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

AB-7663

SUPER CENTER CONCEPTS, INC. dba Superior Super Warehouse
3831 E. Martin Luther King, Jr. Blvd., Lynwood, CA 90262,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 21-315382 Reg: 00048053

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: May 3, 2001
Los Angeles, CA

ISSUED JUNE 21, 2001

Super Center Concepts, Inc., doing business as Superior Super Warehouse (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 30 days, with 15 days stayed for a probationary period of one year, for violations of two conditions on its license, 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 §24200, subdivision (a), and 23804.

Appearances on appeal include appellant Super Center Concepts, Inc., appearing through its counsel, Rick Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated June 22, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 28, 1996. Thereafter, the Department instituted an accusation against appellant charging violations of two conditions on its license on each of two different days.

An administrative hearing was held on April 18, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the alleged condition violations found by Department investigators on August 27 and October 16, 1999.

The subject premises is one of 10 large warehouse-type supermarkets operated by appellant. The premises contains about 50,000 square feet of retail floor space and serves about 3,500 customers each weekday and between 5,000 and 6,000 customers each Saturday and Sunday. There are about 400 parking spaces in the parking lot and approximately 400 shopping carts are in use. Business hours are 7 a.m. to 10 p.m., seven days a week, with peak customer activity between 6:30 and 7:30 on weekdays and around 3 p.m. on weekends.

The two conditions at issue in this appeal are as follows:

> "2. There shall be no coin operated games or video machines maintained upon the premises at any time.
> "3. The [appellant] shall be responsible for maintaining free of litter the area adjacent to the premises over which they [sic] have control, as depicted on the ABC-257 dated 12-13-95 and ABC-253 dated 12-13-95."

On August 27, 1999, between 9 and 9:30 p.m., Department investigators observed shopping carts stored in a fenced alleyway behind the premises. Some of the carts held empty plastic water and milk containers or metal parts and aerosol cans. A discarded plastic bag or bags was trapped between a gate and a wall in this area.

Investigators also found a number of coin-operated machines inside the premises, all but one of which were vending machines. The other was a "claw machine," which allows a customer, after depositing money in it, to guide a "claw" inside the machine to try to pick up a prize, such as a small stuffed animal. Outside the premises were a number of coin-operated kiddie rides.

The investigators believed that the things they had observed violated the conditions shown above. However, at that time they did not contact anyone associated with appellant to advise about their belief. No such contact was made until after the investigators visited the premises again on October 16, 1999.

On their October 16, 1999, visit to the premises, the investigators observed the same coin-operated machines and kiddie rides as before. They also saw some trash in the south parking lot and much more trash in the east parking lot. In the alleyway behind the premises, they did not see any shopping carts, containers, or parts such as they had seen on their previous visit. During this visit, the investigators spoke with one of the store's managers about what they had observed and the conditions they believed had been violated.

The Department recommended a penalty of 45 days' suspension, with 15 days stayed on probationary conditions for one year.

Subsequent to the hearing, the Department issued its decision which determined that the claw machine was a "game" which violated the condition prohibiting coin-operated games, but that the vending machines and kiddie rides did not violate the condition, and that the stored shopping carts, the discarded plastic bag, and the "vermin" (five cockroaches) behind the store on August 27, 1999, and the litter and

trash in the parking lot on October 16, 1999, violated the condition requiring the area to be maintained free of litter. The ALJ found the recommended penalty too harsh, and ordered the license suspended for 30 days, with 15 days stayed for a probationary period of one year.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the evidence does not support the findings and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends the evidence does not support the finding that the claw machine "is exactly the type of machine which is covered [by the license condition]. It is operated by the insertion of coins and it is definitely a game and not a vending machine." (Det. of Issues I.) Appellant also contends that shopping carts waiting for repair do not constitute litter, and the language of the condition, "maintain free of litter," does not contemplate that no litter will exist.

When an appellant argues that there is a lack of substantial evidence to support certain findings, this Board must determine, in light of the whole record, whether there is substantial evidence to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) "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 [95 L.Ed. 456, 71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

Appellant argues that the claw machine did not violate the condition prohibiting coin-operated games, relying heavily on the investigator's testimony that he couldn't "verify whether it's a game. It may, in fact, be a machine that you just purchase an item. . . . I don't know for sure." [RT 41-42.] However, the investigator's statement did not concern the claw machine; it was in response to a question from the ALJ about a machine shown in Exhibit 3-G, which is one of the photographs taken at the premises on August 27, 1999: "Q. Referring to 3-G, the *device to the right of the claw machine*, what leads you to call it a game?" [RT 41] (Emphasis added.)

The investigator described the manner in which the claw machine was operated, by putting in a coin and manipulating a claw by means of a joystick and buttons to try to obtain a small stuffed animal [RT 20], and the ALJ found that the machine was operated in this manner (Finding VII). This is sufficient to support the ALJ's determination that the claw machine "is exactly the type of machine that is covered [by the condition]. It is operated by the insertion of coins and it is definitely a game and not a vending machine." (Determination of Issues I.)

Appellant argues that the shopping carts in the fenced alleyway behind the premises on August 27, 1999, did not constitute "litter," were not shown to have been dirty or attracting insects, and their presence should not have been considered a violation of the condition as alleged in Count 2 of the Accusation. The alleyway is bounded on one side by the back wall of the store and the other by a concrete block wall separating the store from the residences behind it. The investigator was not sure whether the wall shown in the photographs that make up Exhibit 3 is the store wall or the wall between the store and the houses [RT 33].

