

ISSUED OCTOBER 6, 1997

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

DAVID ALVAREZ	)	AB-6779
dba Dave's Italian Market	)	
901 North Broadway	)	File: 20-299653
Santa Maria, CA 93454,	)	Reg: 96035265
Appellant/Licensee,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
DEPARTMENT OF ALCOHOLIC	)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	August 6, 1997
	)	Los Angeles, CA
	)	

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David Alvarez, doing business as Dave's Italian Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which ordered his off-sale beer and wine license suspended for ten days for having sold an alcoholic beverage (Bud Light beer) to a 20-year-old 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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<sup>1</sup> The decision of the Department dated November 27, 1996, is set forth in the appendix.

Appearances on appeal include appellant David Alvarez, representing himself; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

#### FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on September 27, 1994. Thereafter, the Department instituted an accusation alleging that on June 4, 1995, appellant sold two cans of Bud Light beer to a 20-year-old minor.

An administrative hearing was held on October 28, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Larry Ralston and Richard Flores, officers with the Santa Maria Police Department, and John Silvera, the minor who was alleged to have made the purchase in question, concerning the transaction.

Officer Ralston, a member of the Santa Maria police gang suppression unit, testified that he had staked out appellant's premises following reports of sales to minors occurring there. While parked about 200 feet from the premises, and using binoculars, he observed John Silvera enter the premises and, moments later, engage in what appeared to be a transaction at the counter with a male clerk. Silvera emerged from the premises carrying a bag, reentered his car, and drove off. Ralston and his partner pursued Silvera, and stopped him several blocks away. A search of the vehicle

turned up one closed Bud Light container, and another which was empty.<sup>2</sup> When he was stopped, Silvera stated he had purchased the beers at the premises. He reconfirmed this statement in his testimony in the administrative hearing. Appellant cross-examined the witnesses who testified in support of the accusation, but did not himself testify. Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his decision which sustained the charges of the accusation.

Thereafter, appellant filed a timely notice of appeal, which, in essence, contends that the Administrative Law Judge (ALJ) should have rejected the testimony presented by the Department as lacking credibility. In addition, appellant's notice of appeal charges misconduct in the course of the hearing on the part of the ALJ and Department counsel, and accuses the ALJ of bias against him.

## DISCUSSION

### I

Appellant's contention that there is insufficient credible evidence to support the decision is grounded primarily on his attack on the testimony of Officer Ralston and that of the minor.<sup>3</sup> Appellant points to various discrepancies and inconsistencies

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<sup>2</sup> According to the police report (Exhibit F), the containers were of the 24-ounce size.

<sup>3</sup> Appellant has not filed a formal brief. However, appellant's notice of appeal, submitted to the Board in letter format, contains a number of broad assertions challenging testimony given at the hearing as untrue.

between what the police officers claim the minor stated when he was stopped and the minor's testimony at the hearing. When he was stopped, Officer Ralston testified, the minor claimed to have purchased alcoholic beverages from appellant in the past, and identified the seller on the night in question as "Dave." At the administrative hearing, Silvera denied making such statements.

However, Silvera did not at any time deny making the purchase in question. Instead, he simply testified that he did not know appellant, and denied having been in the store on previous occasions.

Appellant contends that Officer Ralston could not have seen anything with the naked eye from where he was parked.<sup>4</sup> Appellant disputes the officer's statement that he was using binoculars, pointing to a police report which does not mention the binoculars. Similarly, appellant disputes the testimony of the minor, claiming it ought to be disbelieved because of his use of alcohol and marijuana.

Appellant elected not to testify at the administrative hearing, even though he was informed by the ALJ of his right to do so.

The credibility of a witness's testimony is determined within the reasonable

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<sup>4</sup> Although he does not clearly articulate the point in his notice of appeal, appellant is, based on arguments he made at the administrative hearing, contending that the officers are assuming that he sold the beer, and that, in fact, they could not have seen the transaction because there was none to be seen. Unfortunately for appellant, the minor provided sufficient testimony to shore up what could have been perceived as a possible weakness in the testimony of the police officer, and the ALJ chose to believe it.

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].)

There is sufficient evidence in the record, which, if believed, supports the findings that appellant sold the two cans of Bud Light beer to the minor. The ALJ 's findings clearly indicate that he believed the testimony of the Department's witnesses. Appellant has not demonstrated any reason sufficient for the Board to entertain doubt about the ALJ's conclusions.

## II

Appellant has, in his notice of appeal, claimed misconduct in the course of the hearing on the part of the ALJ and Department counsel, and bias on the part of the ALJ. Specifically, appellant claims:

“Also at one point in time during the hearing my papers were tampered with by Mr. Echavarria (sic). Mr. Echavarria also took a water break which at that point in time gave ABC officer Dave Wainstein, Officer Flores who sat, listened to all testimony given by both parties time to go out in hallway and fix their stories together. At this point in time I objected to Officer Flores’ testimony, was overruled by Mr. Echavarria.”

There is nothing in the record to show any improper conduct by anyone at the hearing.

Appellant’s suggestion that one officer “fixed” his testimony to square with that of the other officer has no basis from the record. Appellant did object to the testimony of Officer Flores on the ground he had been present during the testimony of Officer Ralston and the minor [RT 48]. His objection, however, was not made until Officer Flores was halfway through his direct testimony, having already testified that he was present when the minor admitted purchasing the beer. following the overruling of appellant’s objection, Flores testified merely that he had seen the minor with a paper bag, and that when he entered the store and there was no other male there.

As noted by the ALJ, there had been no motion to exclude witnesses, so appellant’s injection was untimely. If a party makes a motion to exclude witnesses, it is almost invariably granted. However, in the absence of such a motion, witnesses are customarily not excluded in the regular course. Appellant’s objection coming when it did, there was little the ALJ could do.

Insofar as the claim of misconduct by the ALJ or Department counsel, there is nothing in the record other than appellant’s assertion in his notice of appeal.

Appellant's allegations of misconduct may well be attributable to his unfamiliarity with administrative hearings, and his feeling he was the victim of prejudice. Administrative hearings in the usual Department case are conducted in a cordial, yet adversarial, atmosphere, with much off-the-record dialogue among parties, counsel, and witnesses. Some ALJ's do appear too friendly to Department counsel, undoubtedly because they know them from past cases, and may also appear friendly to witnesses. Yet, cases reviewed by the Appeals Board show that when the evidence warrants it, the ALJ's will rule against the Department when appropriate.

In this matter, the testimony regarding the sale, and the observation of the sale through the binoculars, are sufficient to support the ALJ's findings and determinations.

#### CONCLUSION

The decision of the Department is affirmed.<sup>5</sup>

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

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<sup>5</sup> 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.