

ISSUED NOVEMBER 1, 1996

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

EDDIE R. BLAKE and	)	AB-6545
LAUREN BLAKE)	
dba Chad's Place	)	File: 48-267871
40740 Big Bear Blvd.	)	Reg.: 92029176
Big Bear Lake, CA 92315,)	
Licensees/Appellants,	)	Administrative Law Judge
	)	at the Department Hearing:
v.	)	Alan S. Meth
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	May 1, 1996
	)	Los Angeles, CA

Eddie R. Blake and Lauren Blake, doing business as Chad's Place (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked appellants' on-sale general public premises license, but stayed imposition of the revocation for two years, provided that appellants serve a suspension of 15 days with suspension to continue indefinitely thereafter, until appellants signed a conditional license with terms as provided by the Department's decision, for appellants permitting the illegal sales and negotiations for sales of controlled substances and permitting an

¹The decision of the Department dated June 5, 1995, is set forth in the appendix.

employee to purchase purported stolen property, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §§24200, subdivision (a), and 24200.5, subdivision (a).

Appearances on appeal include appellants Eddie R. Blake and Lauren Blake, appearing through their counsel, Gregory J. Ferruzzo and James J. Ferruzzo; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on September 4, 1984. In a previous matter, the Department instituted an accusation in 1991 against co-appellant Eddie R. Blake and others under another license at the present location, for permitting narcotic sales inside the premises. On October 17, 1991, the license was revoked, with the penalty stayed for one year upon certain conditions.

Thereafter, on October 28, 1992, the Department instituted an accusation in the present matter against appellants for knowingly permitting the illegal sales or negotiations for sales of controlled substances, and permitting their employee to purchase cigarettes which allegedly had been stolen.

An administrative hearing was held on May 16-20, 23, and 30, 1994, at which time oral and documentary evidence was received. It was determined that the San Bernardino Sheriff's Department had conducted a lengthy undercover drug operation in the Big Bear area, concentrating on appellants' premises. The Administrative Law

Judge (ALJ) found certain violations and ordered the license revoked, with revocation stayed for a two-year probationary period with an actual suspension of 20 days, and the suspension to be indefinite thereafter until additional conditions were accepted and placed on the license.

Subsequent to the hearing, the Department issued its own decision (after rejecting the ALJ's proposed decision, which the Department may do pursuant to Business and Professions Code § 11517, subdivision (c)), which revoked the license basically under the same terms as set forth by the ALJ, but reducing the actual suspension to 15 days.²

In their appeal, appellants raise the following issues: (1) the crucial findings are not supported by substantial evidence; and (2) the penalty is excessive.

DISCUSSION

I

Appellants contend that the crucial findings are not supported by substantial evidence. "Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456], and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as in the present matter, the 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

²The proposed decision of the ALJ is set forth in the appendix.

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 conflict[s] 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. 658].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve conflicts of evidence in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]--a case where there was substantial evidence supporting the Department's as well as the license-applicant's position; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Determination I found that appellants did not know, and thus did not permit, the violations.

Determination of issues II is based upon findings V, IX, XII, and XV.

Finding V concerns a violation on March 19, 1992, when deputy Daniel Braun purchased controlled substances from employee Shirley Parker in the licensed premises [5/16, R.T. 30-33].

Finding IX concerns a violation on June 26, 1992, when deputy Braun and his partner, while on the premises, negotiated for the sale of controlled substances with

Terri Galipeaux (not an employee) and Julie Gray (a waitress at the premises). Braun handed money to Galipeaux, who, with Gray, left the premises for approximately 15-30 minutes. The women thereafter returned to the premises. Later that evening, at Galipeaux's residence, Galipeaux, in company with Gray, handed the controlled substances to Braun [5/16, R.T. 57-64; 5/17, R.T. 123-125].

Finding XII concerns a violation on August 6, 1992, when deputy Braun negotiated, while on the premises, with Brad Ostberg, a patron, for the sale of controlled substances [5/16, R.T. 72-74].

In determination of issues I, finding XII, it was determined that the violation was not proven, but in determination of issues II it was determined that the violation was proven. Apparently the ALJ cited finding XII (determination II) as a violation, but the proper finding was XI, being one of the employee incidents (determination I found finding XII not established, so the record was technically incorrect).³

Determination of issues III was based upon findings VI and XIV. Findings VI and XIV concerned the purported stolen property counts. Deputy Braun contacted Dave Shearer, a bartender and employee of the premises. On three separate occasions, Braun sold Shearer cartons of cigarettes which were purported to be stolen [5/16, R.T. 47-49, 78-79, 80-81].

³It appears that determination of issues II which found finding XII a violation was a clerical error of misnumbering. Finding XV lists the three violations where employees were involved: V, IX, and XI, not XII. The matter will not be remanded to the Department for reconsideration, as we do not believe the error as corrected would cause any change in the decision. (Miller v. Eisenhower Medical Center (1980) 27 Cal.3d 614 [166 Cal.Rptr. 826].)

The incidents found to be true in findings V and IX (controlled substance sales violations) and findings VI and XIV (stolen property violations) concerned appellants' employees. The law is clear that a licensee is vicariously responsible for the unlawful on-premises acts of its employees. Such vicarious responsibility is well settled by case law. (Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; and Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].)

II

Appellants contend that the penalty is excessive. 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].) 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].)

The Department had the following factors to consider: (1) at the time of the violations, the license was still under a stayed revocation order; and (2) while the Department specifically found that appellants did not know, and did not permit the violations, they were still liable by imputation for the illegal conduct of their employees.

Considering such factors, such dilemma as to the appropriateness of the penalty must be left to the discretion of the Department. The Department having exercised its

discretion in a reasonable manner, the Appeals Board will not disturb the penalty.

CONCLUSION

The record clearly demonstrates evidence of unreliability if not bias on the part of deputy Braun which was placed in and made a part of the record by the Department (finding of fact IV). However, the ALJ apparently accepted the testimony of the actual violations as testified to by deputy Braun. This is a credibility determination only the trier-of-fact can make. 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 [42 Cal.Rptr. 640, 644]; and Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812].)

Despite the exhibition of bias on the part of a peace officer, the decision of the Department is an example of impartiality and just consideration of the facts.

The decision of the Department is affirmed.⁴

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.