

ISSUED SEPTEMBER 24, 1997

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

SON SUK RHEE	)	AB-6793
dba Jay's Market)	
9836 North Glendora Avenue	)	File: 20-274733
Covina, CA 91724,	)	Reg: 96036603
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John P. McCarthy
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	August 6, 1997
	)	Los Angeles, CA
)	

Son Suk Rhee, doing business as Jay's Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which ordered her off-sale beer and wine license revoked for having sold alcoholic beverages (12- and 24-container packages of beer) to minors on three separate occasions, one of them taking place during a period of time the license was suspended for a previous violation, 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

¹ The decision of the Department dated December 12, 1996, is set forth in the appendix.

Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Son Suk Rhee, appearing through her counsel, Rick A. Blake; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 14, 1992. Thereafter, the Department instituted an accusation alleging that appellant, through her agent and/or employee, Bok Kyu Lim, sold alcoholic beverages to minors on three separate occasions in 1996: March 30 (to Gilbert Kalo), April 26 (to Joell D. Scott), and May 17 (to Nicole Mayer). The March transaction was alleged to have taken place at a time appellant's license had been suspended for an earlier sale-to-minor violation.

An administrative hearing was held on October 7, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the three transactions which were the subject of the accusation.

Thereafter, the Administrative Law Judge (ALJ) issued his proposed decision in which he found that each of the violations had occurred, as alleged, and ordered appellant's license revoked. The Department adopted the proposed decision, and appellant filed a timely notice of appeal.

In her appeal, appellant challenges the sufficiency of the evidence to support the findings, and contends the penalty is excessive.

DISCUSSION

I

Appellant challenges the sufficiency of the evidence to support the findings with respect to the sales to minors in March and April, 1996, and the finding that the sale made in March was during a period when the license was suspended. Appellant concedes the charge of the sale to a minor in May, 1996.

“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 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].)

The Kalo transaction.

As to the Kalo transaction, appellant contends the clerk, Bok Kyu Lim (who did not testify) was reasonably entitled to rely on the false identification (a counterfeit

California driver's license) which was presented to him. Appellant also contends the mere presence of signs to the effect that appellant's license had been suspended is insufficient to establish that the suspension was then currently in effect.

The ALJ found that Kalo had in fact presented the fake license, even though Kalo testified to the contrary at the administrative hearing. The ALJ relied on the testimony of Department investigator Stonebrook that Kalo had admitted to him when apprehended immediately after making the purchase that he had used the fake driver's license. Stonebrook also testified that Kalo also told him the clerk instructed him to bring his car around to the front of the store before he permitted him to remove the beer from the store. Although he did not expressly so state, it would appear the ALJ inferred from this that the clerk was aware the license was not what it appeared to be.

The ALJ found the license was an "obvious fake," showing on its face it had expired, and had a noticeable "bump" where the photograph had been inserted. Appellant argues that the "bump" is weak evidence, since there is no indication of the manner in which the license was displayed to the clerk. However, given the finding the license was an "obvious fake," and the "noticeable bump" where the photo was inserted, coupled with the inference which could be drawn from conduct suggesting guilty knowledge - the instruction to the purchaser to bring his car closer to the door of the store - these factors, in combination, are sufficient to defeat appellant's attack on the evidence relating to this transaction.

As to the posted signs of a license suspension, appellant concedes (App.Br., p.5)

that “it is a possibility that there could have been a suspension in effect, but it’s just as possible that the suspension could have terminated and the signs simply did not come down.”

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].)

Despite the various possible explanations offered by appellant as to why the signs might still be posted even though the period of suspension had expired, it still remains that it is reasonable to infer that a seller of alcoholic beverages would be motivated to remove such a sign as soon as possible, since the sign would be a clear deterrent to sales generally. Thus, the fact the sign was still up supports the ALJ’s conclusion that the sale was made during a period of license suspension.

The Scott transaction.

Appellant suggests the evidence supports the possibility that Scott’s companion, Jesus Cuevas, may have been the actual purchaser, and that he may have been over 21, or the clerk may have believed him to be over 21.

Appellant's theory cannot overcome Scott's testimony that she made the purchase and that her companion was only 19 years old. In addition, the clerk's failure to testify leaves the record totally silent as to what he may have believed. Appellant suggests, in the alternative, that the doubts as to Cuevas' true age ought at least count for mitigation. The problem with this is that the argument again flies in the face of the only evidence in the record - Scott's testimony that Cuevas was only 19.

The Mayer transaction.

Mayer, a police decoy, purchased a six-pack of Budweiser beer, and was not asked for identification. She was 18 at the time of the purchase. The clerk (Lim) told the police officer operating the program he was preparing to close and did not have time to ask about her age. Appellant has not contested the findings relating to this transaction.

II

Appellant contends the penalty is excessive, arguing she was in the process of selling the business to Mr. Lim, and implying (she did not testify) that she was unaware of the violations until the Department denied the application to transfer the license to him because of his involvement in the violations, at which time she immediately terminated the escrow and canceled the sale contract.

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 penalty, license revocation, is admittedly severe. However, the Department had the following factors to consider: (1) appellant had surrendered control of her business to the prospective buyer; (2) four violations had been committed in a relatively brief period of time; (3) one of the violations occurred while the license was suspended for an earlier sale-to-minor violation; (4) the licensee had three additional sale-to-minor violations between 1992 and 1994. Considering such factors, the dilemma as to the appropriateness of the penalty must be left to the discretion of the Department. Being unable to say the Department exercised its discretion unreasonably, this Appeals Board may not disturb the penalty.

CONCLUSION

The decision of the Department is affirmed.²

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

² 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.