

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

AB-7683

SHARON E. and DONALD R. PITTMAN dba Pittman's Liquors
1758 Fillmore Street, San Francisco, CA 94115,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 21-227726 Reg: 00048172

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: August 3, 2001
San Francisco, CA

ISSUED OCTOBER 12, 2001

Sharon E. and Donald R. Pittman, doing business as Pittman's Liquors (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days, all stayed, conditioned upon one year of discipline-free operation, for their clerk, Carl Johnson, having sold an alcoholic beverage (three bottles of Anchor Porter) to Edward Gow ("Gow"), a minor, 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 Sharon E. and Donald R. Pittman, appearing through their counsel, Dawn S. Pittman, and the Department of Alcoholic

¹The decision of the Department, dated August 10, 2000, is set forth in the appendix.

Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued in December 1988. Thereafter, the Department instituted an accusation against appellants charging, in separate counts, the unlawful sale on September 23, 1999, of alcoholic beverages to Edward Gow and Jin Kwon Kim, both minors.

An administrative hearing was held on June 1, 2000, at which time oral and documentary evidence was received with respect to the sales charged in the accusation. The Department presented the testimony of Edward Gow, one of the minors named in the accusation;² Dean Rewerts, a Department investigator; and Justin Gebb, also a Department investigator. Appellants presented testimony from Carl Johnson, their clerk.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation relating to Edward Gow had been established, and ordered an all-stayed 15-day suspension.

Appellants have filed a timely appeal, and now raise the following issues: (1) appellants were denied the opportunity to present the testimony of a critical witness; (2) the evidence does not support the findings; (3) improper weight was given to the conflicting testimony of the Department investigators; and (4)

² The second minor, Jin Kwon Kim ("Kim"), was not present at the hearing, and the count pertaining to him was dismissed, over appellants' objection. That ruling is the basis for one of appellants' issues on appeal.

appellants' request for a short continuance was improperly denied.³ Issues 1 and 4 are related, and will be discussed together. Issues 2 and 3 are also related and will also be discussed together.

DISCUSSION

I

The accusation charged, as violations of Business and Professions Code §25658, subdivision (a), separate sales to Gow and Kim on the same date. The evidence established that Gow and Kim entered the store together. The Administrative Law Judge (ALJ) found that each made a purchase. Because Kim was not present, the ALJ granted, without prejudice, and over appellants' objection, the Department's motion to dismiss the charge involving him, and, on relevancy grounds, significantly limited testimony concerning the transaction involving him. Appellants claim these rulings, coupled with the refusal of their request for a continuance,⁴ prejudiced their ability to defend, since their theory of the case was that Kim had made the purchase claimed to have been made by Gow.

³ Appellants, who represented themselves at the hearing, made two separate requests for continuance. The first such request was made immediately following the conclusion of a hearing on an unrelated accusation, and was grounded on appellants' personal convenience. This request was denied, and the ruling is not involved in this appeal.

⁴ An appellant has no absolute right to a continuance; they are granted or denied at the discretion of the ALJ and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (Givens v. Department of Alcoholic Beverage Control (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446].)

The first indication that appellants believed Kim was essential to their defense came when the Department moved to dismiss the count relating to him. At that time, appellant Donald Pittman stated that he wanted Kim subpoenaed. Appellants had not previously attempted to subpoena him.⁵

Business and Professions Code §25666 provides:

“In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless the licensee has waived, in writing, the appearance of the minor. When a minor is absent because of a then-existing physical or mental illness or infirmity, a reasonable continuance shall be granted to allow for the appearance of the minor if the administrative law judge finds that it is reasonably likely that the minor can be produced within a reasonable amount of time. Nothing in this section shall prevent the department from taking testimony of the minor as provided in Section 11511 of the Government Code.”

There is little or no reported case law addressing §25666. The Board knows from its own experience that the usual practice is for the Department to dismiss a count alleging a sale to a minor when it has been unable to secure the attendance of that minor at the hearing. The Board is also aware from its own experience that, on occasion, an administrative law judge has granted the Department a continuance, even over the objection of the licensee, so that it may produce the minor at a later date, and avoid a forced dismissal of the charge.

This is the first time the Board has confronted the situation where a licensee

⁵ The record does not clearly indicate whether the Department attempted to subpoena Kim. Department counsel represented that Kim “made himself unavailable.”

valued more highly the ability or opportunity to take the testimony of the non-appearing minor than to secure the dismissal of the charge of an unlawful sale made to that person.

The Department presented three witnesses, two Department investigators and Gow, who testified that there were two separate transactions, one with Gow, the other with Kim. Appellants' clerk claimed there was only one, and with Kim, not Gow. Further, appellants' clerk testified that Kim, on a previous occasion, exhibited identification showing him to be 21 years of age.

It is obvious that Kim's testimony would be relevant and material, whether he agreed with the Department's witnesses or with appellants' clerk. Either way, we think fairness required that appellants be given an opportunity to present his testimony. Appellants' position may be folly, and result in their being disciplined for two sales rather than one. On the other hand, if their faith in their clerk is of such strength that they are willing to assume that risk, they should not be precluded simply because they assumed the Department would have secured Kim's attendance.

As we see the question, it is whether the licensees could reasonably have relied on the minor's presence at the hearing. Given the language of §25666, we think they could.⁶

Section 25666 imposes a mandatory requirement upon the Department that

⁶ We acknowledge that appellants' position is somewhat in conflict, at the same time stating, in almost the same breath, that Kim's testimony would be crucial to his case but that he did not even know Kim would be at the hearing.

it produce the minor witness. It is silent as to the consequences of a non-appearance. One obvious consequence, reflecting existing practice, is that any charge involving that minor can be dismissed.

Undoubtedly, the statute was enacted for the benefit of an accused licensee, and reflected an awareness by the Legislature that the Department was in a superior position with regard to securing the attendance of the minor. Thus, when, at the commencement of a hearing, the charge involving a minor has not been withdrawn, §25666 contemplates his or her presence, unless waived in writing by the licensee. Here, of course, there has been no such waiver.

It is not up to the Appeals Board to evaluate what Kim might say. That is the task of the ALJ. We are simply saying that, given appellants' theory of defense, the ALJ should have granted the continuance that appellants' clearly sought. Appellants are entitled to a reasonable opportunity to present Kim's testimony. We assume that the Department will provide such information it may have as to Kim's whereabouts, and a reasonable time for appellants to command his presence at a continued hearing in this matter.⁷

II

Appellants contend the evidence is insufficient to support the decision, and assert that the ALJ gave improper weight to the testimony of the Department investigators.

The Department is authorized by the California Constitution to exercise its

⁷ Of course, if appellants expect to offer additional testimony from Gow, it will be their responsibility to procure his attendance at the hearing.

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.⁸

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].)

⁸ 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].

We have reviewed the record, and are satisfied that, if believed, and if no further evidence is presented, the testimony presented by the Department would be sufficient to support the charge of the accusation with respect to the sale to Gow. However, since we are not in a position to assess the impact of any testimony which may be forthcoming from Kim, any ruling on this issue would be premature.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for reconsideration in light of the comments herein.⁹

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

⁹ 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.