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

AB-9749
File: 20-558407; Reg: 17086234

SHASHI GUPTA,
dba Rodeo Market
634 Sherwood Drive
Salinas, CA 93906,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: August 16, 2019
Sacramento, CA

ISSUED AUGUST 26, 2019

Appearances: *Appellant:* Dean R. Lueders, as counsel for Shashi Gupta,

Respondent: Sean Klein, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Shashi Gupta, doing business as Rodeo Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] revoking his license for permitting the placement and operation of slot machines; possessing and selling counterfeit merchandise, and; selling an alcoholic beverage to a person under 21.

[1]The Department's decision, dated September 11, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 13, 2015. There is a single instance of prior discipline against the license.

On December 12, 2017, the Department instituted a six-count accusation against appellant charging that, on two separate occasions, appellant maintained an illegal gambling device at the licensed premises in violation of Penal Code sections 330b, 330.1, and 330.4, and possessed or sold counterfeit merchandise in violation of Penal Code section 350. Additionally, the Department alleged that appellant's clerk sold an alcoholic beverage to an individual under the age of 21, in violation of Business and Professions Code section 25658(a).

At the administrative hearing held on July 10, 2018, documentary evidence was received, and testimony concerning the violation charged was presented by Department Agent Jeremy Singleton; Arturo Munoz, the minor, and; Lindsay Conn, an expert on counterfeit merchandise. Appellant testified on his own behalf.

Testimony established that on May 19, 2017, Agent Singleton entered the licensed premises to follow up on an anonymous complaint about gambling devices. Upon entering, Agent Singleton observed two large, black electronic consoles with video screens that appeared to be working. Agent Singleton inserted two $1 bills into the first console (console #1) and it registered that he had 8 credits. (Exh. D-12.)

Console #1 had two buttons labeled "Bet" and "Spin." The objective was to press the spin button after selecting the amount of credits to be bet. Pressing the Spin button would randomly spin various images on the screen. Getting three matching images yielded multipliers to the credits that were bet. For example, 3 lemons in a row

would yield a multiplier of 10. Agent Singleton played multiple rounds with the 8 credits he paid for. None of the rounds involved any skill or interaction with the process, and Agent Singleton had no way of influencing the outcome before, during, or after the start button was pressed. Ultimately, Agent Singleton used all 8 credits on console #1 without receiving any additional credits.

Agent Singleton then moved to the second console (console #2), which appeared more modern but functioned essentially the same as console #1. Agent Singleton inserted four $1 bills into console #2 and it registered that he had $4 worth of credit. Agent Singleton pressed the start button and played through random image spins repeatedly. After playing for a while, Agent Singleton accumulated a total of $6 in credit from console #2. At that point, Agent Singleton pressed the collection button and a paper voucher printed out. There was a large “6” on the voucher that corresponded to the credit Agent Singleton had accumulated.

Agent Singleton then headed to the beer coolers and selected a single can of Modelo beer. He took the beer and the voucher to the register and handed them to appellant. Appellant asked Agent Singleton if it was his first time playing the machines, and Agent Singleton indicated that it was. Appellant retained the voucher and gave the beer to Agent Singleton along with $3.07 in change. Agent Singleton then left the licensed premises.

Agent Singleton returned to the licensed premises on May 25, 2017. Agent Singleton went to the location of the consoles and observed that console #1 was being used by a Hispanic male adult. Agent Singleton watched the man repeatedly insert dollar bills into console #1 and engage in game play. Agent Singleton then inserted

four $1 bills into console #2 and played for about 5-10 minutes. At the time he hit the collection button, Agent Singleton accumulated $6.75 in credit. The paper voucher that printed from console #2 had a “7” in the middle. Agent Singleton took the voucher to the front register to get it processed.

As Agent Singleton approached the register, he noticed hats and beanies on display that he believed to be counterfeits. Agent Singleton had received training regarding the detection of counterfeit merchandise. Agent Singleton began to look closely at one of the baseball-style hats that had a Golden State Warriors logo above the brim. The hat had several attributes that led Singleton to conclude that it was not a genuine, trademarked item, such as the stitching of the logo and absence of a holographic tag.

Agent Singleton asked the clerk the price of the hat, and the clerk replied that it was $9.99. Agent Singleton expressed surprise and stated that similar hats usually cost $20 to $30. The clerk agreed and told Agent Singleton that the hat was “a good deal.” (Findings of Fact, ¶ 11.) Agent Singleton purchased the hat for $10.90 and presented the voucher that he received from console #2. The clerk retained the voucher and gave Agent Singleton a $7 cash payout. Agent Singleton then departed the licensed premises.

