

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

ADJOY, INC.	)	AB-6724
dba Seaman's Liquor)	
165 W. Sixth Street	)	File: 21-275205
San Pedro, California 90731,	)	Reg: 96036192
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Ronald M. Gruen
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	April 2, 1997
	)	Los Angeles, CA
)	

Adjoy, Inc., doing business as Seaman's Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which ordered its license suspended for 20 days, with the suspension of 10 days thereof stayed for a probationary period of one year, for its employees having sold alcoholic beverages to minor decoys on two separate occasions in February and March, 1996, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §25658, subdivision (a).

¹The decision of the Department dated September 5, 1996, is set forth in the appendix.

Appearances on appeal include appellant Adjoy, Inc., appearing through its counsel, Edward Paul; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on November 19, 1992. Thereafter, the Department instituted an accusation alleging that on February 15, 1996, and again on March 1, 1996, appellant's employees sold alcoholic beverages to minors engaged in police decoy operations conducted by the Los Angeles police department. An administrative hearing was held on August 6, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the two incidents alleged in the accusation.

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision, which determined that in the first transaction, appellant's clerk, after requesting and being shown identification setting forth the true age of the purchaser, nonetheless proceeded to sell her four wine coolers, even though the identification she tendered showed her true age to be only 19. In the second incident, the ALJ determined that the brother of appellant's clerk sold two Bartles and James wine coolers to the 19-year old minor after being shown identification setting forth the minor's true age. The Department adopted the proposed decision, and appellant thereafter filed a timely notice of appeal.

In its appeal, appellant raises the following issues: (1) Appellant contends

that the sale involved in the first transaction was the product of entrapment; and (2) appellant contends that it is not legally responsible for the second transaction since the person who made the sale was not an employee of appellant authorized to make the sale.

DISCUSSION

I

Appellant contends that its clerk was entrapped into making the sale alleged in the first count of the accusation. It argues that the actions of the minor in persistently questioning the clerk whether he was going to sell her the alcoholic beverages, coupled with the presence in the store of the undercover police officer, frightened the clerk into making the sale, even though he had earlier refused to sell to the minor after determining she was not 21.

According to the testimony of the Department witnesses, the decoy operation was instituted after complaints were received concerning the reported activities of a security guard assisting minors to buy liquor at appellant's store. According to the plan, the minor was to first attempt to purchase an alcoholic beverage before approaching the security guard. She did so. After producing her identification, which showed that she was not 21, the clerk asked her two or three times whether she was sure she was not 21 [RT 55-56, 73]. Upon the decoy's assurance that she was not 21, the cashier refused to sell her the wine.

The minor then left the store. She then approached the security guard, and

asked him if he would purchase the wine for her. He declined, saying, according to the minor, that the police were watching him. However, he then told her to go back into the store, that "there was a skinnier fellow in the liquor store" that would help her.² She then returned to the store, where she was greeted by the same cashier: "Oh, you're back" [RT 61]. At that time she asked the cashier "Are you going to sell it to me or what?" [RT 62]. The cashier again asked the minor if she was sure she was not 21, and asked where she was from [RT 62]. She inferred that he was inviting her to say that she was 21 so that he could make the sale, but she repeated that she was not 21 [RT 82-83]. Nonetheless, he then instructed the other cashier to get the wine coolers for her, accepted her money and made the sale [RT 65].

The cashier denied asking the minor if she was sure she was not 21 [RT 148], and testified that he made the sale only after she persistently demanded: "Are you going to sell me the alcoholic beverage or not?" and because he was concerned that the minor and the undercover police officer might hurt or rob him if he did not comply [RT 149-150]. Appellant contends that the conduct of the minor and the police officer constitute entrapment.

The test for entrapment has been stated in the California Supreme Court case of People v. Barraza (1979) 23 Cal.3d 675, 689 [153 Cal.Rptr. 459]:

"... We hold that the proper test of entrapment in California is the

² Clearly hearsay, this testimony was offered only to explain the decoy's further actions.

following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect - for example, a decoy program - is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime."

Appellant argues that the cashier would not have made the sale had he not been frightened by the presence of the police officer (whom he did not recognize as such) and by the minor's repeated demands to know whether he was going to sell her the wine.

The ALJ elected, instead, to believe the testimony of the minor and of the police officer, and specifically rejected the testimony of the cashier as not credible. In so doing, he rejected the entrapment defense.

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.³

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

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].)

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); 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].)

