

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

AB-7761

File: 20-357721 Reg: 00049313

7-ELEVEN, INC., CANDACE KAY ALBERTS, and JAMES RONALD ALBERTS, JR.
dba 7-Eleven #32606
9609 Aero Drive, San Diego, CA 92123,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: October 4, 2001
Los Angeles, CA

ISSUED NOVEMBER 29, 2001

7-Eleven, Inc., Candace Kay Alberts, and James Ronald Alberts, Jr., doing business as 7-Eleven #32606 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days, with five days thereof suspended for a probationary period of one year, for appellant's clerk selling an alcoholic beverage to a minor decoy, 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 appellants 7-Eleven, Inc., Candace Kay Alberts, and James Ronald Alberts, Jr., appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

¹The decision of the Department, dated January 11, 2001, is set forth in the appendix.

Appellants' off-sale beer and wine license was issued on September 21, 1999. Thereafter, the Department instituted a two-count accusation against appellants charging that, on May 12, 2000, appellants' clerk, Jose Abel Quijano ("the clerk"), sold beer to two 18-year-olds, David West and Nikki Giglio. West and Giglio were working as minor decoys for the San Diego Police Department at the time of the sale.

An administrative hearing was held on November 28, 2000, at which time documentary evidence was received and testimony was presented concerning the sale. In the course of the hearing, Department counsel acknowledged that the evidence did not support the charge of the accusation relating to Giglio (count 2).

Subsequent to the hearing, the Department issued its decision which determined that count 1 of the accusation, charging a sale of beer to West, had been established, but that the preponderance of the evidence did not establish a violation as alleged in Count 2. It also determined that no defense had been established under either Business and Professions Code §25660 or Rule 141 (4 Cal. Code Regs. §141.)

Appellants thereafter filed a timely appeal in which they contend that one of the decoys did not comply with Rule 141(b)(3), which requires that a decoy must show his or her identification upon request to the seller of alcoholic beverages.

DISCUSSION

Appellants contend that the Administrative Law Judge (ALJ) erred when he determined that Rule 141(b)(3) was not violated, because the evidence did not establish that Giglio showed the clerk her identification when he requested it. They argue that the Department's witnesses presented three versions of what happened when the clerk asked for identification, each of which contradicted the other two, and two of which showed that Rule 141(b)(3) was violated. According to appellants, the ALJ

failed to explain "why he disbelieved two out of the three Department's own witnesses," which explanation, they argue, is required by the case of Holohan v. Massanari (2001) 246 F.3d 1195 (9th Cir.).

The Board considered this latter contention recently in 7-Eleven, Inc. and Huh (8/16/01) AB-7680, and rejected it, saying:

"We have reviewed the decision in [Holohan], and the court decisions cited in support of that portion of the court's holding, and are satisfied that the view expressed by the court is peculiarly related to federal Social Security disability claims, and does not reflect the law of the State of California. While it may be true that a statement of the factors behind a credibility determination may be of considerable assistance to a reviewing court, and is welcomed by this Board, we are not prepared to say that a decision which does not set forth such considerations is fatally flawed."

The rule we are bound to apply here is that 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 any case, we are not convinced that the ALJ was required to make a credibility determination, as such, in this case. This is really a case of the ALJ resolving conflicts in testimony. He needed only to determine which recollection appeared to be most accurate or definite, not who told the truth and who did not.

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.²

"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].) 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].) Rather, 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

²The 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].

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 ALJ resolved the conflicts in testimony in the present case and found that the clerk asked only the male decoy, West, for identification, which West produced. (Finding II-A.) This Board has been shown no reason for substituting its own judgment for that of the ALJ in this regard.

Appellants' argument requires first that this Board reject the ALJ's findings, which, as explained above, we are not in a position to do, even if we were so inclined. In sustaining the ALJ's findings, therefore, we reject appellants' argument.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, 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 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.