Agent Singleton contacted Lindsay Conn regarding the Golden State Warriors hat he purchased from appellant. Conn is a trained expert in recognizing and distinguishing genuine trademarked properties for the NFL, MLB, NHL, and NBA from counterfeits. Conn has been working in this field since 2003, and her regular job duties involve coordinating enforcement of genuine trademarks in civil enforcement actions

and with law enforcement agencies in criminal investigations. After reviewing the images, Conn concluded that the hat Agent Singleton purchased from appellant was counterfeit.

Agent Singleton returned to the licensed premises on June 23, 2017 and brought another agent, Francisco Gonzalez, to assist with the investigation. After entering the premises, Agent Singleton observed both gaming consoles being played by male adults. Singleton also observed a youthful looking male retrieving a Modelo beer can from one of the coolers and get in line to make a purchase. When it was his turn, the youthful male presented the beer can to appellant's clerk. The clerk processed the sale without asking for identification, date of birth, or age-related questions. After the transaction was complete, the male was given his beer and change and left the store.

Agent Singleton followed the male out of the store and detained him. The male, identified as Arturo Munoz, Jr. (the minor), told Agent Singleton that he was 19 years old. The minor told Agent Singleton that he purchased alcoholic beverages on multiple occasions at the licensed premises. Agent Singleton seized the beer and cited the minor.

Agent Singleton went back inside the licensed premises and contacted the clerk. Agent Singleton advised the clerk that he had just sold alcohol to a minor. The clerk admitted that the minor did not show identification and confirmed that the minor was a regular customer. The clerk then called appellant, who arrived a few minutes later.

When appellant arrived at the licensed premises, Agent Singleton expressed concern with the two gaming consoles. Appellant stated that the consoles belonged to an unidentified white male who came in every two weeks to collect the money from him.

Appellant denied he had control of the machines and told Agent Singleton that he only rented the space to the purported owner for $500 a month. Nevertheless, appellant was able to provide keys to the money repositories in both consoles. Agent Singleton seized the bills found inside the consoles.

In addition to currency, Department agents seized a total of 73 baseball caps, beanies, and sunglasses with sports logos that were on display for sale at the licensed premises for $9.99 each. After these items were seized, Agent Singleton sent Conn digital photographs of a sample of five hats and two beanies he had seized as evidence. Conn confirmed that the samples of inventory were counterfeit and not licensed or authorized by the trademark holders. Appellant denied being aware that the items were counterfeit and stated that he regularly purchased the items from one of his suppliers, Max Supply, LLC. Appellant provided a receipt showing that he purchased hats for $4.50 each, beanies for $3 each, and sunglasses for $2.50 each.

On July 16, 2018, the administrative law judge (ALJ) issued his proposed decision sustaining all six counts and recommended that appellant's license be revoked. The Department adopted the proposed decision in its entirety on August 20, 2018 and issued its Certificate of Decision on September 11, 2019.

Appellant filed a timely appeal contending that: (1) the ALJ continued the original hearing date based on a prohibited *ex parte* communication from the Department; (2) the Department improperly considered a subsequent violation and ignored mitigating evidence; (3) the Department's analysis regarding appellant's lack of mitigating evidence constitutes an underground regulation; (4) the ALJ erroneously rejected

appellant's claim that he did not know the slot machines were illegal, and; (5) the counterfeit item counts are not supported by substantial evidence.

DISCUSSION

I

ISSUE CONCERNING *EX PARTE* COMMUNICATION

Appellant contends there was an improper *ex parte* communication between the Department and the ALJ, based on language that the ALJ used in denying the Department's Motion to Consolidate the subject accusation with another accusation (Reg. 18086570.) (AOB, at p. 2.) In his denial, the ALJ wrote "t[his] matter was continued to July 10, 2018, at the request of the Department because the case agent was unavailable for the June 5th hearing date." (*Id*. at p. 3.) Appellant argues that neither he nor his attorney were "informed of this continuance request nor … given the opportunity to oppose [it]." (*Ibid*.) According to appellant, this error "mandates reversal." (*Id*. at p. 4.)

An *ex parte* communication is broadly defined as "[a] generally prohibited communication between counsel and the court when opposing counsel is not present." (Black's Law Dictionary (7th ed. 1999) at p. 597.) Section 11430.10 of the Government Code provides, in relevant part:

> (a) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and an opportunity for all parties to participate in the communication.
>
> (b) Nothing in this section precludes a communication, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing.

