

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

AB-7687

File: 20-308265 Reg: 00048663

HAYEL and MAHER HAWATMEH dba B2 Market
1002 East Avenue R, Palmdale, CA 93550,
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

Hayel and Maher Hawatmeh, doing business as B2 Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk, Alaa Abdou Mehles, having sold an alcoholic beverage (a 40-ounce bottle of beer) to Tommy Thuan, a minor decoy, 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 Hayel and Maher Hawatmeh (hereinafter "Hayel" and "Maher"), appearing through their counsel, Rick A. Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

¹The decision of the Department, dated August 17, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on September 8, 1995. 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 June 28, 2000, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been sustained, and this timely appeal followed.

Appellants raise the following issues: (1) the Department abused its discretion when it failed to grant appellants' request for a continuance to permit them to retain counsel and locate a witness; and (2) the evidence from the Department's witnesses is too conflicting to permit a reasonable trier of fact to make the determinations necessary to support the findings and the penalty.

DISCUSSION

I

Appellants contend the Administrative Law Judge abused his discretion when he denied their request for a continuance.

Pursuant to Government Code §11524, the ALJ has the right to grant or deny a request for a continuance for good cause. Under subdivision (b) of that section, a party is ordinarily required to apply for the continuance within 10 working days after discovering the good cause for the continuance, unless that party did not cause and

sought to prevent the condition or event establishing the good cause. 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].)

Appellants made two requests for a continuance. The first was made telephonically by Maher eight days before the scheduled hearing, and was denied by Chief Judge Dorais; the second was made by Maher on the day of the hearing. Maher said he needed the continuance to obtain a lawyer and to locate the clerk who had made the sale. He said he had not hired a lawyer because he first had to talk to his brother, who was out of the country and difficult to reach. He also said he had searched for the clerk, including speaking to relatives of the clerk, who said the clerk was still in the area, but had been unable to locate him.

The hearing took place on June 28, 2000, pursuant to notice served on appellants on May 19, 2000. The notice advised appellants that the failure to request a continuance within 10 days of discovery of the need for a continuance would deprive them of a postponement. The notice also advised them of their right to retain an attorney.

Maher admitted at the hearing that he had spoken to an attorney, but had not retained him.

From this, it appears that appellants had more than a month to locate both an attorney and the missing clerk. Under such circumstances, it cannot be said to have been an abuse of discretion to deny a postponement.

Counsel points to Maher's statement that he was "lost" without the assistance of the clerk. Maher never denied that the transaction had taken place, nor did he indicate just what it was the clerk might say that would assist him, other than the possibility that the clerk would deny having knowingly sold to a minor. Of course, this would not be a defense.

II

Appellants contend that the evidence regarding the face to face identification required by Rule 141(b)(5) is in such a state of conflict that it cannot support the findings.

Appellants' contention that the testimony from the three Department witnesses is in conflict is accurate.

Murphy initially testified that "we all came back, my group that I work with" and informed the clerk that he had just sold beer to a minor. The identification was conducted by Deputy Budge, and took place right in front of Murphy, outside the store. When pressed for details, Murphy drew on what was his usual practice, but could not recall what had been said. Murphy was confident the identification was conducted outside the store, although he believes the clerk may have first been told, while inside the store, that he had sold to a minor.

The decoy testified that Deputy Budge asked him to return to the store to point out the clerk who sold to him. The decoy testified that the clerk came outside, and Budge then asked him to identify the clerk. He was standing five feet in front of the clerk when he did so. He reaffirmed this testimony on cross-examination. He was asked for his identification so it could be shown to the clerk. He was kept separated

from the clerk.

Budge also testified that he asked the decoy to return to the store with him to identify the clerk. However, Budge testified that the identification took place inside the store. He testified that the decoy's identification was shown to the clerk after the clerk had been taken outside.

We agree with appellants that the evidence is conflicting, but not to such an extent that it persuades us no face to face identification took place. Both the decoy and Budge testified that the decoy and the clerk were in close proximity, facing each other, when the identification occurred. It may also be inferred that an identification of the selling clerk initially took place inside the store, as Budge recalled, since the selling clerk was asked outside and a second clerk was asked to take over the register.

Thus, there is a consensus that an identification took place, and that it was face to face. The only conflict appears to be whether it took place inside or outside the store. What may well have happened is that the decoy identified the clerk while inside the store, after which that clerk was taken outside, where a second identification was made as the clerk was shown the decoy's identification.

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].)

The Administrative Law Judge, in Findings of Fact 5 and 6, concluded from all the testimony that the face to face identification took place inside the store, after which the parties went outside “to continue the investigation.” We cannot say these findings are not supported by the evidence, coupled with the inferences which can be drawn from all the circumstances.

ORDER

The decision of the Department is affirmed.²

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

² 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.