

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

AB-9278

File: 21-438060 Reg: 11076162

BOB'S LIQUOR, INC., dba Bob's Liquor
1123 West Orangethorpe Avenue, Fullerton, CA 92833,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: March 7, 2013
Los Angeles, CA

ISSUED APRIL 10, 2013

Bob's Liquor, Inc., doing business as Bob's Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 20 days, with 5 days stayed for a period of one year provided appellant completes one year of discipline-free operation, for its clerk having sold alcoholic beverages to three individuals under the age of 21 (counts 1-3), violations of Business and Professions Code section 25658, subdivision (a), and suspended its license for 5 days for failing to produce a surveillance video demanded by the Department in a timely manner, which constituted a refusal to allow the examination of the records (count 4), in violation of Business and Professions Code section 25753. The suspensions are to run concurrently.

¹The decision of the Department, dated July 5, 2012, is set forth in the appendix.

Appearances on appeal include appellant Bob's Liquor, Inc., appearing through its counsel, Jeffrey S. Weiss, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 3, 2006. On December 16, 2011, the Department instituted a four-count accusation against appellant charging the sale of alcoholic beverages by appellant's clerk to persons under the age of 21 in counts 1-3, and the failure to comply with a request to examine its records in count 4.

At the administrative hearing held on April 12, 2012, documentary evidence was received and testimony concerning the violation charged was presented by Victoria Torrez, a Department Investigator; Gina H., Maia B., and Brett B., the minors to whom alcohol was sold; and Fady Helmy, the manager of the licensed premises.

Testimony established that on July 22, 2011, a Department investigator observed several youthful-looking individuals (four female and one male) enter the licensed premises. She observed the young man, later identified as Brett B., carry a 24-ounce can of Coors beer to the sales counter. She also observed a young woman, later identified as Gina H., carrying a bottle of Miller High Life beer. The clerk completed the sale of the Coors to Brett B. without asking for identification or asking any age-related questions. The young woman later identified as Maia B. selected a bottle of UV Blue Raspberry vodka and placed it on the counter. Gina H. placed her beer on the counter as well. Maia B. told her companions that she did not have enough money and was given some by Brett B. The clerk completed the sale to Maia B. and Gina H., and did not ask either of them for identification or ask them any age-related questions. The investigator followed the minors out of the premises and, upon

questioning, determined that they were 18, 17, and 16 years old.

On July 26, 2011, the Department sent appellant a Notice to Produce Records, asking it to produce all in-store video surveillance recordings for the evening in question within ten days. The surveillance video was not provided within this time frame, but was later provided to the Department in January of 2012.

Subsequent to the hearing, the Department issued its decision which determined that the violations charged were proved and no defense was established.

Appellant filed a timely appeal raising the following issues: (1) count 3 is not supported by substantial evidence; (2) there should have been no suspension as to count 4; and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends count 3 (sale of an alcoholic beverage to Gina H., a person under the age of 21, on July 22, 2011) is not supported by substantial evidence.

Appellant contends the evidence does not support the finding that appellant's clerk furnished an alcoholic beverage to Gina H., the minor named in count 3. It asserts the evidence shows that Gina did no more than carry a bottle of beer to the counter, and that the clerk did not see Gina with the beer. Appellant contends the evidence is insufficient to support a finding of furnishing.

With regard to appellant's contention, the Appeals Board must review the Department's decision to determine if substantial evidence exists, even if contradicted, to reasonably support the Department's 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 [84 Cal.Rptr. 113].) "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].)

In making its 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]; *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*, *supra*, 261 Cal.App.2d 181, 185; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

In the present case, the appellant maintains the alcohol in question was actually paid for by Maia B., that Gina H. did nothing more than carry the beer to the counter, and that the clerk did not observe Gina with the beer. The Department investigator, however, testified that she observed Gina placing beer on the counter [RT 14], and that after the sale was completed, Gina took the bag and exited the store with it [RT 16]. Gina's own testimony [RT 30] confirms that she was the one who grabbed the bag and exited the premises with it.

We believe that the testimony presented at the administrative hearing constitutes the substantial evidence necessary to support the ALJ's finding that the clerk furnished beer to Gina H.

