argument that the penalty is an abuse of discretion is itself weak, since it rests in large part on evidence and testimony which was expressly discredited.

The Department states that a 25-day suspension, with 10 days stayed, is the standard penalty imposed by the Department for violation of a condition. The Board might well question whether, if there is a standard penalty for violation of a condition, the Department deems all conditions to be of equal significance.

In this case, for example, appellant's failure to employ a security guard, undoubtedly an economic decision on the part of the licensee, has resulted in a penalty more severe than if appellant had sold an alcoholic beverage to a minor, a violation for which the standard penalty is 15 days.

On the other hand, it could be argued that the failure to post a security guard, where it had previously been determined one was sufficiently necessary to impose such a requirement by way of condition, is a serious violation, and only through good fortune did nothing happen that could have involved at a minimum the interruption of nearby residents' quiet enjoyment, and, at worst, possible injury to person or property from the occurrence of an uncontrolled incident in the parking lot.

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].) In light of the competing considerations with respect to what would be a reasonable penalty, this Board is not persuaded that the suspension ordered in this case amounts to an abuse of discretion.

CONCLUSION

The decision of the Department is affirmed.[5]

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

[5]This 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 decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate 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.