

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

GURMEET SINGH THIND	)	AB-7139
dba A&G Liquors)	
4900 Madison Avenue, #C-2	)	File: 21-255393
Sacramento, CA 95841,	)	Reg: 97041754
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	George S. Avila
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	March 3, 1999
	)	Sacramento, CA
)	

Gurmeet Singh Thind, doing business as A&G Liquors (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 25 days for appellant's employee selling an alcoholic beverage to person under the age of 21, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

¹The decision of the Department, dated April 30, 1998, is set forth in the appendix.

Appearances on appeal include appellant Gurmeet Singh Thind and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on December 20, 1990. Thereafter, the Department instituted an accusation against appellant charging that his employee, Jagmohan Bhatia (Bhatia), sold an alcoholic beverage, a six-pack of beer, to Justin Barrett Elliott (Elliott), an 18-year-old decoy working for the Sacramento County Sheriff.

An administrative hearing was held on February 6, 1998. Documentary evidence was received, and testimony was presented by the decoy, Elliott, by Sacramento County Sheriff's Deputy Betty Foster (Foster), and by appellant concerning the circumstances of the sale.

On October 3, 1997, Elliott entered appellant's premises, took a six-pack of beer from the cooler at the rear of the store, and took it to the counter where Bhatia was the cashier [RT 10-11, 33]. Bhatia asked for Elliott's identification [RT 12]. Elliott gave Bhatia his lawful California driver's license showing his birthdate as April 7, 1979, and the notation, in bold print, "AGE 21 in 2000" [RT 12-14, 19]. Bhatia looked at the I.D. for five to ten seconds, said "okay," told Elliott the total, and handed Elliott's I.D. back to him [RT 12]. Elliott gave Bhatia a five-dollar bill, received change, picked up the beer, and walked out of the store [RT 18, 33, 34]. Outside, Elliott gave the beer to Foster, both re-entered the store, and Elliott identified Bhatia as the clerk who sold the beer to him [RT 19, 34].

Subsequent to the hearing, the Department issued its decision which determined that appellant had violated Business and Professions Code §25658, subdivision (a), as charged in the accusation.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: 1) Appellant did not receive the notice sent by the Sacramento County Sheriff's Department regarding the decoy program; 2) the testimony of the minor decoy was not accurate; and 3) prior Department decisions finding sale-to-minor violations were in error.

DISCUSSION

Appellant contends he did not receive the notice sent by the Sacramento County Sheriff's Department advising licensees that a decoy program would be conducted.

Failure to receive the notice is not a defense. The Department's guidelines for decoy operations provide that notice should be sent to licensees before a decoy operation was conducted, but the guidelines are only recommended procedures, not statutes or regulations.

Appellant also contends that the decoy "did not mention the whole case before the cross examination." It appears that this is an attack on the decoy's testimony as misleading or false.

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.²

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 Beverage Control Appeals Board (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. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The Appeals Board is bound by the Department's finding of fact even though a contrary finding might be equally or even more reasonable, as long as the finding is supported by substantial evidence. (Harris v. Alcoholic Beverage Control Appeals Board (1963) 212 Cal.App.2d 106 [28 Cal.Rptr. 74,78].)

We have reviewed the transcript and have discovered no material contradictions in or between the testimony of the two Department witnesses. Appellant has not pointed out any specific instances of inconsistencies or inaccuracy in the testimony.

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

Appellant submitted a statement based on his conversation with the clerk. The clerk did not testify and the ALJ did not give appellant's statement any weight, saying: "[Appellant] did not observe the transaction and his recollection of the clerk's statement is unreliable, untrustworthy and is not based on personal knowledge." (Finding VI.)

The ALJ believed the decoy and the police officer and did not believe appellant. The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Appellant contends that the prior violation shown in his licensing history was in error, since there was no sale to a minor. He also argues that he should have been allowed to pay a fine in lieu of serving a suspension in that case. This issue appears to go to the penalty, since the 25-day suspension was based in part on this being a second offense within 3 years. (Finding VII.)

The prior determination was appealed to this board and decided adversely to appellant in Gurmeet Singh Thind, AB-6778 (11/12/97). It is now final and may not be collaterally attacked.

Appellant's claim that he should have been allowed to pay a fine in the prior matter is also a prohibited collateral attack on the prior determination. In any case, the Department has broad discretion whether or not to allow a fine in lieu of suspension, and there is no reason to believe in this case that its discretion has been exceeded.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.