

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

**AB-9602**

File: 20-500140; Reg: 16083594

BATTLE'S MARKET, INC.,  
dba Battle's Market  
1614 South McClelland Street,  
Santa Maria, CA 93454-8626,  
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: June 1, 2017  
Los Angeles, CA

**ISSUED JUNE 29, 2017**

*Appearances:*     *Appellant:* Mario A. Juarez, of Brenneman, Juarez & Adam, LLP,  
as counsel for Battle's Market, Inc.,

*Respondent:* Jonathan V. Nguyen, as counsel for Department of  
Alcoholic Beverage Control.

**OPINION**

Battle's Market, Inc., doing business as Battle's Market, appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> revoking its license because its clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

**FACTS AND PROCEDURAL HISTORY**

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<sup>1</sup>The decision of the Department, dated August 3, 2016, is set forth in the appendix.

Appellant's off-sale beer and wine license was issued on January 20, 2011. On January 19, 2016, the Department filed an accusation charging that appellant's clerk, Alejandra Rodriguez-Garcia, sold an alcoholic beverage to 18-year-old Ruth Lopez on September 11, 2015. Although not noted in the accusation, Lopez was working as a minor decoy for the Santa Maria Police Department at the time, accompanied by a second decoy, Dulce G.

At the administrative hearing held on May 11, 2016, documentary evidence was received, and testimony concerning the sale was presented by Lopez (the principal decoy, hereinafter, "the decoy"); by William Jackson and Salvador Michael Guerra, Jr., Santa Maria Police officers; by Dulce G. (the second decoy); by Alejandra Rodriguez-Garcia (the clerk); and by William Askar, an employee of appellant Battle's Market, Inc.

Testimony established that on the day of the operation, the two decoys entered the licensed premises and went to the coolers where the decoy selected a six-pack of Bud Light beer. She carried the beer to the counter and set it down. The clerk asked for her identification and the decoy produced her California driver's license which contained her correct date of birth—showing her to be 18 years of age—and a red stripe indicating "AGE 21 IN 2018." (Exh. 4.)

The clerk asked her if she was 18 years old, and the decoy replied that she was. The clerk whispered to herself "I'm not sure if I'm supposed to sell to you," then completed the sale. The second decoy, Dulce, stood next to Lopez during the transaction but did not interact with the clerk in any way during the operation and did not handle the alcohol.

Following the sale, the two decoys exited the premises. The principal decoy

then re-entered the store with two Santa Maria police officers to conduct a face-to-face identification of the clerk. A photo of the two of them was taken (exh. 5) and the clerk was subsequently cited. Appellant later terminated the clerk's employment.

On June 10, 2016, the administrative law judge (ALJ) submitted a proposed decision, sustaining the accusation and revoking the license. On June 29, 2016, following the submission of the proposed decision, the Department's Administrative Hearing Office sent a letter from its Chief ALJ to both appellant and Department counsel inviting the submission of comments on the proposed decision. The letter inviting simultaneous submission of comments from the parties states that the proposed decision and any comments submitted will be submitted to the Director of ABC in 14 days.

On July 8, 2016, appellant submitted its comments to the Director, disputing several findings of fact in the decision, pointing out conflicts in the testimonies of the decoys, and noting factors in support of mitigating the penalty. The Department did not submit any comments.

On August 3, 2016, the Department issued its Certificate of Decision, adopting the proposed decision in its entirety and imposing a penalty of revocation.

Appellant then filed a timely appeal contending: (1) the findings are not supported by substantial evidence, and (2) the penalty is excessive and fails to consider mitigation evidence presented.

## DISCUSSION

I

Appellant contends the decision is not supported by substantial evidence. In

particular, appellant maintains the clerk did not ask the decoy her age, or make a statement about being unsure whether she could sell alcohol to the decoy. Appellant further maintains the testimony of the two decoys was not credible and that the ALJ incorrectly found that the clerk believed the decoy was 21 years of age.<sup>2</sup>

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

*(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)*

When findings are attacked as being unsupported by the evidence, the power of

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<sup>2</sup>Appellant did not submit an opening brief. We outline here the arguments raised in appellant's Notice of Appeal at pp. 1-2 and appellant's Reply Brief at pp. 3-4.)

this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]. Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, 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; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].)

The ALJ made the following findings on the interaction between the decoy and clerk:

9. The clerk, Alejandra Rodriguez, asked Lopez for her ID. Lopez handed her California driver license (exhibit 4) to Rodriguez, who held it in front of her, chest high, and looked at it. Rodriguez asked Lopez if she was 18 years old. Lopez replied that she was. Rodriguez whispered to herself, "I'm not sure if I'm supposed to sell to you." Rodriguez handed the ID back to Lopez, who paid for the beer. Rodriguez gave her some change, after which Lopez and Dulce exited.

¶ . . . ¶

18. On September 11, 2015, Rodriguez asked for ID in connection with each sale of alcohol, including the sale to Lopez. Since she had trouble reading Lopez's ID, she held it farther away and turned it toward the light to see it better. She saw "2015" on the ID and commented, to herself, "18 or 21?" Ultimately, she sold the beer to Lopez. She testified that she would not have done so if she knew that Lopez was underage. Rodriguez was terminated as a result of this incident.

(Findings of Fact, ¶¶ 9, 18.) The ALJ's findings are corroborated by the testimony of Lopez (RT at pp. 15, 30) and the testimony of Dulce (RT at pp. 60, 67) who both testified that the clerk asked the decoy whether she was 18 years old, and that she whispered to herself about not being sure whether she should make the sale. (Also see RT at p. 78.)

