

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

AB-8123

File: 21-367265 Reg: 02054126

LE NGUYET TO and KENNY WANG dba Prices Liquor
7371 Florence Avenue, Downey, CA 90240,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 2, 2003
Los Angeles, CA

ISSUED JANUARY 21, 2004

Le Nguyet To and Kenny Wang, doing business as Prices Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for their employee and store manager having sold a six-pack of Coors Light beer to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Le Nguyet To and Kenny Wang, appearing through their store manager, Tom Oo, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on August 21, 2000. Thereafter, the Department instituted an accusation against them charging that their employee, Tom Oo, sold beer to a minor. Although not set forth in the accusation, the minor in

¹The decision of the Department, dated April 3, 2003, is set forth in the appendix.

question was acting as a decoy for the Downey Police Department.

An administrative hearing was held on February 26, 2003, at which time oral and documentary evidence was received. At that hearing, testimony was presented by the decoy, Alex Valladares, and by Kevin Kendall, a Downey police officer who witnessed the transaction. Tom Oo testified on behalf of appellants, and claimed that the decoy had been in the store on several previous occasions, and had then displayed identification which showed his name to be Adam Wright, and that he was of legal age. Valladares denied having been in the store at any previous time, and denied ever having any identification of the kind claimed by Mr. Oo.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and that appellants had failed to demonstrate any affirmative defense. The administrative law judge (ALJ) determined that Mr. Oo was mistaken in his belief that the decoy had previously passed himself off as Adam Wright.

Appellants thereafter filed a timely appeal. The brief filed on their behalf appears to renew the same contentions put forth by Mr. Oo at the administrative hearing.

DISCUSSION

The only real issue in this appeal is whether the ALJ's determination that the decoy was not the person claimed by appellant to have displayed valid identification when purchasing alcoholic beverages on previous occasions is supported by substantial evidence.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor*

Bd. (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].)

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].)

The decoy testified, in response to questioning by the ALJ, that he lived on the opposite side of the city, approximately three miles from the premises; that he had never been in the premises before; that he had never used the name Adam Wright; that he had never possessed a driver's license in the name of Adam Wright; that he did not even know the store existed until the night of the decoy operation; and that he had no friends or acquaintances living in the area of the store.

Mr. Oo testified that the decoy, known to Mr. Oo as Adam Wright, had been in the store four or five times, and had purchased a brand of beer called Mickey.

Mr. Oo testified that it is his practice to record the name, date of birth, driver's license number, and the date he entered the information in a log entitled "Lists of Teenager Customers."² The name "Adam Wright" is the tenth entry for the year 2002,

² The log is a part of Exhibit A. In addition to the log, Exhibit A contains a number of photographs of signs above the beer coolers intended to discourage or prevent sales to minors. The log itself was used to confirm the propriety of selling an alcoholic beverage to one of the persons whose name was in the log who might have forgotten his or her identification when subsequently visiting the store.

the entry apparently having been made on March 17, 2002. According to the information in the log, Adam Wright was 23 years of age on March 17, 2002, and would have been almost 24 the night of the decoy operation.

The decoy, on the other hand, had not reached the age of 19 on the date he supposedly passed himself off as Adam Wright, and, in the opinion of the ALJ (Finding of Fact 6), did not have the appearance of a person almost 24 years of age:

Minor Valladares had an overall youthful appearance of a teenager and wore no jewelry or a watch. He was then 5' 9" tall and weighed 140 pounds. He wore a "Magic Mountain" T-shirt, and blue jeans. His hair was spiked and he was clean shaven. There was nothing in the minor's appearance at the hearing slightly more than 5 months after the September 24, 2002 incident, that his physical appearance, his clothing, poise, demeanor, or maturity to indicate an age beyond his actual 19 years, and he displayed the appearance which could generally be expected of a person under 21 years of age.

The minor also looked younger than his actual age, in terms of his gawkiness and childlike facial characteristics. The appearance of Alex Valladares at the hearing was substantially the same as his appearance presented to the respondent's [sic] clerk on September 24, 2002.

The ALJ concluded that Mr. Oo was simply mistaken in his belief that the decoy had earlier passed himself off as a person named Adam Wright. It is apparent that the ALJ, to reach the result he did, weighed the unlikely probability that the decoy would expose himself to the risk of criminal prosecution for giving false testimony against the much more likely probability that Mr. Oo was either mistaken or himself testifying falsely in an attempt to exculpate himself and keep his job. In essence, the ALJ resolved an issue of credibility in favor of the decoy. And, of course, it is well settled that the credibility of a witness's testimony is determined within the reasonable discretion accorded to 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].)

ORDER

The decision of the Department is affirmed.³

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

³ 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.