

ISSUED APRIL 16,2001

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

LUIS and SIOBHAN HUNTER	)	AB-7439
MARTINEZ	)	
dba Toucan Market and Deli	)	File: 20-317499
420 California Avenue	)	Reg: 99045433
Arcata, CA 95521,	)	
Appellant s/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Jeevan S. Ahuja
	)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	February 15, 2001
Respondent.	)	San Francisco, CA
	)	

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Luis and Siobhan Hunter Martinez, doing business as Toucan Market and Deli (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended their license for 25 days, with 10 days thereof stayed for a probationary period of one year, for their clerk, Aaron McGuire (“McGuire”), having sold an alcoholic beverage (a 24-ounce can of Budweiser beer) to Tara Douglas (“Douglas”), a minor who was then nineteen years of age and acting as a

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<sup>1</sup>The decision of the Department, dated June 24, 1999, is set forth in the appendix.

decoy for the Arcata Police Department, said sale 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, subdivision (a).

Appearances on appeal include appellant Luis and Siobhan Hunter Martinez, appearing in propria persona, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen

#### FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 3, 1996. Thereafter, the Department instituted an accusation against them charging the sale by their clerk of an alcoholic beverage to a minor.

An administrative hearing was held on March 19, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigator Jason Cvitanof ("Cvitanof"), Arcata police officer Ron Sligh ("Sligh"), and Douglas, the minor, in support of the charge of the accusation, and by McGuire and appellant Siobhan Hunter Martinez in appellants' defense. In addition, Department investigator Karen Locken was called as a witness on behalf of appellants.

Subsequent to the hearing, the Department issued its decision which determined that the sale violated Business and Professions Code §25658, subdivision (a), and that appellants had failed to establish a defense under Department Rule 141. (4 Cal. Code Regs. §141, subd. (b)(2) and (b)(5).)

Appellants thereafter filed a timely notice of appeal. In their appeal,

appellants raise the following issues: (1) the finding that the decoy presented the appearance of a person under 21 years of age is not supported by substantial evidence; (2) the finding that the testimony of appellant's clerk was not credible is without evidentiary foundation; (3) the finding that the minor made a face to face identification of the clerk as required by Rule 141 is not supported by the evidence or the findings; and (4) appellants' motion to dismiss based upon the Department's failure to establish that a face to face identification consistent with the standard set forth in the decision in Acapulco Restaurants, Inc.<sup>2</sup> was improperly denied. Issues (2), (3), and (4) are interrelated, and will be discussed together.

#### DISCUSSION

##### I

Appellants contend that the finding that the decoy presented the appearance of a person under the age of 21, as required by Rule 141(b)(2) is not supported by substantial evidence.

"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]; 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

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<sup>2</sup> Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126].

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].)

The Department contends that the decoy fully described her attire, height, weight, hair style and lack of makeup while on the witness stand, thus providing the ALJ an ample opportunity to observe her appearance, and that his finding comports with the rule.

Appellants compare the testimony of the Department witnesses concerning the appearance of the decoy with that of their clerk and of the Department investigator who selected the decoy, and argue that the evidence better supports a finding that the decoy did not present the requisite appearance.

This is nothing more than an attempt by appellants to have the Board substitute its evaluation of the evidence, on the basis of a partisan summary of extensive and often irrelevant testimony, for that of the Administrative Law Judge, who had the luxury of observing the decoy's appearance and demeanor while she testified, and where he had the opportunity and ability to gauge her appearance based upon personal observation.

In considering whether substantial evidence exists in support of the ALJ's findings and determinations, we think the very fact that the minor whose appearance is at issue is exposed to the in-person scrutiny of the trier of fact while

she testifies is of considerable weight, and her appearance, as displayed on the witness stand, itself constitutes substantial evidence.

We are of the view that the ALJ's evaluation of the decoy's apparent age was consistent with the language of the rule and supported by substantial evidence, and should not be set aside.

## II

Appellants contend that the ALJ erred in his determination that the face to face identification required under Rule 141(b)(5) met the standard established by the court in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126]. They contend his findings and determination that the rule was satisfied are not supported by substantial evidence, and that his erroneous determination that McGuire's testimony about the manner in which the identification process was conducted was not credible compounded that error.

The Department contends that the face to face identification satisfied the rule, based upon the testimony of the investigator, Cvitanof, the decoy, Douglas, and Sligh, the police officer. It asserts that McGuire's testimony was inconsistent and conflicting, probably because of medication he had taken (see RT 111-113).

This is the classic situation where the trier of fact is obligated to decide which of conflicting testimony is most persuasive. It is also a situation where the Board's role is sharply limited.

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.<sup>3</sup>

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].)

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].)

"Substantial evidence" is relevant evidence which reasonable minds would

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<sup>3</sup> California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

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]; 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].)

Three Department witnesses testified concerning the identification process. Although their testimony varied with respect to the specific locations of the participants, the distances which separated them, and the way they stood in relation to each other, all were quite specific that an identification process that met the requirement of Rule 141(b)(5) took place.

McGuire's testimony (at RT 124-125, 135-142) is, itself, suggestive that he was uncertain as to precisely what occurred immediately following the sale, and far less than convincing that no identification took place.

Nor are we impressed with appellants' contention that McGuire's denial of any knowledge that he was being identified as the seller demonstrates non-compliance with the rule laid down in Acapulco Restaurants, Inc., *supra*. The ALJ was not bound by McGuire's denials, contradicted as they were by other

testimony.

ORDER

The decision of the Department is affirmed.<sup>4</sup>

TED HUNT, CHAIRMAN  
E. LYNN BROWN, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>4</sup> 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.