The store manager at the premises, Bradley Maehara, testified that broken shopping carts were stored in the fenced and gated alleyway behind the store pending their repair by a company that came to the store once every quarter for that purpose. One of the carts contained wheels and other shopping cart parts, which are saved for use in the carts' repair, and a few metal spray cans. Another cart contained empty plastic milk and water jugs. Maehara indicated the bottles were probably being saved to be taken to the recycling center located nearby. [RT 56-57, 72-73.]

Exhibit 3-C shows "a discarded plastic bag or bags . . . trapped between the open gate and one of the two walls" in the fenced alley behind the premises. (Finding V.) Exhibit 3-D is a photograph of what appear to be 5 cockroaches on or near a painted brick wall. Finding V states that this exhibit "shows that conditions of litter were attracting vermin . . ." The last paragraph of Determination of Issues II states:

> "It is not for the court to advise respondent how to abide by the conditions. It is obvious, however, that the rear space ought not to be used to store anything but clean, broken hardware which cannot be expected to attract vermin. If the shopping carts are so dirty that a health department will not permit them to be stored inside the store, even in the warehouse portion of the store,[2] for the sake of the nearby residents they ought not to be stored in the rear space either."

Determination III - Penalty Consideration notes the absence of shopping carts and bottles behind the store in October as a mitigating factor.

Webster's Third New International Dictionary (1986), defines "litter" as "refuse or rubbish lying scattered about," which also seems to be the ordinarily accepted meaning

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[2]The ALJ appears to have misunderstood Maehara's testimony. According to his testimony, the Health Department did not prohibit storing the carts inside the store because they were so dirty, but because they were inoperable and being used to hold items other than food. [RT 79.]

of the word, the key words being "scattered about."[3] The shopping carts, broken but awaiting repair, do not appear to constitute "litter," since they are neither "refuse or rubbish," nor are they "scattered about." The items contained in the carts also seem to fall outside the definition of litter since, even if they are "refuse or rubbish," they are not "scattered about," but confined within the baskets of the shopping carts, just as they would be if they had been put in trash barrels in the alley. Since all or most of the materials in the shopping carts were apparently intended to be recycled or re-used, it is questionable whether these items should be considered refuse or rubbish.

Although cockroaches may be attracted by, and the result of, litter, they do not, in and of themselves, constitute "litter." The cockroaches were photographed by the investigators because "The residences to the north of the premises had been complaining about roaches coming from the premises and litter behind the premises which is our reason for initially being there" [RT 42]. The ALJ attributed the presence of the cockroaches to litter, but there is no evidence, even if any of the items in the alley were to be considered "litter," that these items attracted the roaches. In any case, the presence of the roaches does not constitute evidence of a violation of the condition.

The only conceivable "litter" shown to have existed on the investigators' August visit was the "discarded plastic bag or bags" caught behind the open gate. We do not consider the presence of a plastic bag or two sufficient to constitute substantial evidence supporting a determination that the anti-litter condition was violated on

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[3]Similarly, Penal Code §373.4, subdivision (c), defines the verb "litter" as: "the *discarding, dropping, or scattering* of small quantities of waste matter . . . ." (Emphasis added.)

August 27, 1999. It may well be that the items in the alleyway were a problem of some kind, but this particular problem was not litter.

Appellant argues that the condition requiring it to keep the area around the premises "free of litter" cannot reasonably be interpreted to mean that no litter could ever be present. This same argument was raised before the ALJ at the hearing. His response was:

> "A reasonable interpretation will be given. Nevertheless, the situation shown in Exhibits 4-A through 4-D is unreasonable. That is specially true given the evidence that no utility clerk was seen working the parking lot for trash anywhere in the vicinity of the trash shown in the photographs."

We are compelled to agree with the ALJ that the extent of the litter found in the parking lot on October 16, as depicted in the photographs in Exhibit 4, far exceeds any reasonable, or even liberal, interpretation of the condition. The Department was not unreasonable or arbitrary in finding a violation in that instance.

II

Appellant contends the penalty was imposed based on the emotional reaction of the ALJ to the condition of the parking lot on October 16 and the presence of cockroaches on August 7. It bases its contention on the use by the ALJ of "deplorable" to describe the condition of the parking lot on October 16, and "vermin" to describe the cockroaches photographed on August 7.

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].)

The Department recommended a 45-day suspension with 15 days stayed. The ALJ found that penalty to be too severe and concluded that a 30-day suspension with 15 days stayed would be sufficient to accomplish the disciplinary purpose. The ALJ enumerated several mitigating factors with regard to the penalty and, even though he used words appellant finds objectionable, he reduced the Department-recommended penalty. Based on the violations found in the Department decision, the penalty cannot be said to be unreasonable.

However, because we have determined that one of the counts of the accusation was not established by substantial evidence, we will reverse the penalty and remand it to the Department for reconsideration in light of our determination.

ORDER

The decision of the Department is affirmed with regard to Counts 1, 3, and 4 of the Accusation, and reversed as to Count 2, and the penalty is reversed and remanded to the Department for reconsideration in light of our determination.[4]

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

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[4]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 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.