

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

AB-7722

AE BOUNMIVILAY and BOUNNHONG SIRIPANNHA dba Neighborhood Market
300 West Park Street, Stockton, CA 95203,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-327543 Reg: 00049035

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

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

ISSUED SEPTEMBER 27, 2001

Ae Bounmivilay and Bounnhong Siripannha, doing business as Neighborhood Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for appellant Ae Bounmivilay and/or his agent, Bounyang Bounmivilay, purchasing food stamps in a manner not authorized by the Federal Food Stamp Act of 1977 or by Part 6, Chapter 10, of the Welfare and Institutions Code, and for Ae Bounmivilay pleading guilty to a violation of Welfare & Institutions Code §10980, subdivision (g)(2), an offense, under the circumstances, involving moral turpitude, contrary to the universal and generic public welfare and morals provisions of

¹The decision of the Department, dated October 19, 2000, is set forth in the appendix.

the California Constitution, article XX, §22, arising from violations of Business and Professions Code §24200, subdivision (d), and Welfare and Institutions Code §10980, subdivision (g).

Appearances on appeal include appellants Ae Bounmivilay and Bounnhong Siripannha, appearing through their counsel, Oscar Budd Kleinfeld, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 25, 1997. Thereafter, the Department instituted an accusation against appellants charging that, on four dates in 1999, appellant Ae Bounmivilay² (hereinafter "Bounmivilay") violated provisions of the Federal Food Stamp Program and the Welfare and Institutions Code. A fifth count alleged that Bounmivilay pled nolo contendere to a charge of welfare fraud on October 12, 1999.

An administrative hearing was held on August 31, 2000, at which time documentary evidence was received and testimony was presented by Thomas Webber, a criminal investigator in the San Joaquin District Attorney's office, and by appellant Bounmivilay. Appellants were not represented by counsel at the hearing.

Webber testified that, acting on information from a "confidential reliable informant" (CRI) that food stamps were being purchased at appellants' premises, the district attorney's office conducted a "food stamp operation" there. The CRI, on each date, was equipped with a transmitter and provided with a quantity of food stamps which he took to

²Appellant's wife, Bounyang Bounmivilay, was alleged to be involved in the transaction on one of the dates.

the premises and offered for sale to Bounmivilay. On each occasion, Webber testified, Bounmivilay purchased the offered food stamps for half their face value or less.³ The CRI would then return to the investigator's vehicle and give the money he received to the investigators.

Webber could hear the conversations between the CRI and Bounmivilay over the transmitter. When asked what he heard while the CRI was in appellants' premises on April 6, 1999, he said:

"A generalization of the conversation is a greeting, an acknowledgment by our CRI that he had 'X' amount dollars worth of food coupons for sale. * * * After the preliminary conversation, the transaction had taken place. The food coupons were sold. He was given an amount of money for those and then brought them directly back to us in the vehicle." [RT 11.]

Later the ALJ questioned Department counsel about exceptions to the hearsay rule that might apply to Webber's testimony, and counsel asserted that Bounmivilay's statements were "party admissions." The ALJ stated that he needed clarification "as to what was said by who" [RT 22]. Department counsel and the ALJ then asked Webber more questions to try to ascertain more specifically what Bounmivilay said during the transactions. Webber said that, since he was testifying from memory, he was not able to do more than state generally that there were conversations that led to the purchase and sale of food stamps for approximately one half their face value. He also stated that the

³ The face values of the food stamps and the amounts paid by Bounmivilay were as follows:

	4/6/99	6/1/99	6/29/99
FACE VALUE	\$170	\$210	\$525
AMOUNT PAID	\$85	\$105	\$250

conversations had been tape recorded, but that he did not have the tapes with him at the hearing. He asserted that the conversations involved the CRI, Bounmivilay, and Bounmivilay's wife, and the ALJ asked him how he had established that it was Mrs.

