

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

AB-8097

File: 20-376847 Reg: 020534275

MOHAMED M. ALWISHAH and AHMED D. MOHAMED dba Y & M Market
1507 Second Street, Coachella, CA 92236,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: December 2, 2003
Los Angeles, CA

ISSUED JANUARY 20, 2004

Mohamed M. Alwishah and Ahmed O. Mohamed, doing business as Y & M Market (appellant), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for having purchased, and permitted the purchase of, food stamp coupons at a discount, and suspended the license for 15 days for appellant Alwishah having sold alcoholic beverages to minors, violations of Title 7, United States Code section 2024, and Business and Professions Code section 25658, subdivision (a).²

Appearances on appeal include appellant Mohamed M. Alwishah appearing

¹The decision of the Department, dated January 30, 2003, is set forth in the appendix.

² The appeal has been briefed as if it is being pursued only by Mr. Alwishah. Inasmuch as the license appears to be held jointly between Mr. Alwishah and Ahmed Mohamed, we consider the appeal as having been brought on behalf of both, and our reference to "appellants" is intended to refer to both.

through his counsel, Martin C. Brhel, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 12, 2001.

Thereafter, the Department instituted an accusation against them charging three instances of the purchase of food stamp coupons for less than face value (counts 1-3), violations of federal law, and two instances of the sale of alcoholic beverages to minors (counts 4 and 5), violations of the ABC Act.

An administrative hearing was held on October 24 and December 11, 2002, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been established. Its order of revocation was based upon the federal food stamp violations; a 15-day suspension was imposed for the sale-to-minor violations.

Appellants have filed a timely appeal in which they raise the following issues: (1) appellants' motion to dismiss on collateral estoppel grounds was improperly denied; (2) the administrative law judge improperly refused to exclude Department witnesses as a discovery sanction; (3) appellants were denied due process because the administrative law judge was an employee of the Department; (4) the administrative law judge failed to make proper findings regarding character evidence; (5) the penalty of revocation is cruel and unusual punishment; (6) the findings with respect to trafficking in food stamps are not supported by substantial evidence; (7) the findings with respect to the sale-to-minor charges are not supported by substantial evidence; (8) the findings

that appellants committed acts involving dishonesty, fraud, or deceit are not supported by substantial evidence; (9) there was no evidence of any nexus between alleged food stamp trafficking and the sale of alcoholic beverages; (10) the administrative law judge abused his discretion by refusing to permit testimony of character witnesses; and (11) the administrative law judge abused his discretion by excluding evidence that a Department investigator was prejudiced against appellants.

DISCUSSION

A number of general principles guide the Appeals Board's consideration of the numerous issues raised in appellant's brief.

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.³

“Substantial evidence’ is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor*

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

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].)

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].)

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].)

I

Appellants argue that the counts charging the unlawful sale of alcoholic beverages to minors should have been dismissed because criminal charges on the same underlying facts had earlier been dismissed. Appellants cite *People v. Sims* (1982) 32 C.3d 468 [186 Cal.Rptr. 77], in which a favorable disposition in an administrative proceeding was held a bar to a subsequent criminal prosecution.

Sims simply does not apply. It has long been settled that, because of the higher (beyond a reasonable doubt) standard of proof in criminal proceedings, a dismissal or acquittal in a criminal proceeding is not a barrier to further administrative proceedings involving the same conduct. (See, e.g., *Cornell v. Reilly* (1954) 127 Cal.App.2d 178 [273 P.2d 572]: “Even if Appellant had been charged criminally and acquitted, such acquittal would be no bar to a disciplinary action based on the same facts looking towards the revocation of a license.”)

II

Although a copy of a United States Department of Agriculture report describing the alleged discount purchases of food stamps by appellants had been furnished to appellants, the Department had not formally identified as witnesses the persons who had conducted the investigation and prepared the report. Department counsel explained that the names of the federal investigators were not in the report, and were not known to the Department until late in the preceding week.

Instead of granting appellants’ motion to exclude the testimony of the two investigators in question (both of whom were present and prepared to testify), the

administrative law judge (ALJ) decided to continue to a later date those charges of the accusation involving alleged food stamp purchases, and limit the evidence to be taken that day to that related to the sale-to-minor charges. The hearing resumed on December 11, 2002, by which time appellants' counsel would have had ample opportunity to prepare for their testimony.

Other than not having avoided the food stamp charges, appellants have not demonstrated any prejudice flowing from the ALJ's decision to continue the matter.

