

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

AB-7965

File: 20-341794 Reg: 01051984

MAGDY WILLIAM MIKHAIL and VIOLETT KAMAL MIKHAIL, dba Grove Market
3153 North Garey Avenue, Pomona, CA 91767,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: December 3, 2002
Los Angeles, CA

ISSUED FEBRUARY 6, 2003

Magdy William Mikhail and Violet Kamal Mikhail, doing business as Grove Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 10 days, with all 10 days stayed for a probationary period of one year, for possession on the licensed premises alcoholic beverages other than those authorized to be sold under their license, in violation of Business and Professions Code section 25607, subdivision (a)²; and revoking their license, with revocation stayed, conditioned on a two-year probationary period and service of a 60-day suspension,³ for appellant Magdy Mikhail furnishing, or causing to be furnished, an alcoholic beverage to a person under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated May 9, 2002, is set forth in the appendix.

²Statutory references hereafter are to the Business and Professions Code unless otherwise noted.

³The stay of the 10-day suspension was ordered to run concurrently with the first-year stay of the revocation.

Appearances on appeal include appellants Magdy William Mikhail and Violet Kamal Mikhail, appearing through their counsel, Michael B. Levin, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 31, 1998. Thereafter, the Department instituted a three-count accusation against appellants charging them with possession, with intent to sell, narcotics paraphernalia (count 1); possessing in the premises four small bottles of rum, for which they were not licensed (count 2); and furnishing or causing to be furnished, alcoholic beverages to Paul Mace (the minor), who was then 16 years of age (count 3).

An administrative hearing was held on February 27, 2002, at which time documentary evidence was received and testimony concerning the counts of the accusation was presented by Department investigator Tony Pacheco; by the minor; by Pomona police officer Robert Baker; and by co-appellant Magdy Mikhail (appellant).

The testimony of the minor and the investigator established that, on May 26, 2001, the minor entered appellants' premises and attempted to purchase beer, but appellant told him he would not sell it to him. After exiting the store, the minor found a person over the age of 21 (Gresham), who agreed to buy beer for him. The minor gave money to Gresham for that purpose, and Gresham entered the store alone. While paying for the beer, Gresham discovered he did not have enough money. He indicated that to the minor, who came in the store and gave some money to Gresham. Appellant witnessed this, but sold the beer to Gresham. Gresham and the minor took the beer outside. Investigator Pacheco witnessed the exchange of money and Gresham's purchase of the beer.

Appellant testified that when Gresham was short of money, the minor, who was nearby, offered Gresham 35 cents, which Gresham accepted. Appellant asked Gresham whether he was buying the beer for the minor, and Gresham denied it, so appellant sold the beer to him.

During an inspection of the premises on May 17, 2001, officer Baker found four small, sealed bottles of rum in the premises' locked restroom. The rum had been given to appellant by a salesperson a few weeks before.

Subsequent to the hearing, the Department issued its decision which determined that only counts 2 and 3 had been proven. Count 1 was dismissed and the penalties noted above were imposed.

Appellants thereafter filed a timely appeal in which they raise the following issue: The decision as to counts 2 and 3 is not supported by the findings and the findings are not supported by substantial evidence in light of the whole record.

DISCUSSION

Count 3 – furnishing to minor

Appellants contend the evidence showed that the violation of section 25658, subdivision (a), did not occur. They base this on the inconsistencies between the testimony of Pacheco and the minor, the unreliability of the minor's testimony due to his lack of sufficient recall, and the consistent and credible testimony of appellant. They also argue that even if a violation occurred, the penalty should be mitigated because appellant did not have the opportunity to challenge a prior discipline, having inadvertently failed to appear at the hearing on the prior charged violations.

It is true that there were inconsistencies between the testimony of the investigator and the minor; however, it is the responsibility of the Administrative Law

Judge (ALJ), not this Board, to resolve conflicts in the evidence. (See *Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) Should there be any unresolved conflicts, this Board is obligated 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. Control App. 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. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

In the present case, however, the ALJ was able to satisfactorily resolve the inconsistencies between Pacheco and the minor, as shown by his findings with regard to this transaction, at the conclusion of which he explained that those findings were "based on a compilation of the testimony" of the minor and Pacheco. (Finding IV. A.)

As for the relative credibility of the minor and appellant, such determinations are within the reasonably exercised discretion of the trier of fact. (*Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) The ALJ here specifically found that the testimonies of the minor and Pacheco were more credible than that of appellant. Further, he found the minor's testimony "especially credible" because it implicated him in a crime. (Finding IV. B.)

Appellants are really asking this Board to re-evaluate the evidence and reach a conclusion contrary to that of the ALJ. However, when the findings are attacked as not

supported by substantial evidence, the Board is not empowered to exercise its independent judgment on the effect or weight of the evidence, but only to 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].) Our review of the record in this matter convinces us that the findings are indeed supported by substantial evidence.

Count 2 – presence of unauthorized alcoholic beverages

Appellants also argue that the penalty imposed for Count 2 – 10 days' suspension stayed for one year – should be mitigated because the distilled spirits consisted of four small bottles, packaged together and unopened, that were given to appellant as a gift; they were found in a locked bathroom; they were not displayed for sale; appellants have no history of this type of violation; and appellant was cooperative with the investigating officer. They suggest that a lesser stayed suspension should be imposed and should run concurrently with any penalty imposed for Count 3.

The statute violated, section 25607, penalizes the simple possession on the premises of any unauthorized alcoholic beverage. There is no exception for gifts or items not held for sale.

The ALJ clearly considered the mitigating factors noted by appellants. In Determination of Issues II, he stated there was no evidence the violation was deliberate, but it appeared that the bottles had been given to appellant as a gift, placed in the restroom, and forgotten. For this reason, he determined that the suspension should be all stayed. In addition, the order makes this stay run concurrently with the first-year stay for count 3.

The ALJ already did what appellants are asking the Board to do. There is no indication that the Department abused its discretion in adopting the ALJ's order.

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 section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.