ISSUED MARCH 5, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

FOURTH AVENUE RESTAURANT, INC., dba Sammy's California Woodfired Pizza, Inc.) 770 Fourth Avenue San Diego, CA 92101, Appellant/Licensee,	AB-6674 File: 293920 Reg: 95034357
v.	Administrative Law Judge at the Dept. Hearing: Rudy Echeverria
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	Date and Place of the Appeals Board Hearing: January 8, 1997 Los Angeles, CA

Fourth Avenue Restaurant, Inc., doing business as Sammy's California Woodfired Pizza, (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended appellant's on-sale beer and wine general public eating place license for 15 days, with 5 days of the suspension stayed for a probationary period of one year, for having sold an alcoholic beverage (beer) to a 19-year-old police decoy, contrary to the universal and generic public welfare and morals provisions of the

[1]The decision of the Department, dated May 16, 1996, is set forth in the appendix.

California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Fourth Avenue Restaurant, Inc., appearing through its counsel, Joshua Kaplan; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine general public eating place license was issued on September 14, 1994. Thereafter, the Department instituted an accusation alleging that on September 12, 1995, appellant's bartender, Christopher Cerasoli, sold an alcoholic beverage (beer) to a 19-year-old police decoy, in violation of Business and Professions Code §25658, subdivision (a).

An administrative hearing was held on March 27, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the circumstances surrounding the transaction upon which the accusation was based.

Subsequent to the hearing, the Department issued its decision which determined that appellant's bartender, although having requested proof of age at the time he sold the beer to the minor, did not examine the driver's license presented to him, which showed the purchaser's true age of 19. The Administrative Law Judge (ALJ) ordered appellant's license suspended for 15 days, and stayed the suspension as to five days

for a probationary period of one year. Appellant thereafter filed a timely notice of appeal.

In its appeal, appellant raises the following issues: (1) the decision is not supported by its findings and its findings are not supported by substantial evidence in the record, in that the record is replete with gross misconduct; (2) appellant has been denied due process by virtue of the unconstitutionality of Business and Professions Code §24210; and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends that the decision is not supported by its findings and the findings are not supported by substantial evidence, arguing (a) that uncontradicted evidence demonstrates that the bartender was prevented from scrutinizing the identification offered to him by the intervention and distraction of the police officer supervising the decoy operation; and (b) the Department violated its own guidelines by its failure to retain the alcoholic beverage and the "buy" money.

"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 [71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant 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 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. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (substantial evidence supported both the Department's and the license-applicant's position); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; Gore v. Harris (1964) 229 Cal.App.2d 821 [40 Cal.Rptr. 666].)

(a) Cerasoli, appellant's bartender, testified that when he asked for identification, the decoy made a motion as if he were reaching for his I.D., but had not placed it on the counter before Cerasoli went to the beer cooler to get the beer [RT 61-62]. Cerasoli testified further that while he was in the process of obtaining beer the decoy

had ordered, he was distracted by the actions of a person he identified as Detective Knish, a member of the decoy team, who waved a five-dollar bill asking for change [RT 64-65]. To accommodate Knish, Cerasoli, according to his testimony, placed the beer in front of the decoy, collected his money, continued to the cash register where he furnished the change to Knish, changed the bill tendered by the decoy, and gave him his change, and was then prevented from inspecting the identification when ABC personnel displayed their badges [RT 66].

The record does not support appellant's theory of distraction. On cross-examination, Cerasoli testified:

Q. So you're not contending that the transaction was not completed, are you?

A. I am contending that I knew I hadn't seen his I.D. and I still needed to see his I.D. So in my opinion the transaction was not completed.

