

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

AB-8228

File: 20-331183 Reg: 03055300

7-ELEVEN, INC., ANTHONY Y. MA, and JANE I. MA dba 7-Eleven #2136-13905
22020 Calvert Street, Woodland Hills, CA 91367,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: November 4, 2004
Los Angeles, CA

ISSUED JANUARY 10, 2005

7-Eleven, Inc., Anthony Y. Ma, and Jane I. Ma, doing business as 7-Eleven # 2136-13905 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days for their clerk, Kamkir Singh, having sold an alcoholic beverage (malt liquor) to Alison Benson, an 18-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Anthony Y. Ma, and Jane I. Ma, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Julie Doi, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated December 31, 2003, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 20, 1997. The Department instituted an accusation against appellants on June 24, 2003, charging the unlawful sale of an alcoholic beverage to a minor on April 11, 2003. An administrative hearing was held on October 31, 2003. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established. This timely appeal followed. Appellants now contend that the evidence does not support the findings.

DISCUSSION

Jeremiah Butler, age 22, was accompanied into the licensed premises by Alison Benson, age 18, and her step-sister, Alexandra Kabakoff, age 17. Butler and Benson took a selection of alcoholic beverages to the counter - a one-pint six ounce bottle of Bacardi Silver O, five bottles of Stolichnaya Citrona, one bottle of Smirnoff Ice, and a four-pack of Bartles & James Strawberry Kiwi, all of which were stipulated to be malt beverages. Butler, the ostensible purchaser, displayed identification showing him to be 22 years of age. Payment was made when Benson passed her step-sister's Citibank ATM card through a scanner located on the counter a few inches from the register, and entered the four-digit "PIN" number. The clerk testified that he was told by Butler that he intended to pay with an ATM card, but claims he did not see Benson perform the mechanical steps of payment - the passage of the ATM card through the scanner, and the input of the four-digit "PIN" number.

The transaction was observed by David Duran, a Department investigator whose attention was drawn to the three by their youthful appearance. He left the store after seeing Benson pay with the ATM card, and confronted the three when they left the

store. He examined their identification, seized the receipt from Benson, returned to the store with Benson, had her identify the clerk who made the sale, and issued a citation to the clerk.

The Department argued at the hearing and contends here that, since the payment, via Benson's use of the ATM card, took place directly in front of the clerk, he was put on notice that Benson was the actual purchaser, and was negligent in failing to ask her for proof that she was old enough to purchase an alcoholic beverage. Since Benson paid for the beverages, argues the Department, she was the actual purchaser. Appellants argued at the hearing and here that 22-year-old Jeremiah Butler was the actual purchaser, and Benson merely facilitated the repayment of a loan from Butler to Kabakoff.

The ALJ, after hearing the testimony of the investigator, Benson, Kabakoff, and Singh, the clerk, was unimpressed with appellants' version of events - that the sale was to Butler. Instead, he saw the substance of what had occurred as a sale to Benson:

The fact of the matter is to an objective third party observing this transaction, the salient features of it would be that the clerk failed to observe what was in plain view, and that is that he ignored that Butler's purchase was being paid for by Benson simultaneous with the clerk's processing of the transaction. He did so at his own peril.

The issue as to the clerk's bona fides in asking Butler for evidence of his age again on this occasion proves nothing more than the clerk fulfilled his obligation as far as it went. But it did not go far enough, in that he ignored or neglected to observe Benson the minor, who was in fact making payment for the purchase, and he failed to determine if she was of age in making the purchase.

(Finding of Fact 7.)

Appellants argue that the administrative law judge (ALJ) selectively chose to consider certain testimony believable, yet dismiss other testimony from the same witnesses as "fantasies associated with the Twilight Zone." They focus on his

acceptance of Benson's testimony that she did not hear Butler tell the clerk he intended to pay with an ATM card. Butler did not testify, and the clerk claimed that Butler had said he intended to pay in that manner.

Benson and Kabakoff both testified that Kabakoff's ATM card was used by Benson merely as a vehicle to repay a debt owed Butler by Kabakoff. It is this scenario that Judge Gruen characterized as fantasy (Finding of Fact 7).

It is well settled that 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.App.2d 315, 323 [314 P.2d 807]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640].) It is equally well settled that 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, 51 [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 ALJ in this case was confronted with a scenario in which a minor was the person who performed the mechanical steps effecting payment for alcoholic beverages ostensibly being purchased by a person of lawful age. She did so in plain view of the clerk, whose testimony that he did not see her do this was either disbelieved, or even if true, inexcusable under the circumstances.

There are a number of reasons why we believe the ALJ's findings and conclusions were eminently reasonable, given the evidence of record. Benson apparently did not object when selected as the person asked to identify the clerk who made the sale. Benson told the investigator she was buying the alcoholic beverages for a friend, Butler. She helped Butler bring the beverages to the counter. The variety of beverages which Butler selected suggested that the taste of more than one drinker had influenced their selection. Kabakoff testified that she removed one of the bottles from the cooler, stating she had been told to "grab that." All three stood at the counter while the clerk rang up the sale. The clerk testified that, under normal conditions he would have been able to observe anyone passing a payment card through the scanner. The scanner was physically adjacent to the cash register. The loan repayment testimony was imprecise as to when the debt arose or how much it was, and Benson's explanation why she had her younger sister's ATM card and "PIN" number seemed labored.

Appellants gloss over the real substance of what took place. A minor transferred money directly, and in plain view, to a seller of alcoholic beverages. Without that transfer, the transaction could not have been completed. That the transfer of money was electronic, rather than the handing of cash to the clerk, is of no consequence.

When the ostensible purchaser is in close company with others who are minors, a seller's level of vigilance must rise to the occasion. Since it is very possible that the older person is a "straw buyer," the seller must exercise caution, and must take reasonable steps to ensure that the substance of the transaction is not a disguised attempt by a minor to buy an alcoholic beverage. We cannot say that the ALJ, who heard all of the testimony, erred in concluding that the clerk did not take those steps.

That being so, it was reasonable for the ALJ to conclude that the sale was to the person who paid for the alcoholic beverages in question.

ORDER

The decision of the Department is affirmed.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.