

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

AB-9219

File: 47-204927 Reg: 11074182

JAYOFER, INC., dba Lido Restaurant
9100 Long Beach Boulevard, South Gate, CA 90280,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 16, 2012
Los Angeles, CA

ISSUED OCTOBER 2, 2012

Jayofer, Inc., doing business as Lido Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 45 days, with 15 days stayed for a period of one year, on condition that no further cause for disciplinary action occur within that one year period, for refusing to allow the Department to inspect the premises, a violation of Business and Professions Code section 25753,² and for violation of a condition on the license, a violation of Business

¹ The decision of the Department, dated November 16, 2011, is set forth in the appendix.

² Section 25753 provides: "The department may make any examination of the books and records of any licensee or other person and may visit and inspect the premises of any licensee it may deem necessary to perform its duties under this division."

and Professions Code section 23804.³

Appearances on appeal include appellant Jayofer, Inc., appearing through its counsel, Rick A. Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on January 6, 1988. On January 13, 2011, the Department instituted a two-count accusation against appellant charging that on September 9, 2010, appellant's agent or employee, Laureano Ferrero, failed to allow or refused to comply with a request by a Department investigator, Brad Beach, to examine the books and records of the premises, and that a condition on the license, which states that "Laureano Ferrero shall not act as manager, consultant, employee or corporate officer, director or stockholder nor shall have any direct or indirect interest in the license applied for herein, or in the business conducted thereunder," had been violated.

At the administrative hearing held on September 21, 2011, documentary evidence was received and testimony concerning the violation charged was presented by a Department investigator, Brad Beach; the president of the corporation, Yolanda Ferrero; and Andres Rey, a manager at the premises.

The testimony of the investigator established that on September 9, 2010, he visited the premises with police officers from the South Gate Police Department. No customers were present, but the establishment appeared to be open. [RT 9-10.] The

³ Section 23804 provides: "A violation of a condition placed upon a license pursuant to this article shall constitute the exercising of a privilege or the performing of an act for which a license is required without the authority thereof and shall be grounds for the suspension or revocation of such license."

investigator asked an unidentified female for the manager, and she summoned Laureano Ferraro (Laureano), who, when asked, identified himself as the manager. [RT 11.] Laureano was asked for, and produced, the alcoholic beverage license and other permits. The investigator notified Laureano that he was there to perform an inspection of the premises, and served him with a Notice to Produce Documents; he was also asked for his identification. [RT 13.] Laureano initially indicated he would obtain these items from the office, but then returned and stated he did not have his identification, that the investigator would need a search warrant to go through the premises, and he would not allow them to inspect the premises. [RT 14.] A short time later, Laureano yelled and lunged at the investigator, and had to be physically restrained by a security guard and another person in the premises. [RT 16-17.] The investigator waited until six customers had been served alcoholic beverages and then informed Laureano that he wanted to inspect the premises under the provision of Business and Professions Code section 25755 which permits inspection of the premises without a search warrant when the premises is exercising the privileges authorized by its license. [RT 19-20.] Laureano refused to allow the inspection, refused to admit the investigator into the office, and refused to supply the telephone number of his daughter, who is the owner of the premises. [RT 20-22.]

Subsequent to the hearing, the Department issued its decision which determined that the charges had been proven and that no defense to the charges had been established.

Appellant filed a timely appeal raising the following issues: (1) the evidence does not support the findings and the findings do not support the decision, and (2) the penalty is excessive because factors in mitigation were not considered.

DISCUSSION

I

Appellant contends the evidence produced at the hearing does not support the findings and the findings do not support the decision.

When findings are attacked on the ground that there is a lack of substantial evidence, 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].)

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, [Inc. v. Alcoholic Bev. Control Appeals Bd. (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];) 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.App2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) 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].)

Appellant maintains there was insufficient evidence to establish that Laureano was employed as a manager, and that since he was not appellant's agent or employee, it is not responsible for his actions. Laureano, it argues, was acting as the landlord of

the premises. Appellant also asserts that the Department did not have a right to inspect the first-floor office because it was not part of the licensed premises. The testimony of appellant's witnesses, Yolanda Ferrero and Andres Rey, portrayed a different version of the events on September 9, 2010 than that of the investigator.

