

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

AB-8254

File: 48-375356 Reg: 02054049

U.S. FOBIE INTERNATIONAL BUSINESS DEVELOPMENT, INC.
dba New Mesa Bar/Crossroads Tavern
741 San Mateo Avenue, San Bruno, CA 94066,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Robert Coffman

Appeals Board Hearing: January 6, 2005
San Francisco, CA

ISSUED FEBRUARY 11, 2005

U.S. Fobie International Business Development, Inc., doing business as New Mesa Bar/Crossroads Tavern (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked its license for its employee Jie Li, acting with the knowledge of its corporate president, Hong Lily Li,² purchasing distilled spirits believing them to have been stolen, a violation of Business and Professions Code section 24200, subdivisions (a) and (b), in conjunction with Penal Code sections 494, subdivision (a), and 696.

Appearances on appeal include appellant U.S. Fobie International Business

¹The decision of the Department, dated February 11, 2004, is set forth in the appendix.

² The decision misidentifies this person as Lily Li Hong, although she testified that her name was Hong Lily Li, stating specifically that her last name was Li. The record is silent as to whether she and Jie Li are related.

Development, Inc., appearing through its attorney, Jeremy Blank, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on May 31, 2001. The Department instituted an accusation against appellant on November 20, 2002, charging that appellant's employee, with the knowledge of appellant's president, purchased distilled spirits on four occasions in 2002, believing them to have been stolen.

An administrative hearing was held on June 27, 2003, and December 16, 2003. Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been established, and ordered appellant's license revoked.

Appellant has filed a timely notice of appeal. In its appeal, appellant raises the following issues: the findings are not supported by substantial evidence and the punishment (revocation) is unduly harsh.³

Appellant does not dispute the findings (Findings 2, 3, 4, and 6) that appellant's

³ This case was originally set to be heard on the Board's October calendar. It was continued by stipulation following appellant's retention of new counsel. A condition of the stipulation was that any additional brief filed on appellant's behalf be limited to issues raised in appellant's opening brief.

Thereafter, appellant filed a lengthy brief raising additional issues which were arguably outside the bounds of the stipulation. Appellant contends that investigator Hirata's use of defective recording equipment and his failure to preserve his investigative notes amounted to purposeful destruction of evidence, and that appellant had been entrapped by Hirata's offer of the purportedly stolen merchandise at "bargain basement" prices.

We have considered each of these additional contentions, and find them without merit.

bartender, Jie Li purchased, on four separate dates, the following distilled spirits, believing them to have been stolen:

May 29, 2002	Two 750 ml. bottles of Johnny Walker Black Whiskey One 1.75 liter bottle of Absolut Citron Vodka One 1.75 liter bottle of Southern Comfort Whiskey One 1.75 liter bottle of Seagram's 7 Whiskey One 1.75 liter bottle of Jose Cuervo Tequila One 1.75 liter bottle of Jack Daniels Whiskey One 1.75 liter bottle of Absolut Vodka
June 3, 2002	One 750 ml. bottle of Hennessy Whiskey One 1.75 liter bottle of Bacardi Rum One 1.75 liter bottle of Jim Beam Whiskey One 1.75 liter bottle of Smirnoff Vodka
June 18, 2002	One 1.75 liter bottle of Jose Cuervo Tequila
July 8, 2003	One 1.75 liter bottle of Jose Cuervo Especial Tequila One 1.75 liter bottle of Jim Beam Whiskey One 1.75 liter bottle of Malibu Rum One 1.75 liter bottle of Crown Royal Whiskey One 1.75 liter bottle of Jack Daniels Whiskey

Some of the above items, including those purchased on July 8, were found in the course of a search of the premises that same day.

In addition, Jie Li purchased a Panasonic CD/DVD player on June 18, 2002, believing it to have been stolen. All of the purchases of the distilled spirits and the Panasonic CD/DVD player were made from Department supervising investigator Eric Hirata. Hirata testified that in his initial meeting with co-owner Hong Lily Li, he told her that he stole distilled spirits from Costco and sold some of what he stole to other sellers. Hirata also testified that, in the course of negotiating the transactions, he told Jie Li that the distilled spirits he was selling her had been stolen, as was the CD/DVD player.

Appellant contends that the administrative law judge (ALJ) ignored in his proposed decision the testimony of Jie Li that everything she purchased from Hirata

was for her personal use, that she bought the bottles of spirits because they were exceedingly inexpensive, and planned to use them for her birthday and Fourth of July celebrations, that she segregated the bottles from those bought for resale at the bar, and that she paid for everything with her own money. In addition, appellant contends that the ALJ ignored in his proposed decision the testimony of He Yu, co-owner of the bar, that based upon cash register tapes, funds from the bar's cash register could not have been used for the purchases, and the testimony of a patron that he loaned Li \$30 so she could make the purchase of the CD/DVD player on June 18, 2002, again to show she was using her own money and not money from the bar. Finally, appellant's other co-owner, Hong Lily Li, although admitting that she had a conversation with Hirata on May 16, 2002, in which he offered to sell her alcoholic beverages, disclaimed any knowledge of any purchases by Jie Li, denied authorizing such purchases, and denied knowing the distilled spirits were stored on the premises.

DISCUSSION

I

When an appellant charges that the Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., article XX, §22; Bus. & Prof. Code §§ 23084 and 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) "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].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (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].)

The result on this appeal turns on the findings of the ALJ in which he accepted the testimony of Department investigator Hirata, and determined that Jie Li's testimony that the purchases were for her own use was not credible and that Hong Lily Li's testimony that she was not aware of Jie Li's purchases was also not credible. This lack of credibility affected both the decision reached by the ALJ and the penalty he imposed, as reflected in his comments in the second paragraph of Finding 11 and paragraph 2 of his Determination of Issues:

Hong's contention, that she was not aware Li purchased alcoholic beverages from Hirata, was not at all credible. The evidence was clear that she was not only aware of such sales, but that she facilitated such sales on more than one occasion. Hirata represented to her on several occasions that such items had been stolen. The evidence was also clear that she was well aware such beverages were to be used for bar sales to bar patrons

...

The following were considered in formulating the appropriate penalty to be imposed in this matter. Hong's unwillingness to accept any responsibility for the transactions that form the basis for discipline; her extremely poor credibility as evidenced by her denial of any knowledge that purportedly stolen property was being sold at the premises; the serious nature of the violations; the fact the

distilled spirits were being resold at the premises; the number of violations, and the extensive period over which the violations occurred.

Appellant's contention that the ALJ ignored the affirmative testimony of its witnesses is simply incorrect. It is clear that he believed the testimony of Hirata that he informed both Hong Lily Li and Jie Li that he was offering them stolen merchandise. The ALJ simply disbelieved Hong Lily Li's denial of any complicity in the transactions.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) We are not inclined to second guess the ALJ's credibility determinations nor his resolution of conflicts in the evidence.

Nor are we prepared to say that the order of revocation was an abuse of discretion. The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion (*Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296]), and we find none here.

Crimes involving fraudulent intent, intentional dishonesty for personal gain or other corrupt purpose are crimes involving moral turpitude. The evidence shows, despite appellant's contentions, that its owner was herself involved in the unlawful conduct. In such circumstances, we cannot say that an order of revocation is unduly harsh or an abuse of discretion.

ORDER

The decision of the Department is affirmed.⁴

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

⁴ 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.