

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

JERRY CEARLEY, SR. &	)	AB-6682
JERRY C. CEARLEY, II)	
dba California Stop	)	File: 20-304651
2224 South Manthey Road	)	Reg: 96035150
Stockton, California 95206,)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Michael B. Dorais
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	March 5, 1997
	)	San Francisco, CA
)	

Jerry Cearley, Sr., and Jerry Cearley, II, doing business as California Stop (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their off-sale beer and wine license for 10 days for their clerk having sold an alcoholic beverage to a minor working as a police decoy, 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 May 30, 1996, is set forth in the appendix.

Appearances on appeal include appellants Jerry Cearley, Sr., and Jerry Cearley, II; and the Department of Alcoholic Beverage Control, appearing through its counsel, John R. Peirce and Kenton Byers.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 16, 1995. Thereafter, on January 16, 1996, the Department instituted an accusation against appellants' license, alleging that, on October 21, 1995, appellants' employee sold an alcoholic beverage to a minor acting as a police decoy under the direction of the Stockton Police Department. Appellants requested a hearing.

An administrative hearing was held on April 15, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the police decoy operation, the minor's appearance, the training received by appellants' employees, and the sale of alcohol by appellants' employee.

Subsequent to the hearing, the Department issued its decision which determined that appellants' employee sold a six-pack of Budweiser beer to an 18-year-old police decoy and that appellants had not established a defense under Business and Professions Code §25660, since no identification had been checked or asked for by the clerk. The Department also determined that, although the minor decoy looked as if "near the age of majority," a reasonable person would have asked for proof of majority before selling beer to him.

Appellants thereafter filed a timely notice of appeal. Written notice of the opportunity to file briefs in support of appellants' position was given on November

4, 1996. However, appellants did not file a brief informing this board about the issues in the appeal. We have reviewed the notice of appeal and have found insufficient assistance in that document which would aid in review.

The Appeals Board is not required to make an independent search of the record for error not pointed out by appellant. It was the duty of appellants to show to the Appeals Board that the claimed error existed. Without such assistance by appellants, the Appeals Board may deem the general contentions waived or abandoned. (Horowitz v. Noble (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710] and Sutter v. Game! (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].)

Although appellants did not file a brief, they did appear for the oral argument before this board. They reiterated their arguments made before the Department's Administrative Law Judge (ALJ), emphasizing the mature appearance of the decoy, who was six feet tall, weighed 185 pounds, and had a "five o'clock shadow." This mature appearance, appellants argued, deceived their employee and violated the Department guidelines for decoy operations. They also argued that the purpose of the law is not to trick licensees into selling to minors, but to discipline licensees who will sell alcoholic beverages to anyone, regardless of age.

Adherence to the guidelines would undoubtedly forestall some challenges by licensees to accusations charging sales to minors; however, police departments are not required to follow the guidelines, and failure of the police to follow them is not a defense to violations for sales to minors. The Department guidelines are merely

that--guidelines. (Provigo v. Alcoholic Beverage Control Appeals Board (1994) 7 Cal.4th 561[28 Cal.Rptr.2d 638].)

In Provigo, supra, the California Supreme Court also determined that the use of mature looking decoys does not unfairly entrap a licensee or deny the licensee due process as long as it is not accompanied by “pressure or . . . other overbearing acts” in an attempt to encourage the sale of an alcoholic beverage. The court emphasized that

“the laws against sales to minors can be violated despite the seller’s (or its agent’s) lack of knowledge of the purchaser’s minority. The seller may readily protect itself by requiring sales agents to routinely check identification. . . . Because the seller cannot avoid liability by relying solely on the appearance of the buyer, it is not unfairly entrapped by the use of mature-looking decoys.”

Therefore, appellants would not have a defense based on the use of a mature-looking decoy. In any case, the ALJ, who had the opportunity to see the decoy, specifically found that even though the decoy did have a “five o’clock shadow,” he looked youthful enough so that “a reasonable person would ask proof of majority before selling him alcoholic beverages.” (Findings of Fact III, 1.)

In addition, appellants’ policy was to check the identification of anyone who appeared to be under the age of either 25 or 30. The ALJ also found that “it would not be credible for [appellants’ employee] to conclude that the minor was age 25, or age 30” Therefore, appellants’ employee did not even follow the store policy in this case.

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] (substantial evidence supported positions of both the Department and the license applicant); 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].)

We cannot say, in light of the whole record and the pertinent case law, that the Department in this case has exceeded the bounds of reasonableness.

²The California Constitution, Article XX, Section 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].

CONCLUSION

The decision of the Department is affirmed.³

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

DISSENT

I respectfully dissent from the foregoing decision. I would reverse the determination of the Department because I believe that the use of a six-foot, 185-pound decoy, who also had a "five o'clock shadow," is clearly unfair.

JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed as provided by 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.