

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

GAYLE HORI and ATSUSHI HORI	)	AB-7507
dba Key Liquor Store)	
3041 South Bristol	)	File: 21-215480
Santa Ana, CA 92704,	)	Reg: 98044874
Appellant s/Licensees,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	July 6, 2000
	)	Los Angeles, CA

Gayle and Atsushi Hori, doing business as Key Liquor Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for appellant's employee furnishing an alcoholic beverage to a person under the age of 21, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article

¹The decision of the Department under Government Code § 11517, subdivision (c), dated September 14, 1999, and the proposed decision of the Administrative Law Judge, dated February 23, 1999, are set forth in the appendix.

XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants Gayle and Atsushi Hori, appearing through their counsel, Rick A. Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on April 12, 1988. Thereafter, the Department instituted an accusation against appellants charging that, on June 5, 1998, appellants' clerk, Lordines Lansang ("the clerk") sold an alcoholic beverage to Jose Luis Nava ("the minor"), who was under 21 years old.

An administrative hearing was held on February 2, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the circumstances of the transaction.

Department investigator Christina Smith was observing the premises from her vehicle, which was in the parking lot in front of the store at about 11:30 at night when she observed a "youthful-appearing male" (the minor) talking to a man (Liborio Angeles) outside the store. They went into the store where they selected Jack Daniels coolers and a bottle of wine from the cooler. They took the alcoholic beverages to the counter, and on the way, the minor gave some money to Angeles. At the counter, the clerk rang up the sale, but the money that Angeles had placed on the counter was not enough to pay for the alcoholic beverages. Angeles told the minor, in Spanish, that he needed more money. The minor then left the store and returned with a 20-dollar bill which he gave to Angeles. Angeles put the

money on the counter and picked up the money he put there previously. The clerk gave Angeles the change and the alcoholic beverages. Angeles left the premises and went to the minor's car in the front parking lot, where he gave the alcoholic beverages to the minor. Investigator Smith approached and identified herself. She determined Nava was under 21 and Angeles was over 21 and cited both of them.

She then went to the door of the premises, which had been locked when the store closed at midnight, and indicated to the clerk that she needed to talk to him. She told him that he had sold to a "furnisher" who had bought alcoholic beverages for a minor. She wrote out an affidavit of what she believed had transpired, read it to the clerk, and the clerk signed it.

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision² which determined that it had not been established that the clerk sold or furnished alcoholic beverages to a minor, but that he had sold them to Angeles, who was over 21, and dismissed the accusation. The Department rejected the ALJ's proposed decision and issued its own decision pursuant to Government Code 11517, subdivision (c), which found a sale-to-minor violation had occurred and ordered the license suspended for 15 days.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) there is not substantial evidence to support the findings, and the findings do not support the decision; and (2) the penalty is excessive.

² The proposed decision of the Administrative Law Judge, dated February 23, 1999, is set forth in the appendix.

DISCUSSION

I

Appellants contend there is not substantial evidence showing that the clerk knew, or reasonably should have known, when he sold alcoholic beverages to Angeles, that Angeles was purchasing the alcoholic beverages for the minor. Appellants argue that the Department failed to consider that the clerk did not see all that Smith saw, particularly the minor talking to Angeles in the parking lot before entering the store, and there was nothing so unusual in the transaction that it should have put the clerk on notice that Angeles was purchasing the alcoholic beverages for the minor.

There were several differences between the findings of the Department and those of the ALJ, and the Department apparently relied on these specific items in reaching a conclusion different from that of the ALJ. The Department found that "Angeles had just exited the premises after buying lemons," (Dept. Dec., Finding III.A.) while this was not part of the ALJ's findings. The Department found that the minor carried some of the alcoholic beverages to the counter (*Ibid.*), while the ALJ said (ALJ Prop. Dec., Finding III.1.), "Angeles and the minor . . . took the [alcoholic beverages] to the cash register area and placed them on the counter." The Department stated:

"Investigator Smith asked the clerk questions about the incident. She reduced to writing what the clerk told her about the sale (Exhibit 3). The clerk said he understood what he was signing. Lansang told Investigator Smith he was guilty." (Finding III.D.)

and

"The clerk signed Exhibit 3, but Investigator Smith filled it out. The clerk testified he never read the form. He merely agreed with Investigator Smith

because he wanted to get out of the store to pick up his kids. He did not tell Investigator Smith he was guilty." (Finding III.E.)

The ALJ did not refer to the preparation and signing of Exhibit 3, or to the testimony regarding what Lansang did or did not say about being guilty.

The Department apparently concluded that, since Angeles had just left the store after buying lemons, his re-entry with the minor and his purchase of alcoholic beverages was sufficiently suspicious that the clerk should have taken greater care in ascertaining the ultimate recipient of the alcoholic beverages. The Department also apparently found that the minor's carrying of some of the alcoholic beverages was also a sign that should have alerted the clerk. Great weight was also apparently given by the Department to the testimony of investigator Smith, while that of the clerk was discounted.

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. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.³

³The 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].

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].)

While reasonable inferences leading to a conclusion different from the Department's could be drawn from the facts in this matter, the Department's inferences are also reasonable. In this situation, the Board must sustain the determination of the Department.

II

Appellants contend the Department did not consider the "significant factors of mitigation" in this case and, therefore, imposed a penalty that is excessive.

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].)

Appellants cite as mitigating circumstances the 10-year history of the license

with no evidence of prior disciplinary proceedings, the age of the minor (20 years and 2 months at the time of the violation), and the actual purchase being made by a person who was clearly not a minor.

Of these factors, only the first is really a mitigating circumstance. The minor was 20 years old at the time, but he was still a minor. This is not a decoy case where use of a minor decoy over the age of 19 will violate Rule 14 1(b)(2) and constitute a defense to a sale-to-minor violation. The purchase of the alcoholic beverages by the adult, rather than by the minor, is not a mitigating factor, it is a factor that makes this a case of furnishing to a minor rather than selling to a minor.

The 15-day suspension is the standard penalty for a first sale-to-minor violation. While the circumstances of this case may make a 15-day suspension appear severe, it is not so onerous that it exceeds the scope of the Department's discretion in imposing discipline.

ORDER

The decision of the Department is affirmed.⁴

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

Board Member Ray T. Blair, Jr., did not participate in the deliberation of this appeal.

⁴This 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.