Q. But you had uncapped the beer, placed it in front of him, taken his money and given him change?

A. Correct.

The Administrative Law Judge chose to believe the testimony of the minor decoy, who testified that he placed his driver's license on the counter, turned toward the bartender so the bartender could read it [RT 15, 29], but the bartender did not look at it while he placed the beer in front of the decoy, took his money and returned his change to him [RT 30-31]. Given the bartender's admission that he had completed each essential step in making a sale, i.e., going to the cooler, obtaining and opening the

beer, placing it in front of the minor where the minor could exercise control over it, taking the minor's money, and giving him his change, his testimony that he then intended to check his identification simply does not ring true. It appears that once the decoy confirmed that he had identification, the bartender assumed there was no need to check further.

The claim of distraction is also undercut by the bartender's statement on the evening in question. When asked if he had asked for identification, his reply was "Yes, but I didn't look at it [RT 49]."

The defense claim of entrapment is also without merit. Even assuming that Detective Knish waved a bill and asked for change, the bartender had already set in motion the essential elements of the violation - he had already opened a beer intending to serve it to the minor. Under California law, the defense of entrapment requires conduct of a law enforcement agent likely to induce a normal law-abiding person to commit the offense. (People v. Barraza (1979) 23 Cal.3d 675, 686 [153 Cal.Rptr. 459].) It would be straining reality to conclude that by asking for change, Detective Knish induced the commission of the offense.

(b) Appellant contends that the Department's failure to preserve the alcoholic beverage and the buy money violates its decoy program guidelines, in violation of the principles set forth in People v. Hitch (1974) 12 Cal.3d 641 [117 Cal.Rptr. 9], and that the failure to preserve the beverage which was sold prevents the Department from

proving an essential element of its case. Neither aspect of this contention has any merit.

The evidence at the hearing clearly established that the alcoholic beverage that was sold was beer. Cerasoli testified that he opened a bottle of Coors Light, and referred to it several times as beer. Beer is an alcoholic beverage. (Bus. & Prof. Code §23006.) Since there was no dispute that the minor had made the purchase and money had changed hands, the fact that the buy money had not been preserved is immaterial.

The Department argues that People v. Hitch does not apply to administrative proceedings, citing Business and Professions Code §11513, which relaxes the rules of evidence in administrative proceedings, and also citing the Board's decision in Woodland Hills Onion (AB-4791) where People v. Hitch was said not to be applicable. In view of the fact that no serious argument can be made that the failure to retain the beverage or the buy money prejudiced appellant in any way, we see no need to revisit the issue here.

II

Appellant attacks the constitutionality of Business and Professions Code §24210, which provides:

> "The department may delegate the power to hear and decide to an administrative law judge appointed by the director. Any hearing before an administrative law judge shall be pursuant to the procedures, rules, and limitations prescribed in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Appellant challenges the use of administrative law judges appointed by the Department as violative of the due process and equal protection clauses of the United States and California constitutions.

The Appeals Board lacks jurisdiction to review this question. (Cal. Const., art. 3, §5.)

III

Appellant's contention that the penalty is excessive is based on two grounds: (1) it is unfair to assess a penalty where there was misconduct by law enforcement officials; and (2) it is disproportionate to the offense, especially in light of appellant's substantial compliance efforts through employee training, education, signage and reminders.

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 Board has already found that the first ground urged by appellant has not been established. As to the second, while it is clear that appellant has a compliance program in place, it is also clear that more is necessary. That program is impressive, but, in the last analysis, it is prone to human failure. That is what this case illustrates.

We note, however, that while the Department sought a 20-day suspension, with 10 days of that stayed, because this was appellant's second such violation within a year, the ALJ imposed only a 15-day suspension with 5 days stayed. While the ALJ gave no explanation for his departure from the Department's recommendation, we may assume that appellant's compliance program was an influencing factor.

The appropriateness of the penalty must be left to the discretion of the Department. Since the Department has, given appellant's disciplinary history, exercised its discretion reasonably, the Appeals Board will not disturb the penalty.

CONCLUSION

The decision of the Department is affirmed.[2]

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

Abstaining:

BEN DAVIDIAN, MEMBER

---

[2] This final order is filed as provided in 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.