

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

AB-7836

File: 20-214591 Reg: 00049109

7-ELEVEN, INC., MOHINDER SINGH JOHAL, and SATINDER M. JOHAL
dba 7-Eleven #20401
6364 Vineland Avenue, North Hollywood, CA 91606,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: June 4, 2002
Los Angeles, CA

ISSUED AUGUST 8, 2002

7-Eleven, Inc., Mohinder Singh Johal, and Satinder M. Johal, doing business as 7-Eleven #20401 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for appellants' clerk selling an alcoholic beverage to 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 7-Eleven, Inc., Mohinder Singh Johal, and Satinder M. Johal, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated May 31, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 21, 1981.

Thereafter, the Department instituted an accusation against appellants charging that, on April 28, 2000, appellants' clerk, Sarup Gothra ("the clerk"), sold an alcoholic beverage to 19-year-old Matthew Verdugo. Verdugo was acting as a decoy for the Los Angeles Police Department (LAPD) at the time of the sale.

An administrative hearing was held on November 15, 2000, and April 12, 2001, at which time documentary evidence was received and testimony concerning the transaction was presented by Verdugo ("the decoy") and by Los Angeles police officer James Miller. Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and determined that no defense had been established.

Appellants thereafter filed a timely notice of appeal in which they raise the following issues: (1) there is not substantial evidence to support the findings and (2) the Department failed to show compliance with Rule 141(b)(5) (4 Cal. Code Regs. §141, subd. (b)(5)).

DISCUSSION

I

Appellants contend there is not substantial evidence to support the findings, because the Department's witnesses lacked credibility. They argue that neither the decoy nor the officer remembered the incident. The decoy, appellants assert, testified to the usual procedures or policies followed, but not to the facts of this particular transaction. Appellants also state that Exhibit C "demonstrates that the sale did not take place at all." (App.Br. at 7.) Exhibit C is a copy of a letter dated May 18, 2000,

and addressed to appellants, signed by LAPD Captain Mark R. Perez, notifying appellants that during a "recently conducted" minor decoy operation, their employee did not sell to a minor decoy. Neither the name of the employee nor the date of the decoy operation is stated in the letter.

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

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Board*. (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

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

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) 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 Bev. Etc. Appeals Board.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. 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 credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Brice v. Department of Alcoholic Beverage Control* (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Appellants are correct in noting that the witnesses had some problems with recalling all the events that had occurred almost a year earlier. They do not, however, point out any specific instances of memory difficulties or any specific findings they

believe lack support because of a witness's failed recollection. Rather, their attack is a general one that the witnesses did not remember the incident.³

The Administrative Law Judge (ALJ) recognized that "There were a number of discrepancies and mistakes on the part of the police officers associated with this matter and a degree of faded memories on the part of witnesses." (Finding 9.) He addressed this specifically in Finding 10:

"The issue of faded memories is understandable in the light of nearly a year having elapsed from the incident to the date of the hearing. The undersigned has carefully evaluated all the evidence and has concluded that the core evidence necessary for a prima facie case has been established."

The ALJ is responsible for resolving conflicts and discrepancies in the record. He did so here, and our review of the record leads us to agree with his conclusion that, despite some discrepancies and confusion in the testimony (caused in part, it appears, by the way some of the questions were asked), substantial evidence exists to support all the findings made by the ALJ.

As for the May 18, 2000, letter from Captain Perez (Exhibit C), the ALJ properly disregarded it, since it contained nothing that specifically connected it to this decoy operation.⁴ Even if it were to be assumed that the letter referred to this decoy operation, all the rest of the evidence in the record contradicts it. The ALJ was clearly entitled to infer that the letter was issued in error and to ignore it in his proposed

³Appellants attempt to draw an analogy between this case and the appeal of *7238 Reseda Boulevard, Inc.* (1998) AB-6975. That case is totally inapposite. This Board reversed the decision in *Reseda Boulevard, Inc.*, finding unreasonable the ALJ's acceptance of obviously false testimony given by a police officer. The present case involves no false testimony, only faded memories.

⁴We note that no evidence was offered to show that the appellants had even received the letter. The copy offered by appellants was not from their own records, but from material provided by the police in response to a subpoena duces tecum. [RT 84.]

decision. He was not obligated to discuss every item of evidence, particularly those he deemed not relevant or material.

II

Appellants contend the evidence does not support a finding of compliance with the requirement of Rule 141(b)(5) that the decoy make a face-to-face identification of the seller after the sale but before a citation, if any, is issued. They base this contention on discrepancies in the testimony of the two witnesses and their assertion that Exhibit 3 (a photograph of the clerk standing next to the decoy, who is holding a can of beer and pointing at the clerk) shows that the clerk had no reason to know that he was being identified by the decoy, presumably because both the clerk and the decoy are facing the camera rather than each other.

The ALJ addressed the face-to-face identification issue in Findings 6 and 7:

"6. . . .Despite a seeming conflict in the evidence regarding the identification procedure which followed, it is found that the minor made a face-to-face identification, once without the benefit of photographic evidence and [a] second semi-facing identification with the benefit of photographic evidence.

" 7. Both identifications were within a distance of four feet of the clerk who was aware of what was taking place. The minor stated to the officers that Gothra, the clerk, sold him the beer while physically pointing him out. Contentions of non-compliance with Department Rule 141(b)(5) are without merit and are rejected."

Our review of the record convinces us that the ALJ did not err in his finding.

ORDER

The decision of the Department is affirmed.⁵

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

⁵This 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.