

ISSUED SEPTEMBER 11, 1997

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

JAMIL S. GAMMOH	)	AB-6711
dba Westside Market)	
327 Eleventh Street	)	File: 21-004242
Huntington Beach, CA 92648,	)	Reg: 95032755
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Sonny Lo
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,)	
Respondent.	)	Date and Place of the
	)	Appeals Board Hearing:
	)	July 2, 1997
	)	Los Angeles, CA
)	

Jamil S. Gammoh, doing business as Westside Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which ordered appellant's off-sale general license suspended for ten days for appellant's son having sold alcoholic beverages (a six-pack of Miller Genuine Draft beer) to a 19-year-old police decoy, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a

¹ The decision of the Department dated October 19, 1995, is set forth in the appendix.

violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Jamil S. Gammoh; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued July 22, 1977. Thereafter, the Department instituted an accusation alleging the sale on August 26, 1994, of a six-pack of Miller's Genuine Draft beer to David Dereszynski, a 19-year-old minor participating in a minor decoy program being conducted by the Huntington Beach Police Department.

An administrative hearing was held on September 6, 1995, at which time oral and documentary evidence was received concerning the charges of the accusation. At that hearing, testimony was presented by Police Officer Irwin Feuerstein, David Dereszynski (the minor), and Gahassan Gammoh, appellant's son, concerning the transaction in question.

Subsequent to the hearing, the Department issued its decision which determined that appellant's son had, in fact, made the sale in violation of the statute, and ordered appellant's license suspended for ten days. Thereafter, appellant filed a timely notice of appeal.

Appellant filed a letter brief, accompanied by that portion of the transcript of

the criminal prosecution which arose from the transaction in question which contains the testimony of Police Officer Feuerstein. Appellant asserts, in both the letter brief and his original notice of appeal, that the evidence was insufficient to support the findings and the decision. Appellant contends that, even though the Huntington Beach police guidelines provide that the arresting officers shall collect the purchase money, the register receipt and register tape, and any surveillance video, they did not do so in this case. Appellant also attacks the credibility of the police officer, contending his testimony in the administrative hearing varied from his testimony in the criminal proceeding, in which appellant was acquitted.

DISCUSSION

Appellant's basic issue on appeal is his contention that the evidence is insufficient to support the decision.

"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 U.S. 474, 477 [71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 747].)

When, as in the instant matter, the findings are attacked on the ground 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].)

Appellant argued at the administrative hearing that the testimony of Mr. Dereszynski (the minor decoy) in the Department proceeding contradicted his testimony in the criminal proceeding. However, appellant could only point to a minor discrepancy regarding whether the customer received any change from the purchase.

In his letter brief filed with the Appeals Board, appellant attacks the veracity of Officer Feuerstein. Appellant has submitted a transcript of Officer Feuerstein's testimony in the criminal case, and his letter brief seeks to demonstrate a number of inconsistencies between that testimony and his testimony in the Department proceeding. Appellant is, in effect, attempting to retry his case before the Appeals Board. He asks the Appeals Board to reject Officer Feuerstein's testimony as unreliable, leaving only the testimony of the minor decoy to support the ALJ's decision.

The Board has not been told whether any attempt was made to obtain the transcript from the criminal trial before the administrative hearing went forward.

Since the transcript is not part of the record in the administrative hearing, it technically may not be considered by the Appeals Board.

Although appellant was acquitted in the criminal case, the ALJ held that the acquittal was no bar to the Department's accusation, citing Lundborg v. Director of Department of Professional and Vocational Standards (1967) 257 Cal.App.2d 141, 146 [64 Cal.Rptr. 650, 655], where the court stated:

"It has long been established that exoneration in a prior civil action or acquittal in a criminal proceeding is not res judicata in subsequent administrative license proceedings. ... [T]hese doctrines do not fit into the purpose of license revocation proceedings."

The Administrative Law Judge heard the testimony, and chose to believe Mr. Dereszynski's testimony that he purchased the beer from Mr. Gammoh over Mr. Gammoh's testimony in which he denied ever seeing Mr. Dereszynski.

The issue of credibility is for the trier of fact, the ALJ and, ultimately, the Department. Where there is evidence which, if believed, supports the findings, the Board may not intervene. (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].)

Although there is evidence the Huntington Beach police did not strictly observe the guidelines the police department had established, we do not consider that to be a bar to this proceeding. To the extent the failure to observe the

guidelines goes to the weight given the evidence, that falls within the prerogative of the ALJ.²

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

² Appellant cites an alleged discrepancy involving the \$10 bill used by the minor in making the purchase. The evidence shows that, in fact, there were two \$10 bills with the same final three digits, and the police officer simply retrieved the wrong bill from the register.

³ This final decision is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said Code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.