

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

BERBERIAN ENTERPRISES, INC.	)	AB-7256
dba Jon's Market)	
1011 East Adams Boulevard	)	File: 21-249282
Los Angeles, CA 90011,	)	Reg: 98043407
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	E. Manders
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	November 5, 1999
	)	Los Angeles, CA

Berberian Enterprises, Inc., doing business as Jon's Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days, with five days thereof stayed for a probationary period of two years, for appellant's clerk, Estella Chararria, having sold an alcoholic beverage (a 24-ounce can of Miller Lite beer) to Gustavo Villanueva, a minor, 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

¹The decision of the Department, dated October 29, 1998, is set forth in the appendix.

Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Berberian Enterprises, Inc., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general license was issued on August 15, 1990. Thereafter, the Department instituted an accusation against appellant charging an unlawful sale to a minor.

An administrative hearing was held on August 6, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the transaction upon which the accusation was based. Ralph Sanchez, a Los Angeles police officer, and Gustavo Villanueva, the 18-year-old minor decoy, testified in support of the Department's charges, and Larry Warsoff, appellant's director of loss prevention and risk management, testified on behalf of appellant.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established. Although Department counsel recommended a 15-day suspension, the Administrative Law Judge (ALJ) proposed only a 10-day suspension, with five days stayed, and the Department adopted the decision and that proposal.²

² The record reflects that a subsequent order has been entered staying the suspension indefinitely pending resolution by way of an offer in compromise.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the decision and findings are not supported by substantial evidence; (2) the failure to comply with Department guidelines constituted gross misconduct; (3) appellant was denied due process because the hearing was conducted by an administrative law judge appointed by the Department; and (4) the penalty is so excessive as to constitute cruel and unusual punishment.

DISCUSSION

I

Appellant's brief has challenged the sufficiency of the findings to support the decision, and contends there is not substantial evidence to support them. Intertwined in this argument is appellant's contention that the police engaged in misconduct by ignoring the Department's guidelines for decoy operations.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, 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].)

The testimony of the police officer and that of the decoy was straight-forward to the effect that Miller Lite beer, in a can so labeled, was purchased by the decoy while in the presence of the police officer, and that identification or proof of majority was not requested or provided. Appellant has not attempted to refute these facts.

Appellant claims there is no evidence that the beverage purchased contained more than one-half of one percent of alcohol by volume. This claim ignores the fact that the beverage was identified as Miller Lite beer, in a sealed can so labeled. The presumption, given such evidence, is that the contents of the container are what the label says they are. (See Mercurio v. Department of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626 [301 P.2d 474].)

Appellant also contends that the police officer's failure to comply with guidelines issued by the Department amounts to gross misconduct which requires the charges be dismissed.

Appellant relies on a decision of the California Supreme Court in People v. McIntire (1979) 23 Cal.3d 742 [153 Cal.Rptr.237], in which the Court stated, in a footnote, that "sufficiently gross police misconduct could conceivably lead to a finding that conviction of the accused would violate his constitutional right to due process of the

law.” While the Court reversed the conviction in that case, its reversal was based on its conclusion that the defendant had been entrapped.

The so-called gross misconduct about which appellant complains consists of the police officer’s failure to comply with guidelines lacking the force of law, and superseded by the adoption of Rule 141, which dealt with the need for warnings of decoy operations, when such could be conducted, and certain requirements regarding the preservation of the money used for the purchase. None of these requirements were incorporated into Rule 141, which does have the force of law.

Appellant’s argument, said to be based on the decision in Provigo v. Alcoholic Beverage Control Appeals Board 1994) 7 Cal.4th 561 [28 Cal.Rptr.2d 638], is that the failure to abide by these guidelines renders the proceedings constitutionally deficient. But that is not what Provigo held. To the contrary, the Court, rejecting the contention that the use of underage decoys constituted “outrageous conduct,” stated that “the additional fact that the law enforcement officers failed to follow the Department’s suggested decoy program ‘guidelines’ and instead used more mature-appearing persons as decoys” would not change its analysis. (Provigo v. Alcoholic Beverage Control Appeals Board, *supra*, 7 Cal.4th at 570.)

Since Provigo, of course, we look to Rule 141 for any valid defense the licensee may have, and not to the Department guidelines.

II

Appellant contends that the Department’s utilization of administrative law judges appointed by the Department denies it due process.

The Appeals Board, as are other state agencies, is constitutionally barred from declaring an act of the Legislature unconstitutional except in certain specified

circumstances, none of which is present here. (Cal. Const., art. 3, §3.5.) It is the practice of the Board, therefore, to decline to address this contention, and we do so here.

III

Appellant challenges the penalty in this case, contending, variously, that it is “out of proportion to the offense ... beyond question an extraordinary penalty for a transgression of ordinary gravity ... an unusual punishment”

Given that the penalty in this case was a mere ten-day suspension, and five of those days were stayed, we have difficulty taking appellant’s contention seriously, so much so that we can only characterize its attack on the penalty as frivolous.

ORDER

The decision of the Department is affirmed.³

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

³ 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.