It is a fundamental precept of appellate review that it is the province of the administrative law judge (ALJ), as trier of fact, to make determinations as to witness credibility and to resolve any conflicts in the testimony. (*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.

The ALJ found the testimony of appellant's witnesses to be less than credible, in Findings of Fact IV E and G:

E. . . . After evaluating the credibility of the witnesses pursuant to the factors set forth in Evidence Code Section 780, including their demeanor, their capacity to recollect, the existence or nonexistence of a bias or motive and inconsistencies in the testimony of Mr. Rey, greater weight was given to the testimony of Investigator Beach than to that of Mr. Rey in resolving the conflicts in the evidence.

G. The testimony of Yolanda Ferrero and Andres Rey that Laureano Ferrero was not working at the premises on September 9, 2010 is found to be not credible. Their testimony is found to be self-serving and it is inconsistent with the statements and actions of Laureano Ferrero on the night of September 9, 2010.

The ALJ's credibility determination is not an abuse of discretion simply because appellant disagrees with it. The Board is not a finder of fact, and the question of whether Laureano was acting as a manager and/or failed to produce records are factual questions to which we accord our usual deference to the ALJ. The record clearly

contains substantial evidence to support the determination of the ALJ that Laureano Ferrero refused to comply with a request by the investigator to examine the books and records of the premises, and that Laureano was acting as an agent or employee of appellant; this satisfies the Board's standard of review.

II

Appellant contends the penalty is excessive because factors in mitigation were not considered.

The Appeals Board may examine the issue of an excessive penalty raised by an appellant (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but 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, 291 [341 P.2d 296].)

“[U]nless the record affirmatively indicates otherwise, the trial court is deemed to have considered all relevant criteria, including any mitigating factors.” (*People v. King* (2010) 183 Cal.App.4th 1281, 1322 [108 Cal.Rptr.3d 333]; *People v. Holguin* (1989) 213 Cal.App.3d 1308, 1318 [262 Cal.Rptr. 331].)

Where, as here, the trial court has discretionary power to decide an issue, its decision will be reversed only if there has been a prejudicial abuse of discretion. "To be entitled to relief on appeal . . . it must clearly appear that the injury resulting from such wrong is sufficiently grave to amount to a manifest miscarriage of justice. . . . [Citations.]" (6 Witkin, *Cal. Procedure* (2d ed. 1970) Appeal, § 242, at p. 4234.)

(*Mission Imports, Inc. v. Superior Court* (1982) 31 Cal.3d 921, 932 [647 P.2d 1075].)

Appellant maintains that it was an abuse of discretion by the ALJ not to consider the cooperation of appellant's representatives, Yolanda Ferraro and Andres Rey, as a

mitigating factor in determining the penalty. Appellant also contends that the fact that the business has been licensed for 22 years, without discipline, should have been considered as a mitigating factor.

“If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion.” (*Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal.2d 589, 594 [400 P.2d 745].)

The Department’s penalty recommendation was a 30-day suspension, with 10 days stayed for one year, for refusing to permit an inspection, and for a separate 15-day suspension, with 5 days stayed for one year, for violation of the condition on the license. Appellant argues that these should be served concurrently, rather than consecutively, giving a net effect of a 30-day suspension with 10 days stayed for one year.

A suspension of appellant’s license for a period of 45 days, with 15 days stayed for one year, is in line with the standard penalty of rule 144 (4 Cal. Code Regs., §144), and clearly within the discretion of the Department.

Rule 144 states:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, *et seq.*) and the Administrative Procedures [*sic*] Act (Govt. Code Sections 11400, *et seq.*), the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. *Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation -- such as where facts in aggravation or mitigation exist.* [Emphasis added.]

The italicized language reflects the reality that factors in aggravation or mitigation do not fall in sharply defined or predictable patterns and the impossibility of establishing a rigid rule fitting all cases. The flexibility offered by rule 144 permits, but does not mandate, the fine-tuning of a standard penalty authorized by rule 144, thereby allowing – but not compelling – the ALJ to consider factors in aggravation or mitigation. We think the ALJ's decision was well within the power authorized by rule 144, and we cannot say that the penalty imposed was unreasonable or an abuse of discretion.

ORDER

The decision of the Department is affirmed.⁴

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, 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.