

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

AB-9179

File: 21-307148 Reg: 10072741

MUSA ALI HASSAN and SELEH KAID NASSER, dba Seminary Liquors & Grocery
2611 Seminary Avenue, Oakland, CA 94605,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: July 12, 2012
Sacramento, CA

ISSUED AUGUST 10, 2012

Musa Ali Hassan and Seleh Kaid Nasser, doing business as Seminary Liquors & Grocery (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 20 days for their clerk possessing, in the premises, the prescription drugs Viagra and Cialis without a prescription and with the intent to sell the drugs without a pharmacist's license, violations of Business and Professions Code sections 4051 and 4060.

Appearances on appeal include appellants Musa Ali Hassan and Seleh Kaid Nasser, appearing through their counsel, Roni Rotholz, and the Department of Alcoholic Beverage Control, appearing through its counsel, Heather Hoganson.

¹The decision of the Department, dated June 23, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on April 10, 1995. On March 22, 2010, the Department filed an accusation charging that their clerk, Abdul Anagar, possessed, in the premises, the prescription drugs Viagra and Cialis without a prescription and with the intent to sell the drugs without a pharmacist's license.

At the administrative hearing held on December 9, 2010, and April 20, 2011, documentary evidence was received and testimony concerning the violations charged was presented by Oakland police officer Frederick Shavies, co-licensee Musa Ali Hassan, and an employee of the licensees, Shihab Ali Anagar.² Shihab Anagar is the brother of clerk Abdul Anagar.³

Officer Shavies testified that he went to the licensed premises to do an inspection because of information he received that there was an unregistered firearm on the premises and the clerk was selling Viagra. Shavies and other officers went to the premises, where they found the firearm and bottles containing Viagra and Cialis near the cash register. They also found three plastic baggies containing Viagra in Abdul Anagar's jacket pocket and Abdul Anagar gave them \$1,000 in cash that he had.

In a written statement, Abdul Anagar admitted that he was selling the Viagra and Cialis to make money for himself. Shihab Anagar also made a written statement that he

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The Department's decision spells his name "Shahab Angabar." At the hearing, however, he spelled his name for the record "Shihab Anagar." We use the latter spelling.

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Abdul Anagar's name is spelled, incorrectly, in the Department's decision as "Angabar."

had known for several days that Abdul Anagar was selling Viagra, and that Abdul was not putting the money he made from the pills in the premises' register, but was keeping the money for himself.

At the hearing, appellants stipulated to the truth of counts 1 and 2, which charged that Abdul Anagar possessed, at the premises, Viagra and Cialis without a prescription. No stipulation was made with regard to Count 3, which charged that Abdul Anagar possessed, at the premises, prescription drugs with the intent to sell them without a pharmacist's license. Shihab Anagar testified that he did not tell the officer that he knew about his brother possessing or selling Viagra at the premises.

Subsequent to the hearing, the Department issued its decision which determined that the charges of all three counts were proved.

Appellants have filed an appeal contending that substantial evidence does not support the finding that Shihab Anagar knew his brother was selling the drugs from the licensed premises.

DISCUSSION

Appellants⁴ contend the ALJ erred when he found the testimony of Shihab Anagar not credible because of the contradiction between his testimony and his prior written statement. This error, they assert, led to the erroneous findings that "the sales indeed took place at the store, that respondent knew about them, and, as such, should suffer

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In their appeal brief, appellants refer to themselves as "respondents," which was their party designation at the administrative hearing. However, they also refer to Shihab Anagar as "respondent." We have assumed that when the plural is used, it refers to the appellants/licensees, Hassan and Nasser, and when used in the singular it refers to their employee, Shihab Anagar, who is not a licensee or an appellant.

the suspension of the license as a result." (App. Br. at p. 2.)

The ALJ explained his credibility determination in Finding of Fact 8:

At hearing, [Shihab Anagar] testified he was not aware his brother, Abdul [Anagar], possessed or attempted to sell Viagra from the Licensed Premises prior to his arrest. This testimony is not credible. [Shihab] [Anagar] signed a statement on the day of the incident indicating Abdul [Anagar] told him several days before that he (Abdul) was selling Viagra to bring his family to the United States. (State's Exhibit 4) [Shihab Anagar] also verbally told Officer Shavies that Abdul [Anagar] was selling Viagra to bring his family to America. (*Id.*)

Appellants argue that, while Shihab Anagar admitted in his written statement that he knew his brother was selling the Viagra to raise money to go to his family in Yemen, nothing in the statement says Shihab Anagar knew his brother was selling it or possessing it for sale at the store. They assert, therefore, that no substantial evidence supports a finding that connects the sale or possession of the Viagra with the licensed

premises.

"Substantial evidence" is relevant evidence which reasonable minds would accept

as 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]; *Toyota Motor Sales U.S.A., Inc. v.*

Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an

appellant charges that a 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., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc.*

v. Dept. of Alcoholic Bev. Control (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) 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. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *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, 826-827 [40 Cal.Rptr. 666].)

It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*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].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

There clearly was substantial evidence for the finding that Shihab Anagar knew about his brother selling the drugs. He said in his signed statement that he knew and he told Officer Shavies that he knew. Although he did not specifically include "at the premises" in his statement, it is reasonable to infer that he knew his brother was making sales while at the premises from his insistence that his brother was not selling the Viagra for the store and that money from the sales did not go into the cash register, but that his brother kept the sales proceeds for his own use.

Even if Shihab Anagar did not know about his brother's illegal activities, that does not mean the violations did not exist. Since Abdul Anagar had Viagra pills in his jacket pocket at the time of the inspection, clearly he possessed the drugs at the premises.⁵He

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In addition, appellants stipulated to counts 1 and 2. Both these counts included

had no prescription for the Viagra or Cialis that he possessed. Since he had up to 300 Viagra pills with him, it is reasonable to infer that he possessed them not for personal use, but with the intent to sell them. His possession of at least \$1,000.00 in cash makes it reasonable to infer that he had been selling the drugs for some time. All of the allegations of the accusation were established.

In addition, whether or not Shihab Anagar knew his brother was selling the drugs at the premises also makes no difference with regard to appellants' liability for the violations. The knowledge and illegal activity of appellants' clerk, Abdul Anagar, are imputed to the licensees. (See *Yu v. Alcoholic Bev. etc. Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377 [3 Cal.Rptr.2d 779]; *Kirby v. Alcoholic Bev. Etc. Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].)

The Department's decision acknowledges that co-licensee Hassan had no knowledge and no benefit from Abdul Anagar's illegal sales. It also acknowledges appellants' 25-year license history with only one other disciplinary action. While not reducing appellants' liability for the acts of their employee, these factors were used by the Department to mitigate the penalty. Under the circumstances, there is nothing unreasonable about the determination or the penalty.

ORDER

The decision of the Department is affirmed.⁶

the charge that Abdul Anagar possessed the drugs at the premises. Appellants cannot stipulate to that fact in counts 1 and 2 and deny the same factual allegation in count 3.

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This 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.

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, MEMBER ALCOHOLIC
BEVERAGE CONTROL APPEALS
BOARD

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.