Exclusion of crucial evidence as a discovery sanction does not appear to have been warranted in this case. There was no evidence of misconduct on the part of Department counsel, intentional or otherwise, deserving of an order excluding the testimony from the Department of Agriculture investigators. The continuance granted by the ALJ was well within his discretion. Pursuant to Government Code section 11524, the ALJ has the right to grant or deny a request for a continuance for good cause. A party has no absolute right to a continuance; they are granted or denied at the discretion of the ALJ and a grant or refusal of a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446].)

III

The ALJ in this matter was an employee of the Department, appointed in accordance with the provisions of Business and Professions Code section 24210. Appellants claim this created the appearance of impropriety and conflict of interest, and denied them due process. Appellants imply that the Department was obligated to have the matter heard by an ALJ from the Office of Administrative Hearings.

The arguments put forth by appellants are essentially those which were raised

and rejected in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2002) 99 Cal.App.4th 880 [121 Cal.Rptr.2d 773]. The court there stated:

Finally, although [appellant] insists that the Department should employ ALJ's provided by the Office of Administrative Hearings - that is, by the state - it is speculative to state that such ALJ's would be "more impartial" than those employed directly by a particular agency. We will not presume that state-employed professional ALJ's cannot, will not, or do not bring a constitutional level of impartiality to the cases they hear, even if one side is the agency which directly employs them. The procedure here was constitutionally permissible.

99 Cal.App.4th at p. 886.

IV

Appellant argues that evidence of good character, presented through two witnesses and over 100 letters of support, should have persuaded the trier of fact that revocation was an inappropriate penalty. They claim the ALJ erred by failing to acknowledge such character testimony in his proposed decision.

The extent to which a licensee may be thought by friends and patrons to be an asset to the community is not the only consideration which must be taken into account in determining what is an appropriate penalty once a violation has been proven. Of equal, if not greater importance, is the issue of a licensee's honesty in his dealings with the public and his obedience to the laws of his state and nation.

In this case, the evidence established that appellant Alwishah had on two occasions violated Title 7 U.S.C. section 2024, by purchasing food stamp coupons for approximately 50 percent of face value, and redeeming them for full value. The evidence also established that a third such transaction had taken place, the evidence pointing to one of appellant's brothers as the purchaser. In all three instances, it would have been appellant, as owner of the business, who redeemed the food stamp coupons

for full value.

Contrary to appellants' assertions, the ALJ did consider the character evidence offered on appellant Alwishah's behalf, but, as seen in entries 8, 9, and 10 in his Legal Basis for Decision, found it outweighed by the specific facts of this case:

Respondents argue that since they no longer participate in the food stamp program there is no longer any threat to the community from permitting them to retain their license. With such community support as is shown by Exhibit E, some sanction short of revocation would be appropriate if the food stamp allegations are found to be true.

The issue is the honesty of co-licensee co-respondent and principal store operator Mohamed Alwishah. He showed personal dishonesty and a willingness to cheat the citizens of the United States in July and August 2001. His agent or employee committed the same unlawful act in September 2001. Two of the three acts were felonies. The acts were crimes involving moral turpitude. Alwishah was not honest at the hearing. The Department's obligation is to protect the public from dishonest operators. The sanction recommended should do just that. Y & M Market may continue to serve the community. It will have to do so without selling alcoholic beverages.

Continuance of the license without imposition of discipline would be contrary to public welfare and morals.

Our review of the record satisfies us that it supports the comments of the ALJ.

Appellants also contend that the ALJ abused his discretion by limiting appellant's presentation of character witnesses. Two of appellants' patron testified that they believed appellant Alwishah to be honest, and a large number of store customers wrote testimonial letters on his behalf.

The ALJ has considerable discretion with respect to the order and presentation of evidence, and to limit evidence that might be cumulative.

We do not believe he abused his discretion in this case. The evidence of his fraudulent dealings with respect to food stamp purchases was strong, and any general belief on the part of appellant Alwishah's customers with respect to his honesty was

obviously insufficient to overcome such evidence.

V

Appellants describe the order of revocation as an “occupational death penalty,” and argue that the transactions involving the food stamp coupons were trivial in amount, so could not have been intended to benefit appellant Mohamed substantially. Further, they say, appellant’s hard work, his service to the community, the absence of any instruction or training in the handling of food stamps, and his lack of command of the English language are all factors militating against the order of revocation. Finally, appellants assert that there is no evidence of any nexus between the alleged wrong, trafficking in food stamps, and the licensed activity, the sale of beer and wine.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (*Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The Department has considerable discretion with respect to the imposition of penalty, and it has been said that the mere fact that reasonable minds might differ as to the propriety of the penalty is not grounds to overturn it. (See *Harris v. Alcoholic Beverage Control Appeals Board* () 62 cal.2d 589 [43 Cal.Rptr. 633].)

