

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

AB-9015

File: 47-357419 Reg: 08068380

K & K, LLC, dba JP's Bar & Grill
1101 Wilshire Boulevard, Santa Monica, CA 90401,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 5, 2010
Los Angeles, CA

ISSUED SEPTEMBER 29, 2010

K & K, LLC, doing business as JP's Bar & Grill (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days, with 10 days stayed for one year, for permitting the consumption of an alcoholic beverage upon the premises during hours in which it is unlawful to sell, give or deliver an alcoholic beverage, a violation of Business and Professions Code section 25632.

Appearances on appeal include appellant K & K, LLC, appearing through its counsel, Kenneth J. Kallberg, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

¹The decision of the Department, dated March 4, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on October 26, 1999. On April 10, 2008, the Department instituted an accusation against appellant charging that appellant permitted the consumption of an alcoholic beverage upon the premises during hours in which it was unlawful to sell, give or deliver an alcoholic beverage.

At the administrative hearing held on January 6, 2009, documentary evidence was received and testimony concerning the violation charged was presented by Jason Olson, a police officer for the City of Santa Monica; Jonas Swyer, the bartender; and two individuals who were present in the bar at the time of the alleged offense: Dean Demilio and Joseph Sparacino.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been established, and that appellant's license should be suspended for 25 days, with 10 days stayed for one year.

Appellant filed a timely appeal raising the following issues: (1) the evidence presented is insufficient to support the decision, (2) the prejudicial effect of the evidence presented outweighs its probative value, and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends that the evidence presented is insufficient to support the decision because it is based solely on the testimony of Officer Olson, who neither took physical evidence from the scene nor arrested anyone at the premises on the night in question. Appellant maintains that the officer could not have seen the activity about which he testified, and that the administrative law judge (ALJ) was wrong to give greater

weight to the officer's testimony than to that of the bartender and other persons present.

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

As the Court stated in *Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815, 817]:

In examining the sufficiency of the evidence, all conflicts must be resolved in favor of the department, and all legitimate and reasonable inferences indulged in to uphold its findings if possible. When findings are attacked as being unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department.

The ALJ states in his Findings of Facts, III.B. that he observed conflicts in the evidence regarding what took place at the premises, and that based on the credibility factors laid out in Evidence Code section 780, he gave greater weight to the testimony of Officer Olson than to that of the other witnesses. This is his prerogative, by law. The

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

conflict in testimony was resolved by the ALJ, and the Board is not inclined to question it. 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 cannot substitute our judgment for that of the ALJ. Where, as here, there are conflicts in the evidence, the Appeals Board is powerless to substitute its own conclusions for those of the trier of fact when there is substantial evidence, even if contradicted, to support the findings.

II

Appellant contends that the prejudicial effect of the evidence offered by Officer Olson exceeds its probative value.

Appellant argues that Officer Olson's testimony is tainted by bias and vindictiveness because he believes the officer has a "vendetta" against the premises. Appellant's assertion that the prejudicial effect of the evidence offered by Officer Olson exceeds its probative value appears to be based on Evidence Code section 352 wherein "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice. . . ."

Appellant is asking this Board to reweigh the facts and come to a different conclusion than that of the ALJ. However the only real reason appellant has given in urging us to reach a different conclusion is its opinion that the ALJ was wrong.

The Court of Appeal addressed the standard of review that it, and this Board, must use when considering a decision of the Department:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends* (2002) 100 Cal.App.4th 1250, 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; Bus. & Prof. Code §§ 23090.2, 23090.3.) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*

(*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing an individual as he or she testifies, as well as making a determination on whether to include or exclude evidence as it is presented. Even if we were permitted to do so, we are not in a position to second-guess the ALJ's decision on factual matters.

III

Finally, appellant maintains that it was an abuse of discretion to impose a 15-day suspension for what he terms "three sips of beer on Christmas Eve." (Oral Argument.)

"[I]t has been held that the propriety of the penalty imposed by an administrative agency is a matter vested in the discretion of such agency, and that its decision thereon will not be disturbed unless there has been a clear abuse of discretion." (*Martin v. Alcoholic Bev. Etc. Appeals Bd.* (1959) 52 Cal. 2d 287, 291 [341 P.2d 296].) Therefore, the Appeals Board may not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. However, where an appellant raises the issue

of an excessive penalty, the Appeals Board will examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Where, as here, a penalty of 15-days' suspension has been imposed for permitting the consumption of alcoholic beverages after hours, we cannot say it was unreasonable, or an abuse of discretion to impose such a penalty, when this is precisely the discipline set forth in the Penalty Guidelines contained in the Appendix to rule 144 (4 Cal. Code Regs. §144) for such a violation. The day of the year and number of sips notwithstanding, we find no abuse of discretion.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.