Section 11430.50 provides guidance where a presiding officer receives an improper written communication:

> (a) If a presiding officer receives a communication in violation of this article, the presiding officer shall make all of the following a part of the record in the proceeding:
>
> (1) If the communication is written, the writing and any written response of the presiding officer to the communication.
>
> [¶ . . . ¶]
>
> (b) The presiding officer shall notify all parties that a communication described in this section has been made a part of the record.
>
> (c) If a party requests an opportunity to address the communication within 10 days after receipt of notice of the communication:
>
> (1) The party shall be allowed to comment on the communication.
>
> (2) The presiding officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that has been concluded.

Based on the above authority, the Board has stated "the proper remedy when a decision maker receives an unsolicited *ex parte* communication is to immediately lift the veil of secrecy and give the opposing party an opportunity to respond." (*7-Eleven, Inc./Sirisut Corp.* (2014) AB-9398, at p. 10.)

However, this Board has also held that failure to raise an *ex parte* objection prior to the administrative hearing waives an appellant's right to appeal. (*See 7-Eleven, Inc./Alexander El, Inc.* (2015) AB 9518, at p. 7 ["If appellants felt the Director's receipt of the document constituted a separate *ex parte* communication, it was incumbent upon them to bring this objection to the ALJ's attention by filing a[] response."]) "Indeed, an

ALJ has the power to dismiss the case entirely if an *ex parte* communication proves sufficiently prejudicial." (*Ibid*.)

Here, appellant admits he received notice of the purported *ex parte* communication contained in the ALJ's ruling denying the Department's motion to consolidate on June 12, 2018, a month before the administrative hearing. (AOB, at pp. 2-3.) Yet, there is nothing in the record indicating that appellant raised an objection at that time (or any time prior to appeal). Appellant, therefore, waives his right to raise an objection now for the first time. *See McDonald's Corp. v. Board of Sup'rs* (1998) 63 Cal.App.4th 612, 618 [74 Cal.Rptr.2d 101, 105] ("Under familiar general rules, theories not raised in the trial court may not be raised for the first time on appeal.")

II

ISSUE CONCERNING MITIGATION/AGGRAVATION EVIDENCE

Appellant contends the Department improperly considered a subsequent violation and ignored mitigating evidence. (AOB, at pp. 4-7.) Specifically, appellant argues that he was "punished twice for one event" because the ALJ considered a second accusation as evidence of aggravation. (*Id*. at p. 4.) Additionally, appellant claims that "the ALJ disregarded the evidence of training …" and remedial actions taken. (*Id*. at pp. 5-6.) These issues will be discussed together.

The Board 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].) "'Abuse of discretion' in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.]" (*Brown v. Gordon*, 240

Cal.App.2d 659, 666-667 (1966) [49 Cal.Rptr. 901].)

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 (emphasis added).)

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. (Cal. Code Regs., tit. 4, § 144.)

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

> **Penalty Policy Guidelines:**
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> 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.

(*Ibid*.)

As the Board has said many times over the years, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing of abuse. Under the penalty guidelines, the ALJ can clearly consider subsequent alleged violations, although unproven, as aggravating evidence based on "a continuing course or pattern of conduct." Further, the record shows that the ALJ considered appellant's testimony regarding both preventative and corrective training, but discounted that testimony based on the ineffective prevention of alcohol sales to minors. (Decision, at pp. 17-18.) Appellant has not demonstrated that the ALJ (and by extension, the Department) abused his discretion in this case. The Board sees no error. [2]

III

ISSUE CONCERNING UNDERGROUND REGULATION

Appellant contends the ALJ imposed "a new underground standard … " in punishing him for not: 1) seeking out information from the Department to develop a prevention plan; 2) providing materials to his employees; 3) availing guidance materials or training from the Department, and; 4) using specialized equipment like scanning registers. (AOB, at p. 6.)

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[2] Appellant also contends that he was unaware slot machines were illegal, which should have also been considered as mitigating evidence. (AOB, at p. 7.) However, for the same reasons discussed as discussed above, the Board rejects this argument.

The APA defines the term "regulation" broadly: "'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Gov. Code, § 11342.600.) "[I]f it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it." (*State Water Resources Control Bd. v. Office of Admin. Law* (1993) 12 Cal.App.4th 697, 702 [16 Cal.Rptr.2d 25].)

