

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

THE SOUTHLAND CORPORATION,	)	AB-7096
BALBIR S. ATWAL, and PARMINDER)	
K. ATWAL	)	File: 20-313273
dba 7-Eleven	)	Reg: 97040506
4092 Chino Hills Parkway)	
Chino, CA 91709,	)	Administrative Law Judge
Appellants/Licensees,	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
v.)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	April 1, 1999
Respondent.	)	Los Angeles, CA
)	

The Southland Corporation, Balbir S. Atwal, and Parminder K. Atwal, doing business as 7-Eleven (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their off-sale beer and wine license for 15 days for appellants' clerk, Harbans Lal, having sold alcoholic beverages (a case of Budweiser beer and a 32-ounce bottle of Bud Dry beer) to Ryan J. Townsend, who at the time of the sale was 19 years of age, being contrary to the universal and generic public welfare and morals provisions of the California

¹The decision of the Department, dated April 2, 1998, is set forth in the appendix.

Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants The Southland Corporation, Balbir S. Atwal, and Parminder K. Atwal, appearing through their counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 20, 1995. Thereafter, the Department instituted an accusation against appellants containing two counts, each charging the sale of alcoholic beverages to a minor.

An administrative hearing was held on February 5, 1998, and oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that only one of the counts, that alleging the sale to Townsend, had been established.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants contend that their clerk reasonably relied upon false identification presented to him by Townsend, thereby entitling them to the defense provided for in Business and Professions Code §25660.

DISCUSSION

The issue presented by appellants is clear-cut. Appellants' clerks testified Townsend presented false identification, in the form of a California diver's license showing a 1975 birth date, and that they relied on that false identification when

they sold to him. Townsend denied having done so, either on the night in question or on any other occasion. He claimed he presented his then current California driver's license, which contained a red stripe showing his date of birth as 1977. Appellants' clerks testified there was no red stripe on the identification they were shown.

Appellants contend that the Administrative Law Judge (ALJ) and the Department erred in accepting what appellants characterize as the untrustworthy, and lacking credibility, testimony of Ryan Townsend, the minor who made the illegal purchase of alcoholic beverages. Appellants argue that the testimony of appellants' clerk, that Townsend, on the occasion in question and on prior occasions, presented identification to them which demonstrated that he was of legal age, was much more credible and entitled appellants to the defense provided for in Business and Professions Code §25660.

Section §25660 provides:

"Bona fide evidence of majority and identity of the person is a document issued by a federal, state, county or municipal government, or subdivision or agency thereof, including, but not limited to a motor vehicle operator's license, or an identification card issued to a member of the armed forces, which contains the name, date of birth, description, and picture of the person. Proof that the defendant-licensee, or his employee or agent, demanded, was shown, and acted in reliance upon such bona fide evidence in any transaction, employment, use or permission forbidden by Sections 25658, 25663 or 25665 shall be a defense to any criminal prosecution thereof or to any proceedings for the suspension or revocation of any license based thereon."

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 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].) 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]; 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 this case, the ALJ acknowledged the conflict in the evidence regarding whether false identification had been presented:

“After evaluating the credibility of witnesses pursuant to the factors set forth in Evidence Code Section 780, greater weight was given to the testimony of the minor than to that of respondents’ clerks. An assertion by Respondents’ clerks that Townsend showed them a false identification on May 23, 1997 is not supported by the facts. ... ”

Appellants argue there is no substantial evidence to support the finding of

credibility of Townsend. They point out that he lied to Department investigator Matty during the initial investigation, denying to her that he had purchased alcoholic beverages on previous occasions, and that he falsely denied having been arrested before.

This case is a good example why the issue of credibility is generally one for the initial trier of fact, who has had the opportunity to see and hear the witnesses as they testify, observe their demeanor, and compare how they fare on cross-examination. When witnesses for each side of a case have something to be gained if their version of the facts is accepted, it is not unusual for conflicting testimony to emerge. And when there are no concrete determinants against which that testimony can be calibrated for accuracy or truthfulness, it falls to the trier of fact to sort out which is the truest version of the truth. The only tools the trier of fact can employ are the amorphous factors enumerated in Evidence Code §780, together with his own experience and understanding of human behavior, his ability to observe the witness, his evaluation of that testimony in light of the testimony of others, and such other considerations that, to the trier of fact, would be of assistance in separating truth from fiction.

