ISSUED JANUARY 13, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

TRESIERRAS BROTHERS CORPORATION	)	AB-6844
dba Tresierras Market	)	
24316 North San Fernando Road	)	File: 20-145510
Santa Clarita, California 91321,	)	Reg: 96037271
Appellant/Licensee,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John McCarthy
DEPARTMENT OF ALCOHOLIC	)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	November 5, 1997
	)	Los Angeles, CA
____	)	

Tresierras Brothers Corporation, doing business as Tresierras Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered its off-sale beer and wine license suspended for 25 days, with 10 days thereof stayed for a probationary period of one year, for its clerk having sold an alcoholic beverage (a four-pack of Seagram's Wild Mango coolers) 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

[1] The decision of the Department, dated March 20, 1997, is set forth in the appendix.

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

Appearances on appeal include appellant Tresierras Brothers Corporation, appearing through its counsel, Joshua Kaplan; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 11, 1983.

Thereafter, the Department instituted an accusation alleging that on May 31, 1996, appellant's clerk, Guillermina Zaragoza, sold an alcoholic beverage, consisting of a four-pack of Seagram's Wild Mango coolers, to Luz Mendoza, a 19-year-old minor participating in a decoy operation conducted by the Los Angeles County Sheriff's Department.

An administrative hearing was held on January 16, 1997, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of the minor and of Joseph Schiro, one of the Sheriff's deputies involved in the operation. Appellant presented the testimony of Julian Barraza, manager of appellant's information systems and the person responsible for training appellant's employees regarding the sale of alcoholic beverages.

Subsequent to the hearing, the Department issued its decision which determined

that the sale had occurred as alleged, that the requirements of Rule 141(Cal.Code

Regs., Title 4, div.1, §141) had been met, and that the product which was sold was an alcoholic beverage. Appellant thereafter filed its timely notice of appeal.

In its appeal, appellant raises the following issues: (1) the decision is not supported by its findings; (2) the findings are not supported by substantial evidence; (3) the record is replete with gross misconduct of the Department; and (4) appellant was denied due process and equal protection as a result of the unconstitutionality of Business and Professions Code §24210. Issues (1), (2) and (3), as set forth in appellant's brief, are interrelated and will be discussed together.

DISCUSSION

I

Appellant challenges the decision and findings on two grounds; it contends that it did almost everything thing possible to avoid a sale to a minor, but was frustrated by the deceptive appearance of the minor, and it claims there is no evidence the product which was purchased was an alcoholic beverage within the meaning of Rule 141.

Appellant stresses the testimony of its management information systems manager regarding its training program for personnel involved in the sale of alcoholic beverages, and its use of a point-of-sale control system which alerts the clerk that an alcoholic beverage has been scanned, and requires that a decision be made whether to request some proof of legal age from the customer. This system

was in place when the sale in question occurred. However, if the customer appears to be over the age of 30, the clerk is authorized to override the system (RT 70, 74), and the clerk apparently did so in this case.

Appellant contends the sale in question would not have happened but for the fact that the minor wore jewelry (unobtrusive earrings) and makeup (lipstick and light eye shadow). Thus, appellant contends, the 19-year-old minor appeared to the clerk to be several years older than she actually was.

The Administrative Law Judge (ALJ), who viewed the minor when she testified, concluded that her physical appearance was substantially the same as at the time of the sale, and was that of a person under the age of 21, such that a reasonable person would request her age or identification. The clerk, who had been discharged by appellant after being cited for making the sale, did not testify at the hearing, so there is no evidence other than speculation as to what may have induced her to override the security system and permit the sale.

Appellant also contends that there is insufficient evidence that the product which was sold was, in fact, an alcoholic beverage. It stresses the fact that the deputy sheriff who testified neglected to bring the physical evidence to the hearing even though it was being held in the station evidence locker and he had ample notice as to when it would be needed; the fact that no chemical analysis was performed on the contents of the containers; and the inability of the witnesses to

testify with any specificity what product was actually purchased.

The decoy testified she selected a four-pack of coolers because they contained alcohol. The deputy could recall only that it was a Seagram's product which had been purchased.

Whether the product which was purchased by the minor was an alcoholic beverage has become a frequently recurring issue in appeals to the Board in decoy cases, in part because of the proliferation of offerings in the alcoholic beverage departments in stores and supermarkets, and in part because of the quality of the evidence offered to support the charges.

The Administrative Law Judge (ALJ), formerly a staff attorney with the Department, addressed this issue in his proposed decision and, although finding for the Department, was critical of the quality of evidence presented in support of the Department's case. Because we share his concerns, we quote what he had to say:

> "The Administrative Law Judge is seriously concerned with the scant evidence provided on this subject. This is particularly true in light of the constantly expanding beverage offerings finding their way into retail stores. In this case the evidence as to what was purchased consists of the following:
>
> > a. Testimony of Mendoza that she selected the product she did because she read the label to see if it contained alcohol and it did. Further, she testified that the label contained the federally mandated alcohol warning. The bottle label also indicated the percentage of alcohol, but Mendoza could not recall what the percentage was,
> >
> > b. Deputy Schiro, who received the product she purchased from Mendoza, looked at the bottles and wrote that it was Seagram's Wild

> Mango, and
>
> c. Respondent's sole witness, its manager of MIS, testified that the store uses a point-of-sale system which automatically stops the scanning of product when an alcoholic beverage is scanned until the clerk either keys an override or enters a date of birth based on seeing an identification. Though not present at the time of the transaction, he 'learned the sale went through because ... Zaragoza bypassed the system.' This hearsay evidence supports Mendoza's testimony that what she bought was an alcoholic beverage, since only an alcoholic beverage would have halted the point-of-sale system.

> This is about as little evidence on a key element of the Department's case as can be tolerated. In the absence of any evidence to the contrary, it tilts the scales such that it is more likely than not that what was purchased was an alcoholic beverage. Therefore, a preponderance of the evidence established that Mendoza did purchase an alcoholic beverage from Zaragoza."

There is no question that the Department's case was based on weak, barely adequate evidence. We simply do not understand why we are seeing, with increasing frequency, cases where the evidence regarding the physical product involved is oral testimony, subject to dispute over its accuracy, when it would be a relatively simple procedure to preserve the container, the label of the container, photographs of the product container, or other hard evidence. It is our belief that the presence of this more direct evidence would be beneficial to all concerned; it would satisfy the licensee that the charges were properly made, it would undoubtedly eliminate a great deal of testimony and cross-examination in the administrative hearings, and, finally, it would almost certainly reduce the number of appeals, or at least the number of issues raised on appeal, to this Board.

Nonetheless, we are unable to agree with appellant that there is a lack of substantial evidence to support the findings and 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 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].)

We are in agreement with the ALJ. The evidence, although weak, is sufficient to support the findings, especially when there is no evidence that the product in question was something other than an alcoholic beverage.

II

Appellant contends that the entire hearing is defective because of the unconstitutionality of Business and Professions Code §24210.

As this Board has frequently pointed out, Article 3, §3.5, of the California Constitution prohibits an administrative agency, such as the Appeals Board, from declaring any statute unconstitutional unless an appellate court has previously made

such a determination. Since we are unaware of any such ruling, and none has been cited to us, we decline to consider this issue.

CONCLUSION

The decision of the Department is affirmed.[2]

BEN DAVIDIAN, CHAIRMAN
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD[3]

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[2] This final order 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 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.

[3] Ray T. Blair, Jr., Member, did not participate in the oral argument or decision in this matter.