The APA requires that all regulations be adopted through the formal rulemaking process.

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation, as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

(Gov. Code, § 11340.5(a).) All regulations are subject to the APA rulemaking process unless expressly exempted by statute. (Gov. Code, § 11346; *Engelmann v. State Bd. of Education* (1991) 2 Cal.App.4th 47, 59 [3 Cal.Rptr.2d 264].) Compliance with the rulemaking process is mandatory; where a regulation was not properly adopted, it has no legal effect. (*Armistead v. State Personnel Bd*. (1978) 22 Cal.3d 198, 204-205 [149 Cal.Rptr. 1].)

In *Tidewater*, the California Supreme Court outlined a two-part test:

> A regulation subject to the APA thus has two principal identifying characteristics. [Citation.] First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. [Citation.] Second, the rule must

> "implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency's] procedure." (Gov. Code, §11342, subd. (g).)

(*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186].)

Here, appellant misreads the ALJ's analysis in the proposed penalty order. The ALJ's comments regarding appellant's failure to utilize certain Departmental resources, training materials, and equipment are not regulations. Rather, the ALJ was merely pointing out the specific things appellant failed to do, which discount his attempt to mitigate the proposed penalty. Further, the ALJ's comments suggest examples of actions that would constitute mitigation. Any argument that the ALJ intended his comments to be regulatory is a gross misreading of the penalty order.

IV

ISSUE CONCERNING MISTAKE OF LAW

Appellant contends that the gaming machine counts should be reversed based on his honest misunderstanding of the law[3]—i.e., he did not know the machines were illegal. (AOB, at pp. 7-8.)

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[3] Both appellant and the Department mischaracterize the issue as a mistake of fact; however, a mistake of fact is "an honest and reasonable belief in the existence of circumstances, which, if true, would make the act with which the person is charged an innocent act … ." (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425 [51 Cal.Rptr.3d 263, 270] disapproved of on other grounds by *People v. Covarrubias* (2016) 1 Cal.5th 838 [207 Cal.Rptr.3d 228, 378 P.3d 615].) For example, if appellant reasonably believed the slot machines were actually video games, the mistake of fact defense may apply. Here, appellant does not dispute that the consoles were slot machines. (AOB, at p. 7.) In fact, appellant expressly states that he "did not know that slot machines were illegal." (*Ibid*.) This is a mistake of law, not fact. (*See People v. Meneses* (2008) 165 Cal.App.4th 1648, 1662 [82 Cal.Rptr.3d 100, 112] ["A mistake of law, in its strict sense, means ignorance that the penal law (of which one stands accused) prohibits one's conduct … ."].)

One of the oldest precepts of law, descended to the United States from Roman law by way of the European legal tradition, is *ignorantia legis neminem excusat*, or "ignorance of the law excuses no one."[4] (See, e.g., *Shevlin-Carpenter Co. v. Minn*. (1910) 218 U.S. 57, 68 [30 S.Ct. 663] [rejecting loggers' argument that they were ignorant of law requiring permit for removal of lumber from state land]; Central *of Ga. Ry. Co. v. Wright* (1907) 207 U.S. 127, 136 [28 S.Ct. 47] [rejecting railway shareholders' argument that they were ignorant of shares' taxability].)

This general rule has, in limited circumstances, been rejected. In *Cheek v. United States*, for example, the U.S. Supreme Court observed that an exception was appropriate where the legislature expressly made willfulness an element of the crime:

> The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. [Citations.] Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. This common-law rule has been applied by the Court in numerous cases construing criminal statutes. [Citations.]
>
> The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term "willfully" as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws.

(*Cheek v. United States* (1991) 498 U.S. 192, 199-200 [111 S.Ct. 604].) The Supreme Court also explained that due process required notice where a registration law made "mere presence in the city" a violation:

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[4] An alternative phrasing, also employed by the courts, is *ignorantia juris non excusat*, or "ignorance of the law does not excuse."

> The rule that "ignorance of the law will not excuse" [citation] is deep in our law, as is the principle that of all the powers of local government, the police power is "one of the least limitable." [Citation.] On the other hand, due process places some limits on its exercise. Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act.

(*Lambert v. Cal.* (1957) 355 U.S. 225, 231 [78 S.Ct. 240] [addressing defendant's failure to register as a felon with the chief of police, as required by municipal code for stays within city exceeding five days].)