The Appeals Board, as an appellate body, has only the cold transcript of the proceeding, devoid of the emotion of the moment, silent as to the pace and intensity of the hearing, guided only by the competing characterizations of the witnesses' testimony provided by counsel for the parties - at times, as if two ships passed in the night, each seemingly unaware of the other. That said, it is not

difficult to understand why the law defers to such a great extent to the trier of fact on issues of credibility

We have reviewed Townsend's testimony. There is nothing in it which would have compelled a finding that he testified falsely when he denied having presented a false driver's license on the night in question. While it is true that he gave untrue answers to the Department investigator at the scene, it does not follow that the ALJ was obligated to disbelieve Townsend's denial, at the hearing, under cross-examination, that he possessed false identification.²

Appellants make much of Townsend's acknowledgment during his cross-examination that he had expected to be asked about false identification, and suggest (App.Br. 12) that "any reasonable trier of fact, if not acting in an arbitrary and capricious manner," would have seriously questioned why Townsend would anticipate questions on a subject "of which he had no prior knowledge."

Appellants' brief equates the ALJ's failure to do so with "turning a blind eye toward the incredible witness."

This an unfair characterization. Investigator Matty testified that the focus of her search of Townsend was false identification, as was that of the police officer who also searched Townsend. It seems unlikely that both Matty, an experienced investigator and former prison employee, and another police officer would fail to

² Appellants argue that Townsend's testimony is rendered suspect by his denial, and then admission, of a prior arrest. However, a reading of his testimony in context is that he was only denying a prior arrest for purchasing alcoholic beverages (see RT 57), not denying any arrest whatsoever.

find false identification on Townsend's person if there had been any there.³

Investigator Matty testified that she conducted a thorough search of Townsend after accosting him as he left the store; she searched his wallet and pockets, and even had him remove his shoes [RT 122-123]. She saw his California driver's license with the red stripe. Townsend was also searched by a police officer called to the scene. No false identification was found to be in his possession.

We find ourselves in agreement with the Department's argument that, being surprised at the confrontation with Department investigator Matty upon his exit from the store, Townsend had neither motive nor opportunity to dispose of any false identification he may have had in his possession. Thus, his consistent denial of possessing false identification, both to Matty at the scene (see RT 124) and at the hearing (see RT 42-43, 52-53, 54-55, 56; and see RT 60) is not inherently incredible, and, indeed, is corroborated by other evidence, i.e., investigator Matty's description of her search.

On the other hand, there is nothing in the testimony of appellants' clerks that is so inherently incontrovertible that the ALJ was obligated to accept it as conclusive.

³ Investigator Matty testified she asked Townsend if he was carrying false identification [RT 124]. Townsend said he was not told why he was being searched. However, having been asked several questions on direct examination about false identification, it is somewhat unfair to suggest the topic, when it was addressed during cross-examination, was one on which Townsend had no previous knowledge. Moreover, it would not have been unreasonable for him to assume that the search might have been for some identification other than that the investigator found, especially since the statement he signed at the scene included a question concerning false identification, which he answered in the negative. (See Exhibit A).

Lal testified he had seen Townsend three or four times. It was his practice to ask for identification if the purchaser appeared young, which is why he asked Townsend for identification. He described Townsend's identification as a driver's license, one without a red stripe, showing a picture and a date of birth of 1975. He said Townsend showed the same identification each time he bought alcoholic beverages. He saw Townsend three or four times; on each occasion Townsend bought a 12-pack or case of beer [RT 96]. Appellants' other clerk, Vasdev Badyal, currently a clerk at a different 7-Eleven store, testified that he also saw Townsend in the store several times preceding the night of the incident in question. According to Badyal [RT 101-102], Townsend bought beer from him "four or five" times, the most recent occasion being the week before Lal was cited. Neither clerk could recall any more than that the supposed false identification showed 1975 as the year of birth and contained no red stripe.

Appellants cite and quote from the Appeals Board's decision in 7238 Reseda Boulevard, Inc. (1998) AB-6975, a case in which the Appeals Board reversed a decision, and remanded it to the Department, because a police officer's apparent perjury was revealed during his cross-examination, but ignored by the Department. The case is clearly distinguishable; it was the officer's own testimony on cross-examination that demonstrated the falsity of his testimony on direct examination. In this case, there is no testimony directly impeaching Townsend's denial of having used false identification, and, in contrast, there are the results of investigator Matty's and a police officer's search of Townsend corroborating his denial.

In the last analysis, the ALJ made a judgment call, based upon all the testimony. It is not the Appeals Board's prerogative, even were it so inclined, to say the ALJ was wrong in attributing more weight to Townsend's testimony than to appellants' clerks' testimony.

ORDER

The decision of the Department is affirmed.⁴

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

⁴ 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.