

ISSUED SEPTEMBER 30, 1998

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

ARMAND CONTRERAS	)	AB-6940
dba Armand's Bar)	
7803 Foothill Blvd.	)	File: 48-8493
Sunland, California 91040,	)	Reg: 97039529
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:
	)	July 8, 1998
	)	Los Angeles, CA

Armand Contreras, doing business as Armand's Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 40 days, with 20 days thereof stayed for a probationary period of two years, for appellant's bartender, Susan Lynn Affrunti, having sold an alcoholic beverage (beer) to Rebecca Keyser, a 19-year-old minor acting as a decoy under the supervision of a Los Angeles police officer, 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,

¹The decision of the Department, dated September 11, 1997, is set forth in the appendix.

subdivision (a).

Appearances on appeal include appellant Armand Contreras, appearing through his counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general license was issued on July 26, 1977. Thereafter, the Department instituted an accusation against appellant charging the sale-to-minor violation.

An administrative hearing was held on June 19, 1997, at which time oral and documentary evidence was received. At that hearing testimony was presented by police officer Greg Fuqua and Rebecca Keyser on behalf of the Department, and Aurora Contreras on behalf of appellant.

Fuqua testified that he witnessed the transaction while sitting several bar stools² away from Keyser. He heard the bartender ask Keyser what she wanted, and heard Keyser order a Miller Lite beer. He saw the bartender open a bottle of Miller Lite beer, and place it in front of Keyser. He saw Keyser pay for the beer and receive change. Fuqua testified he did not hear the bartender ask for any identification, nor did she ask Keyser her age.

Keyser also testified that she was not asked her age or asked for identification. The bartender simply asked what she would like, and brought her

² On direct examination, Fuqua said he was five bar stools away; on cross, he said he was only three stools away.

the beer she ordered.

Aurora Contreras, the licensee's spouse, testified that while looking out a window from her residence above the bar, she saw men in cars speaking on telephones, and realized a police sting operation might be in progress. She testified further that when she saw a young woman she thought might be a decoy, she alerted her husband to her suspicions, and rushed downstairs to warn the bartender: "There's a girl who is going to come in right now. Ask her age. Make sure she's 21." According to Mrs. Contreras, the bartender followed her instructions, and when asked if she was 21, Keyser said she was. "She said yes and nodded very strongly."

On cross-examination, Mrs. Contreras admitted she told neither the police nor her husband that she had supposedly heard the minor assert that she was 21, even though she was present when the bartender was being cited by the police.

Subsequent to the hearing, the Department issued its decision which determined that the transaction had taken place in the manner described by the witnesses presented by the Department, and rejected Mrs. Contreras' testimony as lacking credibility. In his proposed decision, which the Department adopted, the Administrative Law Judge (ALJ) expressed great scepticism over the notion that Mrs. Contreras would have instructed the bartender merely to ask the decoy her age rather than for identification, and that if she actually saw and heard what she claimed, would have remained silent, telling neither her husband or the police that

the minor had claimed to be 21. Her story, the ALJ concluded, "suggests recent fabrication."

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issue: The record lacks substantial evidence to support the finding of a violation. The decoy lied about her age, giving rise to a defense under Rule 141.

DISCUSSION

Appellant contends that there is not substantial evidence in support of the decision. He stresses the conflict between the testimony of the witnesses presented by the Department and that of his spouse, and argues that her testimony is the only substantial evidence in the case.

"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 US 474, 477 [71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

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 conflicts 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.2d 658].) 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].)

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].)

In this case, the ALJ made a specific determination that Mrs. Contreras' testimony lacked credibility. He saw and heard her testify, and was able to observe her demeanor while testifying. He concluded that her testimony did not withstand analysis, especially with regard to her silence when a protestation of innocence or claim of unfairness would seem to have been called for if her story were true.

The Appeals Board is not in a position to substitute its judgment for that of the trier of fact where, as here, the issue of credibility was addressed by the ALJ and the choice he made is supported by evidence in the record.

The contention that the decoy lied, so as to give rise to a defense under Rule 141, also falls by virtue of the ALJ's findings.

CONCLUSION

The decision of the Department is affirmed.³

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

³This 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.