In the context of default judgments resulting from a mistake of law, the California Supreme Court observed:

> The issue of which mistakes of law constitute excusable neglect presents a fact question; the determining factors are the reasonableness of the misconception and the justifiability of lack of determination of the correct law. [Citation.] Although an honest mistake of law is a valid ground for relief where a problem is complex and debatable, ignorance of the law coupled with negligence in ascertaining it will certainly sustain a finding denying relief.

(*Ontario v. Superior Ct. of San Bernardino County* (1970) 2 Cal.3d 335, 346 [85 Cal.Rptr. 149]; see also *A&S Air Conditioning v. John J. Moore Co.* (1960) 184 Cal.App.2d 617, 620 [7 Cal.Rptr. 592].)

This Board has, in the past, dealt with appellants pleading ignorance of the state's alcoholic beverage laws and has firmly rejected that defense. (*See e.g. Dhillon* (2001) AB-7434; *Zaighami* (2015) AB-9486.) Further, under controlling legal authority, licensees have an affirmative duty to maintain and operate their premises in accordance with law. (*Laube v. Stroh* (1992) 2 Cal.App.4th 364, 379 [3 Cal.Rptr.2d 779] ["A

licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly."]; *see also CMPB Friends, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.App.4th 1250, 1256 [122 Cal.Rptr.2d 914] ["[L]icensees bear an affirmative duty to ensure that minors are not permitted to enter and remain in their premises in violation of section 25665."]; *Ballesteros v. Alcoholic Bev. Control Appeals Bd.* (1965) 234 Cal.App.2d 694, 700 [44 Cal.Rptr. 633] ["[A]n on-sale licensee has an affirmative duty to maintain a properly operated premises"]; *Morell v. Dept. of Alcoholic Bev. Control* (1962) 204 Cal.App.2d 504, 514 [22 Cal.Rptr. 405] ["The holder of a liquor license has the affirmative duty to make sure that the licensed premises are not used in violation of the law"]; *Munro v. Alcoholic Bev. Control Appeals Bd.* (1960) 181 Cal.App.2d 162, 164 [5 Cal.Rptr. 527] ["The owner of a liquor license has the responsibility to see to it that the license is not used in violation of law"]; *Mack v. Dept. of Alcoholic Bev.* Control (1960) 178 Cal.App.2d 149, 153 [2 Cal.Rptr. 629] ["The licensee, if he elects to operate his business through employees must be responsible to the licensing authority for their conduct in the exercise of his license"].)

Here, ownership, possession, or use of a slot machine or gambling device is expressly prohibited under California Penal Code sections 330b, 330.1, and 330.4. Appellant had an affirmative duty to maintain and operate his premises in accordance with these laws. *Laube*, *supra*, at p. 379. Appellant's ignorance of the law is, therefore, no defense.

V

ISSUE CONCERNING SUBSTANTIAL EVIDENCE

Appellant contends that counts three and five (counterfeit items) are not supported by the evidence. (AOB, at pp. 8-10.) Specifically, appellant challenges the ALJ's determination that he knew the items were counterfeit or that he had reason to believe they were counterfeit. (*Id*. at p. 8.)

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 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—all conflicts in the evidence must be resolved in favor of the Department's decision. (*Kirby*

v. Alcoholic Bev. Control Appeals Bd. (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106, 112 [28 Cal.Rptr.74].)

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. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (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]; Harris, *supra*, at 114.)

Under Penal Code section 350(a), it is unlawful to manufacture, sell, or knowingly possess for sale any counterfeit marks. "'Knowingly possess' means that the person possessing an article knew or had reason to believe that it was spurious … ." (Pen. Code, § 350(e)(4).)

Here, the ALJ made the following findings regarding appellant's knowledge that the items for sale were counterfeit:

> 19. Gupta was told that the sportswear in the displays near the register were going to be seized because they appeared to be counterfeit. Gupta denied knowing that the items were counterfeit. During the search of the Licensed premises on June 23, 2017, Singleton and the other Department agents seized a total of 73 baseball caps, beanie caps, and sunglasses with sports logos that were on display for sale in the Licensed premises. (Exhibits D-18 & D-19) They were being sold for $9.99 each according to Gupta.
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> 20. After these items were seized, Singleton sent Conn digital files of photos he had taken of a sample of the hats and beanies he had seized as evidence. Conn confirmed … [that the] sample … w[as] counterfeit and not licensed or authorized by the trademark holders. […] In examining digital images …, Conn

