

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

RIMOUN A. NUNEZ	)	AB-7214
dba U Pick Market)	
16520 Beach Boulevard	)	File: 21-298983
Huntington Beach, CA 92647,	)	Reg: 98042851
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John P. McCarthy
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	March 2, 2000
	)	Los Angeles, CA

Rimoun A. Nunez, doing business as U Pick Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 15 days for his clerk having sold an alcoholic beverage to a minor, and for having violated a condition on his license prohibiting the advertising of alcoholic beverages directed to the exterior of the premises, both being contrary to the universal and generic public welfare and morals provisions of the California

¹ The decision of the Department, dated July 23, 1998, is set forth in the appendix.

Constitution, article XX, §22, arising from violations of Business and Professions Code §25658, subdivision (a), and 23804.²

Appearances on appeal include appellant Rimoun A. Nunez, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 26, 1994. Thereafter, the Department instituted an accusation against appellant charging that on September 24, 1997, his clerk, Orsy Calderon, sold an alcoholic beverage (Keystone beer) to Christopher Dormae, who was then 19 years of age. In addition, the accusation charged appellant with having violated a condition on his license which prohibited exterior advertising, including interior advertising directed to the exterior of the premises.³

An administrative hearing was held on May 18, 1998, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that both charges of the accusation had been established, and this appeal followed.

² A 15-day suspension was imposed for each of the violations, but the two suspensions are to run concurrently.

³ The condition provides:

“There shall be no exterior advertising of any kind or type, including advertising directed to the exterior from within, promoting or indicating the availability of alcoholic beverages. Interior displays of alcoholic beverages which are clearly visible to the exterior shall constitute a violation of this condition.”

Written notice of the opportunity to file briefs in support of the appellant's position was given on June 16, 1998. No brief has been filed by appellant. We have reviewed the notice of appeal and have found little assistance in that document which would aid in review.

The Appeals Board is not required to make an independent search of the record for error not pointed out by appellant. It was the duty of appellant to show to the Appeals Board that the claimed error existed. Without such assistance by appellant, the Appeals Board may deem the general contentions waived or abandoned. (Horowitz v. Noble (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710] and Sutter v. Game! (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].).

However, we have reviewed the record, including appellant's notice of appeal, and are satisfied that the Department's decision should be affirmed.

DISCUSSION

In his notice of appeal, appellant challenges the even-handedness of the Administrative Law Judge (ALJ); claims he failed to take at face value the testimony of witnesses who claimed they had been shown identification on previous occasions showing the minor to be above the legal age limit; and blamed salesmen of his suppliers for the presence of the advertising signs. We have examined the record with these contentions in mind, and have concluded that each lacks merit.

Appellant's complaint that the ALJ did not act in an even-handed manner is

groundless. Other than minor displays of impatience with appellant's interruptions, the record clearly demonstrates that the ALJ performed his functions in a fair and impartial manner.

There is no dispute that the sale to Dormae occurred. Appellant claims Dormae had displayed identification on prior occasions that showed him to be 29 years old, and presented two witnesses who testified in support of that assertion.

Dormae had no identification on his person when apprehended following the purchase, and, at the hearing, denied displaying any identification at appellant's store on any previous occasion.

The ALJ chose to believe the testimony of the Department investigator and the minor over that of the witnesses presented by appellant. The Appeals Board is not permitted to substitute its judgment for that of the ALJ on an issue of credibility.

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].)

Appellant's case could not have been helped much by the witness he presented who ventured the opinion that the 19-year-old Dormae appeared to be older than the witness himself, who was 37 years of age.

The ALJ also appears to have given little weight to appellant's attempt to blame his beer salesmen for the presence of the signs, posted without his

knowledge or permission. He was clearly influenced by the testimony of investigator Kenny, who removed the signs, that he had to climb onto a counter, near the cash register, to reach one of the signs, referring specifically to that testimony in his proposed decision.

We could add that it seems an unlikely coincidence that salesmen for three different distributors called on the same day and each of the three posted signs without the knowledge of appellant or any of his employees. There were Miller's, Coors and Budweiser signs on the windows on the day of the incident, each brand carried by a different distributor, according to appellant [RT 88-89].

ORDER

The decision of the Department is affirmed.⁴

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district 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.