In this case, there was a clear conflict between the testimony of the cashier

³ 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].

and that of the Department's witnesses. In addition, the ALJ made an express finding as to the lack of credibility on the part of appellant's cashier. There is substantial evidence which, if believed, establishes that appellant's employee sold an alcoholic beverage to a person he knew was not 21, a clear violation of law, and that he did not do so in response to conduct of the kind decried in Barraza.

We think the alleged conflict between the testimony of officer Abad and that of the minor to be much less than appellant would have the Board believe. We have reviewed the transcript, and are satisfied that any inconsistencies in their testimony are of no real significance. For example, appellant's brief makes much of the fact that police officer Abad testified on direct examination that the minor and the cashier spoke to each other in Spanish [RT 17], and on cross-examination said that they were speaking to each other in English [RT 36]. Yet, the minor testified that the conversation with the cashier began in English [RT 62], and then switched to Spanish [RT 64]. Indeed, it can be inferred, as the Department contends, that the cashier's switch to Spanish to warn the minor that the man (police officer Abad) at the magazine rack was the type who would report them, proves his awareness he was about to commit an illegal act.⁴

II

⁴ We find it difficult to understand why the clerk would persist in asking the minor if she was sure she was not 21, unless he was attempting to protect himself when making the sale he intended to make, by having been told the purchaser was old enough legally to purchase alcoholic beverages. Whatever his motivation, the fact that he went ahead with the sale was his undoing.

Appellant contends that it is not legally responsible for the sale involved in the transaction which took place on March 1, 1996. That transaction also arose in a decoy operation, and consisted of a purchase of two Bartles and James wine coolers by a then 19-year-old minor after he displayed identification showing his true age.

The sale in question was made by Javier Hernandez, the brother of Raphael Hernandez, appellant's cashier. Raphael testified that he was in the bathroom when the sale took place, and that Javier, who was only 19, had been instructed to tell any customers simply to wait, and had been told not to make any sales [RT 152]. Adele Soffa, one of the owners, testified that Javier had been permitted by his brother to be in the store while Raphael was working, because Raphael did not want Javier "on the street" [RT 138]. She claimed that she learned this only after the fact, and produced documentary evidence [Exhibit B] to show that Javier had never been a paid employee. Therefore, appellant argues, it should not be held responsible for an act it never authorized.

Javier, however, contradicted his brother's testimony. He testified that his brother had left him "in charge" [RT 164], and instructed him to "ask for ID when I saw a young man," because people under 21 could not be sold alcohol [RT 168]. Javier testified that he requested the minor's ID, looked at it, concluded the minor was 21, and made the sale [RT 168-169]. Javier's testimony as to why he made the sale, rather than tell the customer to wait, as he had been instructed, was

similar to that of his brother, Raphael, as to why Raphael made the sale to a person he knew to be a minor: "Because I saw they were going to rob me or do something" [RT 149, 164].

The ALJ found that although Javier was not formally employed by appellant, the fact that his brother was appellant's manager and knew that Javier had been asked to stand in for him and to check for identification of youthful patrons, was sufficient for appellant to be lawfully responsible. Under these circumstances, there is little question but that appellant is bound by the acts of its manager, including the manager's creating a situation where the person he left in charge made an unlawful sale of alcohol.⁵

A licensee is vicariously responsible for the unlawful on-premises acts of his employees. A licensee is also charged with knowledge of the acts of its agents. 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, 632-633].)

This rule, we suggest, clearly applies in the circumstances of this case. Raphael, the employee in charge, effectively deputized Javier to act in his stead. Raphael's knowledge that Javier had been placed in charge is imputed to his

⁵ Javier testified that Raphael "went to the bathroom, and he said, 'I'm leaving you in charge here for a little while'" [RT 164].

principal. As stated in Mack, supra, at 632:

“A continuous line of California cases has held that a liquor licensee may be disciplined by the licensing authority for the unlawful acts of employees while engaged in the conduct and operation of the business, even though the employer did not authorize them and did not have actual knowledge of the activities.”

And, as stated in Mantzoros v. State Board of Equalization (1948) 87 Cal.App.2d

140 [196 P.2d 657, 660]:

“The licensee, if he elects to operate his business through employees, must be responsible to the licensing authority for their conduct in the exercise of his license, else we would have the absurd result that liquor could be sold by employees at forbidden hours in licensed premises and the licensees would be immune to disciplinary action by the board. Such a result cannot have been contemplated by the Legislature.”

CONCLUSION

For all these reasons, we are satisfied the decision of the Department should be, and is, affirmed.⁶

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

⁶ 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.