> concluded, [the sample] lacked authentic holograms, there were of inferior quality and craftsmanship, and the labeling of the products was improper as the reasons why she concluded they were counterfeit. […]
>
> 21. Gupta testified in this matter. He confirmed that the items seized by Singleton and the Department agents were items that were being sold in the Licensed Premises for $9.99 each. Pricing described by Conn for the purchase of a genuine hat was in the range of $30 retail. Gupta provided receipts that reflected the hats were bought wholesale for $4.50 each, beanies for $3 each and glasses for $2.50 each (Exhibit L-1) Gupta testified that the items seized were included in inventory that Gupta regularly purchased from one of his suppliers, Max Supply, LLC (MSL). Gupta chose to make them available for sale after the representative from MSL brought them to the Licensed Premises as part of the wholesale inventory being sold. Gupta did not have any training from the Department in recognizing counterfeit sporting goods. Gupta denied being aware that the items were counterfeit.

(Findings of Fact, ¶¶ 19-21.) Based on these findings, the ALJ reached the following conclusions:

> 19. In this matter, the Department has established, but sufficient evidence, that the Respondent-Licensee, Gupta knew, or should have known, at the very least, that the item sold on May 25, 2017 and available for sale on June 23, 2017 were spurious articles. While Gupta has denied having actual knowledge of the spurious nature of the items at issue, the evidence received from the testimony of Singleton and Conn established that the items had multiple features, like poor quality materials, inferior stitching and stamping, and the lack of labels with proper logos that would have informed an objectively reasonable person making a good faith effort to ascertain the truth that they were counterfeit. (Findings of Fact ¶¶ 2-23)
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> 20. Gupta's business is in the broader, northern California community that contributes to the fan base of the sports teams that made up many of the spurious items. Even if Gupta himself did not follow local sports teams, it would be unreasonable for this court to conclude that he would not have been exposed to genuine marks of these entities while going about the business of living. A trip to the mall or department store will lead you by several legitimate vendors of these products for comparison. Further, pricing described by Conn for the purchase of a genuine hat was in the range of approximately $30 retail. Gupta was selling the counterfeits for $9.99 retail. Gupta provided receipts that reflected the hats were the most expensive items bought at wholesale for $4.50 each which should have given him pause regarding the nature of the hats, beanies and sunglasses. The evidence stablished that Gupta paid wholesale prices and then put the items into the retail inventory of the Licensed Premises without any further inquiries. (Findings of Fact ¶¶ 2-23)

> 21. It is not a defense that Gupta may have actively avoided knowledge of the spurious nature of the items being sold in the Licensed Premises. The poor quality, lack of labeling, inferior stitching and unusually low wholesale process for the merchandise would have compelled an objectively reasonable person to make a good faith effort to ascertain the truth of the products before offering them for sale. Gupta did not follow this legally required path before offering these spurious products for sale. If Gupta felt this was too much of a burden, Gupta's other option was to decline adding the products to his retail inventory. Gupta elected the easy profit instead. In light of the above, the Respondent's contention that the elements of Penal Code Section 350(a) have not been met is rejected.

(Conclusions of Law, ¶¶ 19-21.)

Based on the above, there is substantial evidence to support the ALJ's findings that, under the totality of the circumstances, appellant had reason to believe the items for sale at the licensed premises were spurious. Appellant asks this Board to look at the same evidence available to the ALJ and reach a different conclusion. However, this Board cannot simply substitute one version for another, as it "is without power to make findings of fact." (*Hasselbach v. Dep't of Alcoholic Beverage Control* (1959) 167 Cal.App.2d 662, 667, [334 P.2d 1058, 1062].)

"[C]ourts generally will defer to the broad discretion vested in administrative agencies when the evidence is conflicting, or even when reasonable men might well differ on questions of the credibility of witnesses, or upon the proper inferences to be drawn from the evidence, subject to the requirements, of course, that the finding be supported by substantial evidence." (*Lorimore v. State Pers. Bd.* (1965) 232 Cal.App.2d 183, 186 [42 Cal. Rptr. 640].) A higher administrative body "may not ignore the 'great weight' accorded to ALJ findings on witness credibility where the ALJ observed demeanor." (*Absmeier v. Simi Valley Unified Sch. Dist.* (2011) 196 Cal.App.4th 311, 318–19 [126 Cal. Rptr. 3d 237, 243].)

The ALJ's findings are supported by substantial evidence. The Board is prohibited from reweighing the evidence or exercising its independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (*Masani, supra*.)

ORDER

The decision of the Department is affirmed.[1]

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[1]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.