ISSUED MARCH 10, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

QUIK STOP MARKETS, INC., and MANINDER MALHAN and ANITA RANI dba Quik Stop Market #57 1510 E. Washington Street Petaluma, CA 94952, Appellants/Licensees,	)	AB-6862 File: 20-279237 Reg: 96037393
v.	)	Administrative Law Judge at the Dept. Hearing: Robert R. Coffman
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	Date and Place of the Appeals Board Hearing: December 3, 1997 San Francisco, CA

Quik Stop Markets, Inc., and Maninder Malhan and Anita Rani, doing business as Quik Stop Market #57 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 55 days for appellant's clerk selling an alcoholic beverage (beer) to a 19-year-old police decoy and for co-appellant Maninder Malhan refusing to provide a videotape of the transaction to Petaluma police officers, being contrary to the universal and generic

[1]The decision of the Department, dated April 17, 1997, is set forth in the appendix.

public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§23658, subdivision (a), 25753, and 25755.[2]

Appearances on appeal include appellants Quik Stop Markets, Inc., and Maninder Malhan and Anita Rani, appearing through their counsel, George Boisseau, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 17, 1992. Thereafter, the Department instituted an accusation against appellant charging that their clerk sold an alcoholic beverage (beer) to a 19-year-old police decoy and that co-appellant Maninder Malhan refused to provide a videotape of the transaction to Petaluma police officers.

An administrative hearing was held on November 26, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the decoy operation, the purchase of the beer, and the events following the transaction involving the police request for the surveillance videotape.

Subsequent to the hearing, the Department issued its decision which determined that the clerk had sold beer to the minor as alleged, that Maninder Malhan had refused to allow inspection of the videotape in violation of §25755, but

[2]Section 25753 permits the Department to inspect a licensee's books and records. Section 25755 authorizes peace officers to visit and inspect licensed premises while enforcing the provisions of the Alcoholic Beverage Control Act.

that the allegation as to violation of §25753 was not proven. The charge regarding §25753 was ordered dismissed, and the license was ordered suspended for 45 days with regard to the sale to the minor decoy and for 10 more days with regard to the §25755 violation, for a total suspension of 55 days.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issue: the findings are not supported by substantial evidence in light of the whole record.

DISCUSSION

Appellants contend that neither the findings regarding the sale to the minor decoy nor the findings regarding the §25755 violation were supported by substantial evidence in light of the whole record.

(a) The sale to the minor decoy

Appellants allege that the finding that Rule 141 (Cal.Code Regs., title 4, §141) was fully complied with was not supported by the weight of the evidence because the decoy was just one month under age 20, had substantial experience in such operations, was training to become a police officer, did not display the appearance that would be expected of a person under the age of 21 years, and was not provided with written instructions regarding decoy guidelines of the Department or the Petaluma Police Department.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's 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]

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] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); 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]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

In any case, none of the items mentioned by appellants violate Rule 141. The decoy, although almost 20 years old, was still “less than 20 years of age” as required by the rule; there is no prohibition against the decoy having participated in decoy operations or studying to become a law enforcement officer; the ALJ made the specific determination that the decoy displayed the appearance of one under 21

[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].

years of age and this Board cannot disturb this finding by the trier of fact; and there is no requirement that decoys be given written instructions.

(b) The §25755 violation

Appellants contend that Maninder Malhan could not be found to have violated this statute because the surveillance tape in question is not part of the "books or records" of appellants. Books and records which may be inspected, argue appellants, are merely the financial and inventory records of the business, not those having to do with security.

Appellants seem to confuse the requirements of §25755 with those of §25753. The latter section refers to the Department's examination of a licensee's "books and records," and the ALJ determined that it was not applicable in this situation because the officers involved were from the Petaluma Police Department, not the Department. Section 25755, however, authorizes peace officers to "visit and inspect the premises of any licensee."

