ISSUED MARCH 21, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JAE HYUN LEE & MAN CHOON LEE dba South Bay Liquor 1014 Wilmington Boulevard Wilmington, California 90744, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6696 File: 21-276527 Reg: 95034143 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: February 5, 1997 Los Angeles, CA

Jae Hyun Lee and Man Choon Lee, doing business as South Bay Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which ordered their off-sale general license suspended for 20 days, with 10 days of such suspension stayed for a probationary period of one year, for having sold alcoholic beverages (beer) to a minor, 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 §25658, subdivision (a).

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[1]The decision of the Department, dated July 18, 1966, is set forth in the appendix.

Appearances on appeal include appellants Jae Hyun Lee and Man Choon Lee, appearing through their counsel, Andreas Birgel, Jr.; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on October 23, 1992. Thereafter, the Department instituted an accusation alleging that on July 11, 1995, appellants' clerk sold two 40-ounce bottles of Budweiser beer to a 20-year-old minor.

An administrative hearing was held on June 4, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the alleged sale and appellants' denial thereof. Subsequent to the hearing, the Department issued its decision which determined that appellants' clerk had in fact sold the beer to the minor as alleged in the accusation. Appellants thereafter filed a timely notice of appeal.

In their appeal, appellants raise the following issues: (1) the evidence is insufficient to support findings that a sale was made to the minor in question; and (2) the penalty is excessive.

DISCUSSION

I

Appellants contend that the evidence is insufficient to support findings that their employee sold the Budweiser beer to the minor. Their brief reviews the

testimony of the several witnesses at the hearing, and asserts that claimed discrepancies and weaknesses in the testimony with respect to such matters as who removed the beer from the cooler, who placed the beer on the counter, and who paid for the beer, preclude any findings that the sale was to the minor or that the minor purchased the beer.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing a Department decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them 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);

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[2] The California Constitution, article XX, §22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

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].)

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

The Department's brief acknowledges the "sharp conflict in testimony" (Dept.Br., p. 1), but argues that the testimony of the arresting officer and the minor is sufficient to support the Department's findings. Appellants attack the credibility of the police officer with respect to his testimony regarding whether he knew or should have known that the minor was a gang member.

The Administrative Law Judge (ALJ) made special note of the sharp conflict in the evidence, but rejected appellants' suggestion that what the evidence showed was actually a theft of another customer's purchase by the minor. Instead, the ALJ concluded, "based on the totality of the evidence," that the minor had in fact obtained the beer from the cooler and paid for it. We think that there is ample evidence in the record to support the ALJ's determinations.

The arresting officer, a Los Angeles police officer, testified that he saw the

minor remove the beer from the cooler, take it to the counter, and place money on the counter [RT 10-11]. The minor was not asked for identification [RT 14]. The minor left the store with the beer, was stopped by the police officer, and the beer was taken from him [RT 12-13].

The minor also testified that he took the beer from the cooler [RT 31, 52], placed it on the counter [RT 52] with the money [RT 54] while facing the cashier.

Other witnesses included a customer (Polk) who testified that it was he who put the beer and the money on the counter [RT 66], but after leaving the counter momentarily, found when he returned that the beer was gone; another customer (Scott) who testified that he saw Polk put the money and the beer on the counter [RT 88-89]; and appellants' cashier, who testified that Polk bought and paid for the beer, left the store with the minor, and returned for some chips.

We think it clear from this very brief summary of the testimony that the ALJ had to decide which witnesses to believe, and chose to believe the police officer and the minor, thus rejecting the version of the transaction suggested by appellants' witnesses - that the minor had stolen Polk's beer.

All of the witnesses could be said to have a bias. The police officer would want his actions to be vindicated. The minor may have felt that by helping the Department, he would avoid prosecution. The cashier, who at the time was still employed by appellants, would want to preserve his job. The two customers who testified appeared to be regular patrons of appellants' premises. Moreover, there

were inconsistencies in the testimony of appellants' witnesses on key points. The cashier testified that Polk left the store with the beer [RT 100,101]; Polk testified that his beer and his money were taken from the counter while he had momentarily stepped away [RT 69] (and yet registered no complaint to the cashier, the owner or the police officers outside the store [RT 78-79]); Scott (who was reading a magazine while the transaction took place [RT 86]) testified that Polk had placed the money on the counter [RT 89], while the cashier testified that Polk handed him the money [102-103].

The ALJ was in a position to question the witnesses himself, observe their demeanor, weigh their motives and biases, and assess the overall import of their testimony. Although the evidence may have been susceptible to other interpretations, it clearly lends itself to the interpretation the ALJ accorded it.

II

Appellants contend that the penalty - a 20-day suspension, with 10 days of the suspension stayed - is excessive because it prevents appellants from petitioning the Department for leave to pay a fine rather than serve the suspension. Appellants also contend that the cashier acted in good faith in an otherwise confusing situation, believing that he was truly selling the beer to Polk, and not to the minor. Alternatively, appellants argue as mitigation that the appearance of the minor (six feet tall, weighing 250 pounds, and less than one year away from his 21st birthday) could have led the clerk to think he was over 21.

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].)

We are unaware of any statutory or case law requirement that the penalties imposed by the Department must be of such duration that they qualify as eligible for payment of a fine in lieu of suspension. The California Legislature has, by amending Business and Professions Code §23095 in 1995, determined that the Department may not extend such an option where the period of suspension exceeds 15 days. To interpret this legislative action as requiring the Department to reduce the level of penalties it may impose would defeat the very purpose of the statute.

This is appellants' second violation for a sale-to-minor. Appellants paid a fine in lieu of a 15-day suspension in 1995. Consequently, the 20-day suspension (with a net suspension of 10 days) does not appear to be abusive.

The contention that the cashier may have acted in good faith is simply another way of attacking the ALJ's findings. Appellants' challenge to the evidence having been rejected, the suggestion that the cashier may have been confused is not a consideration in determining the penalty.

CONCLUSION

The decision of the Department is affirmed.[3]

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

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[3] 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.