In *Circle K Stores, Inc.* (2004) AB-8209, which involved the purchase of beer by

one person who was 21 years old, accompanied and helped by several other people who were not yet 21, the Board said:

The clerk is the person in control of the sale. He or she must be alert to the substance of the transaction, and cannot ignore circumstances that ought to raise questions in the mind of a reasonably prudent person. When the transaction is in the nature of a group purchase, as the one in this case appeared to be, a clerk must establish that each of those who are involved in the transaction are 21 or over. It is not enough that the person who assembles the various selections and pays for them is 21. A clerk may not close his or her eyes to the reality of what is taking place. The critical fact in this case is not the mere presence of minors, it is their participation in the transaction, all of which took place in front of the clerk.

Business and Professions Code section 23001 declares that “the subject matter of this division involves in the highest degree the economic, social, and moral well-being and safety of the state and of all its people,” and mandates that “all provisions of this division shall be liberally construed for the accomplishment of these purposes.” It would be an unduly restrictive reading of the word “furnish” to accept appellant’s contention that there was no furnishing in this case.

While the facts in AB-8209 were somewhat different from those in the present appeal, they are sufficiently similar to provide appropriate guidance. We have no difficulty concluding that the participation of each of the minors in this transaction was sufficient to put a reasonable clerk on notice that it was necessary to verify the age of each and every person in the group, to confirm they were at least 21 years of age, before completing the sale.

II

Appellant contends there should have been no suspension as to count 4 (failure to produce the surveillance video in violation of Business and Professions Code section 25753).²

²§ 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."

Appellant maintains that the proper time for the investigator to have attempted to view the surveillance tape would have been at the time of the investigation by Investigator Torrez on July 22, 2011, rather than via a Notice to Produce mailed on July 26, 2011. Appellant cites no authority for this assertion.

Appellant also contends that the date of the violation on count 4 is more than ten days after the due date listed in the Notice to Produce Records. This is simply incorrect. The date cited is August 6, 2011, and this is the date on which the violation occurred since the ten days provided in the Notice to Produce had passed.

Appellant further asserts that, although it was untimely, the surveillance tape was in fact sent to the Department. It fails to cite any authority for this assertion, and fails to explain how, if a violation occurred on August 6, 2011, the furnishing of the surveillance tape five months later erases the problem.

III

Appellant contends the penalty is excessive and that an aggravated penalty was improper given the lack of substantial evidence to support counts 3 and 4.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].)

The ALJ made the following observation with regards to the penalty (FF 15):

Regarding the sale of alcoholic beverages to three minors, the Department's attorney recommended an aggravated penalty consisting of a twenty day suspension with five days stayed for one year arguing that Respondent's clerk sold alcoholic beverages to three very youthful looking minors who were sixteen, seventeen and eighteen years old respectively

and the clerk failed to ask them for identification. As for the failure to respond to the Notice To Produce, the Department's attorney asked for a five day suspension to run concurrently. After considering all the evidence presented at the hearing, a determination has been made that the recommended penalty is an appropriate penalty in this matter.

The propriety of a penalty, including whether aggravating or mitigating factors in a particular case justify a higher or lower penalty, is vested in the Department's discretion. But the Department "does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion." (*Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal.2d 589, 594 [400 P.2d 745].)

The Department's rule 144 penalty guidelines (Cal. Code Regs., tit. 4, §144) list specific factors that it may consider in determining whether a higher or lower penalty may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances. Although the Department is not limited by its guidelines to the specific aggravating or mitigating factors listed in rule 144, it is telling that each of the factors listed is closely related to the dynamics of the transaction constituting the violation. In this case, alcohol was sold to three minors, not just one – a single charge of which would have yielded the typical 15-day suspension for a first offense of selling alcohol to a minor. Aggravation of the penalty for a sale to multiple minors does not seem to us to be unreasonable.

Appellant's disagreement with the penalty imposed does not mean the Department abused its discretion. The penalty comports with the Department's penalty guidelines pursuant to rule 144, and appellant has not shown that the Department abused its discretion in imposing an aggravated penalty.

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
FRED HIESTAND, 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.