While the Petaluma police officers were clearly engaged in enforcing the alcoholic beverage laws when they asked for the videotape, the record indicates that their request was not merely to "inspect the premises," but to physically take the videotape with them. The testimony of Officer Fish [RT 20] was as follows:

> "MR. BOISSEAU: Q. Detective Fish, when you went to Mr. Santokh Singh and asked him for this surveillance tape, you asked him to take the tape out and give it to you, correct?
> A. Correct.
> Q. Did you ask him whether you could view the tape on a monitor?
> A. I don't recall if I did. Officer Toupin might have, but I don't recall asking to view the tape.

Q. In fact, you just wanted the tape, right?
A. Yes."

On direct examination [RT 37], Officer Toupin testified:

"Q. Now, did you meet Mr. Malhan there?
A. Yes, I did.
Q. Did you ask him about retrieving the tape at that point?
A. Yes, I did.
Q. What did Mr. Malhan tell you?
A. He refused to give me the tape.
Q. What did you do in response to that refusal?
A. I advised him that this was evidence and that I had the right to seize it as evidence."

On cross-examination [RT 41], Officer Toupin testified:

"Q. . . . . At the time you went back at 6:00 p.m., did you ask to see the tape played?
A. No.
Q. So you just wanted the tape, right?
A. Yes."

The Administrative Law Judge (ALJ) determined, in his Determination of Issues II:

"(b): Section 25755 authorizes peace officers to visit and inspect licensed premises while enforcing the provisions of the Alcoholic Beverage Control Act.

While the officer requested the video be given to him, rather than specifically asking to inspect the tape, respondent's refusal to provide the tape to the officer had the same effect as refusing to allow him to inspect the tape. The officer could not inspect the video without it being provided to him. Inspecting the video versus obtaining the video, under the circumstances herein, is a distinction without any substantive difference. Respondent's actions precluded the officer from inspecting or viewing the video withing the meaning of section 25755. The violation of section 25755 is cause for discipline under sections 24200(a) and (b), and Section 22 of Article XX of the State Constitution."

We disagree with the legal standard used by the ALJ in determining that a

violation of §25755 had occurred. The ALJ rationalized that the refusal to give the tape to the officer "had the same effect as refusing to allow him to inspect the tape" since "[t]he officer could not inspect the video without it being provided to him." The flaw in this rationalization is that the officers testified that they did not want to see the tape, they wanted to take the tape. Seeing and taking are separate things, and we do not believe that refusal to allow inspection is a kind of "included offense" that can be charged when there is a refusal to give the tape to officers. There is nothing in the record to support the ALJ's assumption that the officers really wanted to inspect the tape; it is fairly clear that the officers wanted to seize the tape.

The parties have not cited, and we have not found, any case law specifically addressing this issue. However, the dictionary definitions of "inspect," "obtain," and "seize" make clear the distinction between inspecting the tape and seizing the tape. Contrary to the conclusion of the ALJ, there is indeed a "substantive difference" inherent in this distinction. To inspect something is to "view closely and critically" or to "scrutinize"; to obtain is "to gain or attain possession or disposal of"; and to seize is "to take possession of" or "confiscate."[4] Obviously, "inspect" does not involve any taking of possession or even touching; it is done by merely looking at something. "Obtaining" or "seizing" something involves having the physical possession of the thing.

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[4]Webster's Third New International Dictionary (1986) pp. 1170, 1559, 2057.

On the record before us, we cannot say that there was a violation of §25755: no request was made to inspect the videotape, so there was no refusal to allow inspection. The officers requested possession of the tape and they were refused possession of the tape. Whether or not the officers had a right to seize the tape as evidence under other provisions of law, they had no right to seize it under §25755, and that is the only statute charged as violated. Since that statute was not violated, the Department was in error in imposing discipline based on that charge.

CONCLUSION

The decision of the Department is affirmed with respect to Determination of Issues I and Determination of Issues II(a). The decision is reversed with respect to Determination of Issues II(b).[5]

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

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[5]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.