

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

AB-7657

File: 21-173177 Reg: 99046601

CHANG HEE LEE and KYUNG HEE LEE dba Sam Sam Liquor
4533 East Slauson Avenue, Maywood, CA 90270,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: June 7, 2001
Los Angeles, CA

ISSUED AUGUST 16, 2001

Chang Hee Lee and Kyung Hee Lee, doing business as Sam Sam Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for appellant Chang Hee Lee having sold an alcoholic beverage (a six-pack of Bud Light beer) to Joshua Herrera, a minor at the time of the sale, 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 §25658, subdivision (a).

Appearances on appeal include appellants Chang Hee Lee and Kyung Hee Lee, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel,

¹The decision of the Department, dated June 15, 2000, is set forth in the appendix.

David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on August 12, 1985. Thereafter, the Department instituted an accusation against appellants charging a violation of Business and Professions Code §25658, subdivision (a).

An administrative hearing was held on September 9, 1999, and May 2, 2000. Department investigators Will Salao and Jerry Garcia, and Joshua Herrera, the minor, testified in support of the accusation, and appellant Chang Hee Lee testified on behalf of appellants.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, that appellants had been disciplined in 1998 for a similar violation, and which ordered a 25-day suspension.

Appellants thereafter filed a timely appeal in which they contend that there is no substantial evidence that an alcoholic beverage was sold to the minor in question, because the Department erred in resolving the question of credibility in favor of the minor and against appellant Chang Hee Lee.

DISCUSSION

Appellants contend that the Administrative Law Judge (ALJ) and the Department erred in concluding that the testimony of the minor, that he purchased the six-pack of beer, was more credible than that of the appellant, that the minor stole the beer after appellant refused to sell it to him.

The Department is authorized by the California Constitution to exercise its

discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

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.²

Ordinarily, the issue of credibility is one for the trier of the fact, who sees the witness as he or she testifies, and is in a position to observe the demeanor of the witness, whether the witness appears candid or evasive. This well-settled rule (see Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644]) recognizes the obvious - review of a cold transcript is

² California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

inferior to hearing live testimony.³

Appellants have not provided any persuasive reason why the Department's credibility finding should be set aside.

Joshua Herrera, the minor, testified consistently on direct and cross-examination that he paid for the beer in question, that the person at the register placed the beer in a paper sack, that he was not asked his age or for identification, and was not given a receipt.

Chang Hee Lee, on the other hand, testified that he could not recall seeing Herrera before the police officers brought him in to the store, and denied selling him the beer. According to Lee, he had declined to sell the six-pack of beer to another male who had brought the beer to the counter, but who could not produce identification when asked to do so. According to Lee, he then left the area of the counter momentarily, and when he returned, the beer was gone.

Lee's testimony leaves unanswered how it was that the six-pack was in a sack when Herrera was apprehended by the Department investigators. Additionally, Lee's explanation that the beer was stolen after it had been left on the counter is inconsistent with his contemporaneous statement to investigator Garcia, when questioned about what had happened, that he did not remember anything.

³ The case authority cited by appellants (Martin v. State Personnel Board (1982) 129 Cal.App.3d 835 [181 Cal.Rptr. 358]) (erroneously cited by appellants as Martin v. Alcoholic Beverage Control Appeals Board) leaves much to be desired. The opinion has been omitted from the official reports, so lacks any precedential authority. (See footnote at 129 Cal.App.3d 165.)

Appellants argue that Herrera's testimony is questionable because of his ability to say with confidence, and without first looking, that there was no receipt in the bag with the beer. Appellants suggest that this shows that Herrera himself supplied the bag in which the beer was found when Herrera was apprehended. We do not find appellants' argument the least bit persuasive, for two reasons. First, Herrera had already testified that he was positive he had not been given a receipt [I RT 15-16]. Second, and more importantly, Herrera was not asked whether there was a receipt in the bag. He was asked only whether he had looked inside the bag [I RT 20].

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]; 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].)

Here, it is much more reasonable to infer from all the evidence that Lee sold the beer to the sixteen-year-old minor and placed it in the sack in which the beer was found, and that Lee's claim that the beer was stolen was contrived in order to defeat the charge of the accusation. The ALJ got it right, we think, when he said that "whatever version of Mr. Lee's story one believes, the real casualty here is Mr. Lee's credibility as a witness."

ORDER

The decision of the Department is affirmed.⁴

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

⁴ 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.