It must not be overlooked that the crimes involving the food stamps were crimes involving moral turpitude. Revocation, in such circumstances, albeit severe, may well be appropriate, even necessary, to ensure the protection of the public. The fact that

appellants no longer participate in the food stamp program (appellants' claim that the decision not to do so was voluntary rings hollow in the face of the Department of Agriculture's imposition of a \$20,000 penalty as the price for remaining in the program) does not mean that other opportunities for dishonest acts will not confront a licensee who has already demonstrated a willingness to break the law.

VI

U.S. Department of Agriculture investigator Flores testified that she sold food stamps to appellant Alwishah on two occasions in July and August, 2001. Ignoring this testimony, appellants attack Finding of Fact 19, and contend that Flores did not tell investigator Meyers during their visit to the store on November 13, 2001, that Alwishah was the person to whom she had sold the food stamps.

It is difficult to make any sense of appellants' argument. Any failure on Flores' part to make it clear to Meyers, when they were in the store together, that it was Alwishah with whom Flores had dealt, does not detract from Flores' direct testimony at the hearing about her transactions with Alwishah.

Alwishah denied ever seeing investigator Flores in his store. The ALJ obviously disbelieved him.

VII

Appellants contend that Department investigator Finn coerced Raul Galvez into admitting, falsely, that he had purchased beer from appellant Alwishah. Alwishah denied that he or anyone else in the store sold Galvez beer. Appellants rely on the testimony of Fawwaz Mohamed that he heard Finn threaten Galvez with jail if he did not identify Alwishah as the person who sold him beer.

Both Raul Galvez and Esteban Galvez testified that Raul Galvez purchased beer

from Alwishah.

Riverside County deputy sheriff Andy Gerrard testified that he observed Raul Galvez and Esteban Galvez enter appellants' store, and minutes later exit the store, each carrying a bag containing a can of Bud Light beer.

Finn denied threatening Galvez with jail, and deputy Gerrard testified that he did not recall such a statement having been made.

Again, the ALJ chose to believe the Department witnesses. There is nothing in the record to suggest that he abused his discretion in so doing.

VIII

Citing *Santa Ana Food Market, Inc. v. Department of Alcoholic Beverage Control* (1999) 76 Cal.App.4th 570 [90 Cal.Rptr.2d 523], appellants contend that the Department failed to establish a sufficient nexus between the food stamp purchases and the sale of alcoholic beverages to justify discipline.

The *Santa Ana Food Market* decision is totally inapposite. That case involved purchases of food stamps by an employee who had successfully concealed such conduct from her employer. The court ruled that knowledge of the employee's conduct would not be imputed to her employer where there was no nexus between her conduct and the sale of alcoholic beverages.

In this case, the nexus between the purchase of food stamps and the sale of alcoholic beverages is appellant Alwishah's honesty, or, more specifically, his dishonesty. The Department has a legitimate concern that holders of alcoholic beverage licenses obey the law, and it has the right and the duty to move against a licensee who acts dishonestly in the operation of its business.

It is irrelevant that the federal government did not charge appellants with a crime.

What is relevant is that there was substantial evidence that appellant Alwishah had, for personal gain, engaged in conduct which violated federal law.

The requisite nexus was established by the evidence. The ALJ was justified in concluding that the evidence of appellant Alwishah's dishonesty warranted revocation.

IX

Appellants claim that they were not permitted to demonstrate that Department investigator Finn was prejudiced against them. It appears to be their claim that the Department would not have proceeded against them but for the alleged bias of investigator Finn.

Finn did not testify as part of the Department's case. Appellants' attorney called Finn as his first witness and sought at the outset to establish that Finn was biased against appellant Alwishah. The pages of the transcript cited by appellants as reflective of the ALJ's refusal to permit them to establish Finn's alleged bias include references to actions taken by Finn in matters unrelated to the charges of the accusation.

Appellants' counsel has included a long declaration with his brief, purporting to summarize evidence of Finn's bias against appellant Alwishah. Again, none of the matters in the declaration appear to have any relationship to the conduct which led to the order of revocation. The declaration is not part of the record, and may not be considered by the Board. (See Business and Professions Code section 23083.)

Whatever Finn's personal view may be with respect to appellant Alwishah, it has no relevance to the evidence of appellants' misconduct demonstrated in this record. Finn did not testify in support of the charges, and there is no reason to believe the charges would not have been pursued but for action on his part.

ORDER

The decision of the Department is affirmed.⁴

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, 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.