

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

AB-8048

File: 20-351148 Reg: 02052980

ABDUL RAUF dba Gold Star Gas & Food
2399 Florin Road, Sacramento, CA 95822,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Muriel Evens

Appeals Board Hearing: June 12, 2003
San Francisco, CA

ISSUED AUGUST 28, 2003

Abdul Rauf, doing business as Gold Star Gas & Food (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his license pursuant to Business and Professions Code section 24200, subdivision (a), for a violation of Penal Code section 496, subdivision (a). The order of revocation was stayed for a period of two years, subject to appellant obeying all laws and regulations related to licensed activity, and service of a 14-day suspension.

Appearances on appeal include appellant Abdul Rauf, appearing through his counsel, Roger M. Miller, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

¹The decision of the Department, dated October 17, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on May 25, 1999.

Thereafter, the Department instituted an accusation against appellant charging that appellant permitted an employee, Gilbert Lewis, to conceal a stolen JVC camcorder in the premises, and further charging that appellant gave false statements to a police officer investigating the theft.

An administrative hearing was held on August 7, 2002, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Sacramento police officer Eric Nygren and by appellant. Their testimony was in substantial conflict. Following the hearing, the Department adopted the proposed decision of the Administrative Law Judge which determined that the charges of the accusation had been sustained.

The case arose out of an undercover sting operation conducted by the Sacramento police.

Officer Nygren described the undercover operation as one in which a valuable object is left in plain view in a vehicle in which the ignition has been punched out to give it the appearance of having been stolen. In this case, the valuable object was the JVC camcorder, left in a case on the seat of the vehicle, which was parked near a gasoline pump in front of appellant's store. A locating device had been attached to the camcorder. The device emitted an electronic signal which was actuated by movement, thus permitting it to be tracked. The doors of the vehicle were locked, but a window was open, so that a person could gain access to the interior of the vehicle and its

contents. One doing so committed vehicle burglary. (See Penal Code section 496, subdivision (a).)

The vehicle was parked by Nygren's plain-clothes partner, who, after purchasing a small item in the store, was picked up by another unmarked car and then rejoined Nygren. The two then sat in a vehicle parked in another lot, where they were able to observe the "sting" vehicle. Nygren was using 10 x 50 binoculars.

According to Nygren, Lewis was washing down the driveway and, on two occasions, looked in the open driver's window. Lewis was joined by a customer, who also looked inside the vehicle. Appellant and another employee stood next to the vehicle at one point, but Nygren could not recall whether appellant looked inside the vehicle.

While Nygren's attention was distracted, the signaling device was activated. He saw Lewis walk away from the vehicle, while the customer quickly got into his vehicle and drove away. Nygren pursued that vehicle, stopped it, and determined that the camcorder was not in the vehicle. He returned to the station and confirmed that the camcorder was no longer in the undercover vehicle. He spoke briefly with appellant, who told him the vehicle in question had been parked for over an hour, and appellant had planned to call the police to have it towed. Appellant then returned to the store, and Nygren and his partner followed him. Inside the store, Nygren asked appellant if he knew of anything missing from the vehicle. Appellant disclaimed any knowledge of anything inside the car or taken from it.

At that point, Nygren identified his partner as a police officer, and informed

appellant of the missing camcorder. He advised appellant that the camcorder was equipped with a transmitter, that a strong signal was coming from the building itself, and that he intended to search the premises. Appellant said he had no problem with the search, that there was nothing inside the store that was illegal or stolen. The camcorder was found on a shelf in the storeroom, hidden underneath some clothing.

The officers took statements from Lewis and the second employee, and arrested Lewis for theft of the camcorder. Nygren then showed the camcorder to appellant, and told him he wanted to review the surveillance tape to determine who had carried the camcorder into the business. The tape showed Lewis entering the store, carrying the camcorder case in front like a bag of groceries. Nygren testified that appellant was shown standing at the counter watching Lewis walk through.

Nygren testified that, after being told what the police had discovered, appellant said he had seen the case in the vehicle, and that he had seen Lewis enter the store with the case and go back to the storeroom. Appellant said he had not said anything to Lewis because he did not want to get involved. Appellant said Lewis had worked part-time for appellant as a cleanup man and was paid a "couple of bucks."

Appellant denied that Lewis was an employee, saying Lewis had done odd jobs for him two or three times. On the night in question, Lewis had approached appellant and asked if he could help the employee who was washing the parking lot. Appellant told Lewis to ask the employee if he needed help.

Appellant testified that he went out to the undercover vehicle to see to whom it belonged, and intended to call the police to have it removed. However, when he

returned to the store, there was a line of customers, so he didn't have a chance to call.

Appellant testified that he told Nygren he hadn't seen anything because he didn't want to get involved. He admitted he had seen the case in the car. He insisted, however, that he had not seen Lewis bring the camcorder into the store. Appellant denied being present when Nygren viewed the surveillance tape.

Appellant has filed a timely notice of appeal. In his appeal, appellant contends that the findings are not reasonably related to appellant's license, are outside common expectations of fairness in the administration of his license, and are not supported by substantial evidence.

DISCUSSION

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., 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].)

This is a case where the ALJ elected to believe the testimony of a police officer and not that of appellant. She explained at some length her reasons for doing so

(Factual Finding 4):

Respondent did make a false statement to a uniformed Sacramento Police Department officer as he was investigating the disappearance of property from a vehicle. Respondent at first denied, and later admitted to having knowledge of property left in the vehicle parked in the premises, but said he did not want to get involved. The officer testified that respondent also said he saw Lewis bring the camera case into the store, but did not want to get involved with Lewis' activities. Respondent denied this admission at the hearing.

No other evidence offered assists in determining which witness was telling the truth, other than the credibility of the two witnesses - respondent and the police officer. Here, the evidence established that respondent had been dishonest to the officer on September 18. In addition, respondent modified his account of his relationship with Lewis. He testified Lewis had done odd jobs two or three times, for "a couple of bucks" or product. On September 18, Lewis was to help a regular employee wash the lot. Respondent says he normally does not allow Lewis in the store, but that night he did. He later testified that he "sometimes gives Lewis money, but "mostly" gave Lewis cigarettes or other items. From the testimony, it appears that respondent intentionally understated his relationship with Lewis.

Respondent was not forthright about his relationship with Lewis, nor what he saw and knew on September 18, 2001, when questioned by the police officer. Accordingly, his testimony is given less weight than that of the officer.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; *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 Bev. Control App. Bd.* (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. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Appellant argues that when he denied any knowledge of the “bait” in the vehicle, he did not know who he was talking to. He claims that once he learned that the “citizen” who parked the car was really a police officer, he was fully cooperative.

In other words, appellant believed he could deceive Nygren, a uniformed police officer, but, once he knew the “citizen” was another police officer, decided that he had more to gain by telling the truth.

Appellant’s argument that what he told the police was not well established is unpersuasive. Officer Nygren’s testimony sufficiently relates the interchange with appellant to establish appellant’s false statements and his knowledge of Lewis’ theft.

We think that the evidence is insufficient to show that when Lewis was engaged in washing the driveway, he was an employee of appellant. The relationship was limited both in scope and in duration. Lewis’ actions with respect to the camcorder were well outside the scope of the task for which he had volunteered. The charge that appellant permitted an employee to conceal stolen property on the premises is not supported by the evidence.

ORDER

The decision of the Department is reversed as to count 1 of the accusation, and

affirmed as to count 2 of the accusation, The case is remanded to the Department for reconsideration of the penalty.²

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

² 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.