ISSUED MARCH 6, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ZIP IN LIQUOR, INC., dba Zip In Liquor 11432 Old River School Road Downey, CA 90241, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6680 File: 21-039362 Reg: 95034343 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: January 8, 1997 Los Angeles, CA

Zip In Liquor, Inc., doing business as Zip In Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered appellant's off-sale general license suspended for 15 days for having sold alcoholic beverages (beer) to a minor, and for having offered for rental or sale X-rated videotapes in an area open to the general public and without a sign stating "adults only," being contrary to the universal and generic public welfare and morals provisions of the California

[1] The decision of the Department, dated June 6, 1996, is set forth in the appendix.

Constitution, article XX, §22, arising from violation of Business and Professions Code §25658, subdivision (a), and Penal Code §313.1, subdivision (e).

Appearances on appeal include appellant Zip In Liquor, Inc., appearing through Hoa Nguyen, its sole shareholder; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's license was originally issued in August 1976. Hoa Nguyen, its current president and sole shareholder, purchased the business in March 1995. Thereafter, the Department instituted an accusation alleging the sale of alcoholic beverages (three bottles of Coors beer) to a minor, in violation of Business and Professions Code §25658, subdivision (a),[2] and the offering of adult videotapes for rental or sale in an area open to the general public and without an "adults only" sign, in violation of Penal Code §313.1, subdivision (e).

An administrative hearing was held on February 13, 1996, and April 24, 1996, at which time oral and documentary evidence was received. At that hearing it was determined that, on August 12, 1995, appellant's clerk sold alcoholic beverages to a minor, and that, on August 16, 1995, appellant had adult videotapes on display for rental or sale in an area open to the public and without the required "adults only" sign.

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[2] Determination of Issues "B" cites this code section as §23658(a), an apparent typographical error.

Subsequent to the hearing, the Department issued its decision which suspended appellant's license for 15 days. Appellant filed a timely notice of appeal.

Appellant raises the following issues: (1) the decision is invalid since the proposed decision is dated prior to the date of the accusation; (2) the minor had on previous occasions presented identification showing that he was over 21; (3) Mr. Nguyen was not warned when he bought the business that the license had been the subject of discipline on previous occasions;[3] and (4) the Department's verbal warning about the manner in which the videotapes must be displayed was ineffective because it was verbal and not understood because of language barriers.

DISCUSSION

I

The Administrative Law Judge's (ALJ's) proposed decision bore an incorrect date, stating the year as 1995 when it should have stated 1996. Inasmuch as this is an obvious typographical error not going to the merits nor prejudicing appellant in any way whatsoever, we choose to disregard it. It should also be noted that it is the date of the adoption of the decision by the Department which is controlling.

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[3] Appellant's brief refers to a conversation between Mr. Nguyen and an unidentified representative of the Department, and suggests that she may have been prejudiced against him because of skin color. There is nothing in the record to suggest Mr. Nguyen's race or skin color was in any way the subject of discrimination. Nor was this issue ever raised during the two days of hearings.

II

Appellant contends it is unreasonable to believe that its employees would have sold alcohol to someone who looked as young as the purchaser without having at some time checked his identification for proof of age. This is, in effect, an attack on the sufficiency of the evidence.

Appellate review does not "... resolve conflict[s] 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. 658].)

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] (substantial evidence supported both the Department's and the license-applicant's position); 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]; Gore v. Harris (1964) 229 Cal.App.2d 821 [40 Cal.Rptr. 666].)

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

The Department presented the testimony of a Department investigator and that of the minor who made the purchase in question. The testimony established that on August 12, 1995, the then 20-year-old minor entered the store, went to the beer cooler, and returned to the counter with a box containing one 40-ounce bottle of Coors beer and two 32-ounce bottles of Coors beer. He placed some money on the counter, spoke to the clerk, then dashed from the store, only to return immediately and deposit some additional change on the counter. The clerk then rang up the sale without asking for identification, and the minor left the store with the beer. Department investigator Harris, who was in the store, witnessed the transaction. He followed the minor from the store, ascertained his age, and seized the beer, which was later placed in evidence. Investigator Harris and the minor both testified that no identification was ever requested.