The ALJ addressed the conflict issue as follows:

5. The Respondent noted that there was a conflict in some of the testimony. Among other things, the witnesses differed as to whether the conversation between Rodriguez and Lopez was in English or in Spanish. This is a distinction without a difference—both witnesses were bilingual and it is clear they understood each other. It is also clear that Rodriguez was uncertain whether Lopez was old enough to purchase alcohol, talking to herself during the transaction. Rodriguez testified that she wondered, out loud, “18 or 21?” (Finding of Fact ¶ 18.) She did not intend this to be a question for Lopez; nevertheless, Lopez took it that way. (Finding of Fact ¶ 9.) As required by rule 141(b)(4), <sup>[fn.]</sup> Lopez truthfully answered the question and indicated that she was only 18 years old. The Respondent did not establish any defense to the violation.

(Conclusions of Law, ¶ 5.)

Appellant maintains the ALJ incorrectly found that the clerk believed the decoy was 21. However, what the clerk believed is clearly established by her own testimony—when she states that she believed the decoy was 21:

BY MR. JUAREZ:(d) The proceedings at the hearing shall be reported by a stenographic reporter. However, upon the consent of all the parties, the proceedings may be reported electronically.

Q So on the occasion of September 11<sup>th</sup>, 2015, when [the decoy] purchased the beer from you, how old do you believe she was?

A 21, in – ‘cause – at 2015.

I got both dates confused.

Q Was it because you didn't have your glasses?

A Yes. That's why I went like this.

Also turn around to look at it.

Q Did you intentionally want to sell alcohol to [the decoy] if she was under 21 years of age?

A No. Knowing? I wanted to make sure she was 21 years old. I would have never sold alcohol to her if I would have known, because that's my training and what I know.

(RT at pp. 79-80.) It seems clear from her own testimony that the clerk sold alcohol to the decoy because she mistakenly believed the identification showed her to be 21.

There is no conflict or error on this point.

It is a fundamental precept of appellate review that it is the province of the administrative law judge, as trier of fact, to make determinations as to witness credibility and to resolve any conflicts in the testimony. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640].) The Appeals Board will ordinarily not interfere with those determinations unless there is a clear showing of an abuse of discretion.

Abuse of discretion exists whenever in the exercise of its discretion, the court exceeds the bounds of reason, all of the circumstances before it being considered. [Citations.] To exercise the power of judicial discretion, all material facts and evidence must be both known and considered, together with legal principles essential to an informed, intelligent and just decision. (*Martin v. Alcoholic Beverage etc. Appeals*

*Bd.* (1961) 55 Cal.2d 867, 878 [13 Cal.Rptr. 513, 362 P.2d 337]; *People v. Surplice* (1962) 203 Cal.App.2d 784, 791 [21 Cal.Rptr. 826].)  
(*People v. Davis* (1984) 161 Cal.App.3d 796, 804 [207 Cal.Rptr. 846].)

As noted in *Masani, supra* at 118 Cal.App.4th 1429, 1437, the Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. Appellant is essentially asking this Board to second guess the ALJ's factual findings. However, appellant's disagreement with such findings is not sufficient to show that there has been an abuse of discretion. Indulging, as the Board must, in all legitimate inferences in support of the Department's determinations, it is clear that substantial evidence supports the Department's decision.

## II

Appellant contends that the penalty is excessive and fails to consider mitigation evidence presented. (App.Reply.Br. at pp. 4-5.)

This Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of Cal. v. Alcoholic Bev. 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 Bev. 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 its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, et seq.), and the Administrative Procedures Act (Govt. Code Sections 11400, et seq.), the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144.) Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid.*)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

**Penalty Policy Guidelines:**

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

In his proposed decision, the ALJ devotes a separate section to the discussion of the penalty in which he explains:

The Department requested that the Respondent's license be revoked, noting that this was the Respondent's third sale-of-alcohol-to-a-minor violation in the span of two years. The Respondent argued that a mitigated penalty was warranted given the extenuating circumstances—the emergency which led to a last minute change in personnel which, in turn, led to the violation. Once Alejandra Rodriguez arrived at the License [*sic*] Premises, however, the problem created by the emergency was solved—all of the rushing around was over and an experienced clerk began working the register. None of the emergency circumstances had any impact upon the transaction at issue (except for the fact that Rodriguez had forgotten her glasses in her rush to get to the Licensed Premises). Ultimately, when faced with the sale of alcohol to a person whose age she was unsure of, Rodriguez decided to proceed with the sale instead of exercising caution (e.g., making further inquiry into Lopez's age). No mitigation is warranted under the circumstances. The penalty recommended herein complies with rule 144.

(Penalty, at p. 5.) Contrary to appellant's assertion, the ALJ *did* consider evidence of mitigation—the firing of the clerk and cooperation of the licensee in the investigation—but he reached a decision that a mitigated penalty was not warranted. This is entirely within the discretion of the ALJ.

Appellant's disagreement with the penalty imposed does not mean the Department abused its discretion. This Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there.

The penalty of revocation imposed by the Department is, technically, within the guidelines of rule 144—which allow for revocation when a licensee sells alcohol to a minor three times in a 36-month period. We note, however, that these guidelines are permissive—not mandatory—and the Department has great discretion in deciding

whether to seek revocation as opposed to a lengthy suspension. While we cannot say that the penalty was an abuse of discretion, we do believe the Department's imposition of revocation in this matter was draconian, and a missed opportunity to employ discretion. We would like to see the Department change its approach—away from punishment and towards compliance—by considering working with licensees in the future, to aid them in adhering to the law, rather than imposing the “death penalty” of revocation in every third-strike case.

#### ORDER

The decision of the Department is affirmed.<sup>3</sup>

BAXTER RICE, CHAIRMAN  
PETER J. RODDY, MEMBER  
JUAN PEDRO GAFFNEY RIVERA, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>3</sup>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.