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

AB-8300
File: 48-380135 Reg: 03056032

JACK LEROY MORGAN, dba Jack's Back Sports Bar
31 North Sacramento Street, Lodi, CA 95240,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

Appeals Board Hearing: January 6, 2005
San Francisco, CA

ISSUED FEBRUARY 11, 2005

Jack Leroy Morgan, doing business as Jack's Back Sports Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 15 days for purchasing alcoholic beverages (beer) for resale in the licensed premises from a retailer who did not hold a beer manufacturer's, winegrower's, rectifier's, brandy manufacturer's, or wholesaler's license, a violation of Business and Professions Code section 23402.

Appearances on appeal include appellant Jack Leroy Morgan, appearing through his advocate, Charles Benninghoff, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

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[1]The decision of the Department, dated June 10, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on November 14, 2001. On October 10, 2003 the Department instituted an accusation against appellant charging the unlawful purchase of alcoholic beverages for resale in the licensed premises from a retailer of alcoholic beverages.

At the administrative hearing held on April 23, 2004, documentary evidence was received, and testimony concerning the violation charged was presented by Department investigator Mark Gedney, by appellant Jack Morgan, and by John Moraiia.

Investigator Gedney, with Department investigator Ochoa, went to appellant's licensed premises in an undercover capacity in response to a complaint that appellant was purchasing alcoholic beverages at retail. As they were approaching the front of the premises, they saw a man (later identified as John Moraiia) pushing a metal cart into the bar. The cart held several 12-packs of Pepsi and six 12-packs of Natural Light beer. After entering the premises, the investigators saw Moraiia behind the bar counter, putting cans of beer from one of the 12-packs into a cooler behind the bar counter. When he finished, he pushed the metal cart into the storage room of the premises.

The investigators then spoke with appellant, who came out of the adjacent cardroom. They asked him about the Natural Light beer, and he said he bought it for his girlfriend. At their request, he produced a receipt for the purchase of the beer from Rite-Aid, which holds only a retail off-sale general alcoholic beverage license. Gedney took pictures of the three 12-packs of Natural Light beer on the metal cart and two 12-packs of the beer on shelves in the bar area. The cans of beer from the sixth 12-pack had been placed in the cooler by Moraiia.

Moraiia testified, in heavily accented English, that he had mistakenly taken the beer into the premises. He said that appellant had asked him to get the 12-packs of Pepsi from the trunk of appellant's car, but Moraiia misunderstood and brought the beer in as well. At the time of the incident, Moraiia did not work at the premises, but helped out sometimes in return for a favor appellant had done for him. He began paid employment at the premises about two months before the hearing.

Appellant testified that he bought the 12-packs of Natural Light beer when they were on sale because his girlfriend likes to drink it, and he had three refrigerators, in his home and on his boat, to hold the beer. He said he had asked Moraiia to take the Pepsi into the premises, but Moraiia misunderstood and brought in the beer as well.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation was established. Appellant then filed an appeal contending that the findings are not supported by the evidence; relevant evidence was improperly excluded at the hearing; and the penalty is excessive.

DISCUSSION

I

Appellant contends, in essence, that the testimony of Moraiia and appellant was credible and the Department should have believed their explanations of why the beer was in the premises.

When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§

23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Board* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) In making its determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that 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]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *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].)

It is the province of the administrative law judge (ALJ), as trier of fact, to make determinations as to witness credibility. *(Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

After describing what the investigator witnessed, the decision continues with the following findings (Findings of Fact 4-6):

> 4. Respondent-licensee testified that the Pepsi he purchased at Rite Aid was intended for resale at the licensed premises, but the

> Natural Light beer was not. He testified that he does not sell much of that brand of beer, but his live-in girlfriend likes it, and he bought the six 12-packs (containing a total of 72 cans) for her, intending to take them to his home and boat. He testified that he gave [Moraiia] the keys to his car, told him to bring in the Pepsi, and was in the card room of the premises when [Moraiia] brought the Natural Light beer into the bar area and put it away, implying that respondent-licensee had no knowledge of what [Moraiia] was doing. However, respondent-licensee had a bartender on duty at the time, and that person's observation of what [Moraiia] was doing, as well as the failure to stop him, are imputed to respondent-licensee. [Moraiia] – whose credibility is somewhat diminished by the fact that he is currently employed by respondent-licensee and has received financial assistance from him when [Moraiia] needed it to avoid being deported – corroborated respondent-licensee's testimony that he told [Moraiia] to bring in the Pepsi. However, neither [Moraiia] nor respondent-licensee testified that [Moraiia] was specifically told not to bring in the beer, and [Moraiia] offered no plausible explanation either for bringing in the beer, or for putting it away in a manner that was obviously for resale.
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> 5. Respondent-licensee's contentions that he purchased 72 cans of Natural Light beer for his girlfriend's consumption at home and on his boat, and that the beer was brought into the licensed premises without his knowledge or consent are so implausible as to be unworthy of belief.
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> 6. Based on the foregoing, it is found that respondent-licensee purchased said Natural Light beer for resale at the licensed premises.

The ALJ did not believe the explanation offered by appellant, but relied on a reasonable inference from the actions witnessed by the investigator. It was clearly within the realm of his responsibility and discretion to reach the conclusion he did. Appellant has not demonstrated an abuse of discretion, only a difference of opinion between himself and the ALJ. In such a contest, the ALJ prevails.

II

Appellant contends the failure of Department investigator Ochoa, who participated with Gedney in the investigation, to be present at the hearing constitutes the improper exclusion of relevant evidence. Appellant asserts that Ochoa "should

have been available for cross-examination," because her "testimony is vital as it could impact the findings of the Department with respect to Mr. Moraiia and the Appellant."

It was not the Department's failure that caused Ochoa's absence at the hearing; appellant should have subpoenaed the investigator if, in fact, her testimony was vital.

Appellant also asserts under this heading that the ALJ's finding that Moraiia placed the cans from the sixth 12-pack of beer into a cooler "is unfounded." He bases this assertion on the fact that the investigators only took photographs of the five intact 12-packs. Appellant ignores the clear testimony of Gedney that Moraiia took the cans from one of the six 12-packs and placed them in the cooler. (RT 9-11, 32-33.)

III

Appellant contends that the penalty is too harsh, based on his anticipation of this Board finding in his favor on the first two contentions discussed above. Also, he contends the penalty should be abated entirely because, he insists, "After all, the whole affair appears to be no more than a mistake in communications."

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Since appellant has not convinced this Board that he should prevail on the first two contentions he raised, the asserted basis for reducing the penalty has disappeared. As for his argument that the incident was only "a mistake in communications," the Department has determined to the contrary, so abatement of the penalty would not be appropriate.

Appellant has shown no abuse of discretion in the penalty imposed.

ORDER

The decision of the Department is affirmed.[2]

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

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[2]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.