Appellant admits that the clerk did not request identification, but contends that the minor had on previous occasions made purchases at the store, and on those

occasions had presented identification which showed him to be over the age of 21. The ALJ rejected this defense because the only evidence offered to support it was hearsay testimony.

Appellant initially contended that the transaction was witnessed by a Mr. Chung, who allegedly could testify that he had seen the minor produce such identification on a prior occasion. According to Mr. Nguyen, Mr. Chung was unable to appear at the initial hearing because he was hospitalized the preceding evening [I RT 63]. However, at the later hearing on April 24, 1996, which was scheduled to accommodate appellant's desire to present Mr. Chung's testimony [I RT 71], Mr. Nguyen again represented that Mr. Chung was unavailable, this time because he had moved [II RT 5]. Mr. Chung was not subpoenaed [II RT 5].

Appellant then asserted that his wife and his brother had seen such identification on prior occasions, and that on the night in question his wife told the clerk, her daughter, that she could make the sale.

Charlie Nguyen, the brother, testified at the April 24 hearing that he had sold beer to the minor on other occasions and had checked his California identification which showed him to be over 21. He did not recall whether it was a driver's license he checked, but said he did recall telling the clerk's mother on other occasions that the person making the purchase was over 21. Neither the clerk nor her mother testified. Consequently, there was no direct or admissible testimony that the clerk had relied,

even indirectly, on the presentation of proof of age on earlier occasions.

We believe the ALJ was correct in his conclusion that the testimony offered in support of the good faith defense was all hearsay, and therefore insufficient to support a finding of good faith under Business and Professions Code §25660. The explanations for Mr. Chung's non-appearance, and the reason that the clerk could not be present because of illness, did not seem to ring true, and the explanation that her mother could not appear because she had to mind the store is also unpersuasive.

Appellant's contention that the minor's personal appearance was that of a teenager, so that it would be unreasonable to think no one would check his age, albeit a novel argument, is no defense. If the minor's appearance was that of a teenager, as appellant suggests and as the minor's photo confirms, (see exhibit 3), that is all the more reason to check his identification at all times, and to do so carefully.

III

Appellant contends that when he purchased the business and applied for the transfer of the license, no one told him that it had been subjected to discipline on three prior occasions. Therefore, he argues, the violation should be treated as a first offense.

The Department points out that appellant had retained a consultant to help him buy the business, and disclaims any obligation on the part of the Department to warn people who purchase corporate licenses about prior discipline. We are unaware of any such duty.

Appellant's stated concern [II RT 27-28] was that the penalty would reflect conduct for which he was not personally responsible. The ALJ apparently was swayed by this appeal, since he imposed only a 15-day suspension, while the Department had recommended a 25-day suspension with 10 days of the suspension stayed.

Appellant asks the Appeals Board to consider the incident as a first-time violation and impose a fine rather than a suspension. We cannot do so. The matter of penalty is peculiarly within the discretion of the Department. The Appeals Board may not set aside a penalty imposed by the Department in the absence of an abuse of discretion, and we have found none here.[4]

IV

Appellant admits that Investigator Harris warned appellant's employees that videotapes in his store were improperly displayed, but suggests that because the warning was only verbal, language barriers prevented it from being understood or heeded. However, Investigator Harris testified that he spoke to appellant personally, and appellant agreed at that time that he would move the videotapes [I RT 20-21]. Thus, there is evidence in the record that refutes appellant's suggestion of a communications breakdown.

Appellant does not argue that the videotapes were not improperly displayed, but

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[4] If by appellant's request it is attempting to invoke the provisions of Business and Professions Code §23095, it has directed his plea to the wrong body. Appellant should direct its request to the Department.

instead again attempts to shift blame to someone or something else. The record does not support this attempt.

CONCLUSION

The decision of the Department is affirmed.[5]

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

[5] This final order is filed as provided in Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.