

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

ANTONIO LIZARRAGA and RODRIGO	)	AB-7082
LIZARRAGA)	
dba Top Hat Pool Bar	)	File: 42-274641
9019 East Garvey Avenue	)	Reg: 97040514
Rosemead, CA 91770,)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Sonny Lo
)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	July 1, 1999
Respondent.	)	Los Angeles, CA
)	

Antonio Lizarraga and Rodrigo Lizarraga, doing business as Top Hat Pool Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their on-sale beer and wine public premises license for appellant Antonio Lizarraga having been found to possess cocaine for sale, 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 §24200, subdivision (a), in conjunction with Health and Safety Code §11351.

¹ The decision of the Department, dated March 19, 1998, is set forth in the appendix.

Appearances on appeal include appellants Antonio Lizarraga and Rodrigo Lizarraga, appearing through their counsel, M.R. Ward, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public premises license was issued on September 24, 1993. Thereafter, the Department instituted an accusation against appellants charging that on March 22, 1996, Antonio Lizarraga possessed cocaine for sale while in the licensed premises.

An administrative hearing was held on January 22, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigator Lowery Spencer and San Gabriel police officer Andrew Borello regarding the circumstances which led to the possession charge, and by co-appellant Antonio Lizarraga in his defense against the charge.

Spencer testified that, on the day in question, he had been assigned to assist San Gabriel police officers in the service of a search warrant at the premises. His specific assignment was to secure the rear door of the premises during the search. As he drove to the rear of the premises, he heard voices on his radio indicating that the warrant was being served. Simultaneously, he saw two men exiting the back of the premises. He exited his car and detained the two men, one of whom was later identified as co-appellant Antonio Lizarraga. In the course of a pat-down search of Lizarraga for weapons, Spencer felt what he believed to be a cigarettes box, and a lighter, in Lizarraga's breast pocket. After directing the men into the bar, Spencer conducted a more thorough pat-down search. The cigarette box was

still in Lizarraga's pocket. He then escorted Lizarraga to the northwest corner of the bar, and, before Lizarraga sat down, cleared the table and surrounding area of any objects except the tablecloth which was on the table.² Spencer then turned around for a few seconds, and when he turned back to face Lizarraga, he saw a Marlboro cigarette box on the floor in front of Lizarraga. The box had not been there before, and no one else was in the area. Spencer called this to the attention of officers Baumgart and Morello. Baumgart picked up the box from the floor, and he and Borello both looked inside. Spencer did not. After searching Lizarraga a third time, Spencer found that there was no longer a cigarette box in Lizarraga's shirt pocket.

Officer Borello testified that he was given the cigarette box by Baumgart, and told that Baumgart had picked it up from the floor "directly near" Lizarraga. Borello looked in the box and saw twelve folded paper bindles (marked as Exhibit 2, and stipulated by the parties to contain cocaine). Borello testified that Lizarraga was again searched after being taken to the police station, and was found to have \$452 in cash and an additional bindle of cocaine. Borello further testified that Lizarraga, having been given a Miranda warning, executed a written waiver of his Miranda rights, and admitted possessing the cocaine. However, according to Borello, Lizarraga claimed he was merely holding the cocaine for an unidentified friend. In Borello's opinion, based on his extensive experience, the quantity of

² Spencer explained that he cleared the area to be sure nothing was within reach, an action based upon his 22 years of experience as a law enforcement officer.

cocaine and the way it was packaged indicated that it was intended to be sold.

On cross-examination, Borello acknowledged that Lizarraga's name was not on the search warrant, but, in response to a question from the Administrative Law Judge (ALJ), said the search warrant included the premises as part of the search which it authorized.

Lizarraga, testifying in his own behalf, said the bundle of cocaine which was with his money had been given to him as collateral for a loan of \$50. He denied possessing the box which contained cocaine, and claimed there was a cigarette pack with two or three cigarettes in it in his shirt pocket. "... I smoked my last cigarette, and I put the box -- the package on the top of the table" [RT 95]. He denied admitting to the police that the box found on the floor was his, and said he signed the Miranda waiver form, without reading it, only after being told he could not have a lawyer.

Recalled as a rebuttal witness, Borello testified that he read the contents of the waiver form to Lizarraga before Lizarraga signed it, and that Lizarraga appeared to understand what was being read to him.

Subsequent to the hearing, the Department issued its decision, which sustained the charge of the accusation and ordered appellants' license revoked.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants contend that the decision is not supported by the findings and the findings are not supported by substantial evidence in light of the whole record.³

³ Appellant's brief points out that there is no evidence co-licensee Rodrigo Lizarraga was involved in the case. Assuming this is true, it is no barrier to revocation. (See

DISCUSSION

Challenging the sufficiency of the evidence, appellants argue that the evidence connecting Antonio Lizarraga with the cocaine is contradicted by his testimony, and that the police officers failed to exercise investigative or technological options to prove or disprove his connection with the cocaine.

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

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].)

The testimony of investigator Spencer that the cigarette box containing the twelve packets of cocaine was found on the floor near Antonio Lizarraga's feet,

Coletti v. State Board of Equalization (1949) 94 Cal.App.2d 61 [209 P.2d 984, 985-986]; Rice v. Department of Alcoholic Beverage Control (1979) 89 Cal.App.3d 30, 39 [152 Cal.Rptr. 285].)

coupled with the concurrent disappearance of the cigarette package from his breast pocket, lends itself to a strong inference that the cigarette box on the floor had been discarded by Lizarraga. On the evidence presented, the ALJ was free to draw that inference, and free to reject appellants' suggestion that some other person may have disposed of the cocaine-containing cigarette box.

Appellants are, in essence, asking the Appeals Board to reweigh the evidence in appellants' favor. But the Board is not permitted to substitute its view of the evidence for that of the Department simply because it may disagree on issues of credibility or the drawing of reasonable inferences.

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.⁴

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

⁴ 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].

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].)

Our review of the record convinces us that there was ample evidence in support of the Department's decision, and appellants' attempt to tie the cocaine to some unknown person was and is simply unpersuasive.

ORDER

The decision of the Department is affirmed.⁵

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

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 order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.