Bounmivilay who was talking:

"A. They were the only two people who were managing the cash register at the store when these transactions were taking place. That and the word of the CRI when he came back and said, 'Okay here's the money. I sold it to so and so at the store.'"

"[THE ALJ]: Even the identification by the CRI is hearsay."

Subsequent to the hearing, the Department issued its decision which determined that the violations had occurred as charged, with the exception of Count II, which was dismissed because no evidence was presented regarding it.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the penalty of revocation is an abuse of discretion, and (2) there was not substantial competent evidence to support the findings.

DISCUSSION

I

Appellants contend revocation of their license is an abuse of discretion because the unlawful purchases of food stamps have no nexus to the sale of alcoholic beverages. They cite Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board (1999) 76 Cal.App.4th 570, 575 [90 Cal.Rptr.2d 523], in which the court said that for discipline "to be rational, the acts giving rise to it must have some minimal nexus to the licensee's sale of alcoholic beverages."

Santa Ana involved the unlawful purchase of food stamps by an employee who

took great pains to conceal the transactions from the licensee. The court found, under the circumstances of that case, that the Department's imposition of discipline was an abuse of discretion. The significant difference between Santa Ana and the present appeal is that here, it is the licensee himself who made the multiple unlawful purchases. In Santa Ana, the licensee received no benefit from the employee's unlawful purchases; here the licensee made the transactions for his own benefit and profit.

The violations committed by Bounmivilay involved moral turpitude, which "is inherent in crimes involving fraudulent intent, intentional dishonesty for purposes of personal gain or other corrupt purpose" (Rice v. Alcoholic Beverage Control Appeals Board (1979) 89 Cal.App.3d 30, 37 [152 Cal.Rptr. 285].) The Department is charged with protecting public welfare and morals, and requiring honesty of its licensees is well within its charter. Some might say that a penalty less than outright revocation would suffice to protect the public welfare and morals, but "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (Harris v. Alcoholic Beverage Control Appeals Board (1965) 62 Cal.App. 2d 589, 594 [43 Cal.Rptr. 633, 636].) There was no abuse of discretion here.

II

Appellants contend there was not substantial competent evidence to support the findings. Specifically, they argue that 1) the testimony of Webber about the conversations between the CRI and Bounmivilay was hearsay, and not sufficient by itself to support a finding; 2) the ALJ based his decision on evidence obtained by entrapment; and 3) the ALJ based his decision on evidence obtained by outrageous conduct.

Administrative hearings need not be conducted according to technical rules relating to evidence and witnesses. (Gov. Code §11513, subd. (c).) "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Gov. Code §11513, subd. (d).)

Webber's testimony about what he overheard – the actual transaction in which the food stamps were sold – was hearsay. The ALJ determined (Determination of Issues I), correctly, that this testimony was admissible because it supplemented and explained non-hearsay parts of Webber's testimony, based on his personal knowledge. Webber testified that, on the dates in question, food stamp books were provided to the CRI, he took those into appellants' premises, and returned with no food stamps, but cash equal to half the face value of the stamps. The testimony about what Webber overheard explains what happened to the food stamps and how the CRI got the money. It also supplements and explains Exhibit 3, a copy of a Search Warrant Report prepared by Webber, which lists among the items discovered at appellants' premises, some of the food stamps that had been issued to the CRI. Substantial evidence existed, therefore, to support the findings.

Appellants' vague allegations of entrapment and outrageous conduct are simply unsupported by any evidence.

Even if Webber's testimony of the overheard conversation had been insufficient to support the findings with regard to counts I, III, and IV of the accusation, the Department's order does not need to depend on any of Webber's testimony. Evidence showing Bounmivilay was convicted of food stamp violations (Exhibit 5) which, as

discussed above, involve moral turpitude, supports revocation of the license under Business and Professions Code §24200, subdivision (d).

ORDER

The decision of the Department is affirmed.⁴

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

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.