ISSUED APRIL 30, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

IBRAHIM YUSUF dba Shop-N-Go 1215 E. Bayshore Road East Palo Alto, CA 94303, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6704 File: 21-175249 Reg: 94031289 Administrative Law Judge at the Dept. Hearing: Cheryl R. Tompkin Date and Place of the Appeals Board Hearing: March 5, 1997 San Francisco, CA

Ibrahim Yusuf, doing business as Shop-N-Go (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked appellant's off-sale general license for appellant's employees having bought, received, withheld, and concealed property, believing such property to be stolen; and for appellant failing to correct objectionable conditions in the vacant lot adjoining the premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Penal Code §§ 664 and 496 and Business and Professions Code §24200, subdivision (a).

[1]The decision of the Department dated July 25, 1996, is set forth in the appendix.

Appearances on appeal include appellant Ibrahim Yusuf, appearing through his counsel, Timothy G. Sullivan; and the Department of Alcoholic Beverage Control, appearing through its counsel Robert M. Murphy.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on December 15, 1986. Thereafter, the Department instituted an accusation alleging violations of Penal Code §§664 and 496 (buying or receiving stolen property; attempt to receive stolen property) and Business and Professions Code §24200, subdivision (e)[2] (failure to correct objectionable conditions on the area owned, leased, or rented by the licensee adjacent to the licensed premises). Appellant requested a hearing.

An administrative hearing was held on May 16, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the undercover operation conducted by the Department in which purportedly stolen items (cartons of cigarettes and bottles of whiskey) were offered for sale to employees of appellant (who were also his sons) and purchases of rock cocaine were made in the vacant lots adjoining the building in which the licensed premises were located.

Subsequent to the hearing, the Department issued its decision which determined that appellant had, through his employees, bought, received, withheld, and concealed property which was believed by the employees to have been stolen.

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[2]Except as otherwise noted, all subsequent statutory references are to the Business and Professions Code.

The Department's decision also determined that, although appellant's failure to correct objectionable conditions did not violate Business and Professions Code §24200, subdivision (e),[3] that same failure constituted a condition that was contrary to public welfare and morals, thereby violating subdivision (a) of §24200. The Department ordered that the license be revoked. Appellant thereafter filed a timely notice of appeal.

In his appeal, appellant raises the following issues: (1) The Department's findings were not supported by substantial evidence, and (2) the Department erred in not allowing testimony concerning the identity of a confidential informant and in allowing testimony concerning tangible evidence.

DISCUSSION

I

Appellant contends that, although it was true one of his sons, who was also an employee at the licensed premises, did buy property that the son believed to have been stolen, appellant himself did not participate in the purchase and did not know of the purchase until investigators seized the property on the premises several weeks later. Appellant also contends that he complied with all the Department suggestions for correcting the objectionable conditions, except for hiring a security guard for the vacant lot adjoining the building because he did not

[3]The Department's decision erroneously refers to §24200, subdivision (f). (Determination of Issues 2.)

own or lease the lot and "had no authority to control the happenings on this vacant lot." (App. Br. at 4.)

"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 [95 L.Ed. 456, 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].) 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. 658].)

Appellant argues that there is not substantial evidence showing that appellant himself was involved in or was even aware of his son's purchase of goods believed to be stolen. However, there need not be substantial evidence to show that appellant was personally involved; he is still held liable for the on-premises misconduct of his employees. The imputation to the licensee/employer of an employee's on-premises knowledge and misconduct is well settled in Alcoholic Beverage Control Act case law. (See Harris v. Alcoholic Beverage Control Appeals

Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633]; and Endo v. State Board of Equalization (1956) 143 Cal.App.2d 395 [300 P.2d 366, 370-371].)

In this case, however, imputation is not necessary in order to find appellant liable. The Administrative Law Judge (ALJ) made specific findings, in Findings of Fact 2 and 3, that appellant arrived at the premises on March 16, 1994, while investigator Urmanita was there negotiating the sale of whiskey and cigarettes with appellant's sons and that, after Urmanita left, investigator Robillard saw appellant come out of the premises, have one of his sons put the contraband in the trunk of appellant's Mercedes, and drive off. The ALJ clearly believed that appellant was personally involved and that he lied when testifying that he was not present and knew nothing of the transaction [RT 219]. 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].) The discretion exercised by the ALJ and the Department in determining this witness's credibility was reasonable, and this Board will not disturb that determination.

With regard to the "objectionable conditions" in the adjacent vacant lot, the Department had sent appellant a letter notifying him there had been complaints

about the premises, particularly about activities in the adjoining vacant lots, and making several suggestions for reducing the problems. The Department did not establish at the hearing that appellant owned or leased the vacant lots adjoining the building, so there could be no violation of subdivision (e) of §24200. However, it was established that many customers of the licensed premises used the vacant lots for parking and that appellant was aware of this. Appellant contends he has followed all but one of the suggestions made by the Department to correct the problems, but there is no evidence in the record as to when these corrections took place.

Although the Department did not find a violation of subdivision (e) of §24200, it did find that appellant's failure to correct the problems in the parking lots created a condition that was clearly contrary to public welfare and morals. Therefore, the Department determined that the same acts alleged in Count IV, drug sales in the parking lots, constituted cause for discipline under the general "public welfare or morals" provision of subdivision (a).

While it is clear that there were drug sales in the vicinity, the Department has not shown any connection at all between the operation of the licensed premises and the activity in the parking lot. The parking lot was apparently not legally under appellant's control, a factor that this Board took into consideration in Gray, AB-6502, when reversing the Department's decision as to alleged violations occurring on the public sidewalk in front of the licensed premises. It is also noteworthy in the present appeal that one of the parking lots involved was at the other end of the

building which housed appellant's premises, near the laundromat that also occupied the building, and that all but one of the drug purchases made by the investigators took place in the south parking lot, near the laundromat, not in the north lot adjoining the licensed premises.

The ALJ found that there had been no violation of the statute named in the accusation, but found a violation of the more general subdivision providing for discipline "[w]hen the continuance of a license would be contrary to the public welfare or morals." However, there was no basis for reaching such a conclusion where there was no showing that the drug sales had any connection at all with the licensed premises. Appellant should not be held responsible for every neighborhood evil that exists in the vicinity of the licensed premises unless the operation of the licensed premises is shown to contribute to that evil in some way. We conclude that there is not substantial evidence in this record to sustain Determination of Issues 2, concerning the objectionable conditions.

II

Appellant contends that the ALJ erred in allowing investigator Robillard to testify about tangible evidence that was not produced at the hearing and in refusing to strike the testimony of investigator Urmanita because the investigator refused to reveal the identity of a confidential informant.

The Department's witnesses testified that the bottles of whiskey sold to appellant's son were secretly marked so that they could be, and were, identified

when found for sale on the shelves of the premises. None of these bottles was introduced into evidence at the hearing.

The ALJ denied appellant's motion to strike investigator Robillard's testimony and reaffirmed the denial after considering legal authority submitted by appellant's counsel following the hearing. Appellant contends that the testimony is hearsay and, as the only evidence presented regarding the purchase of whiskey by appellant's son (appellant's son denying that he purchased anything but cigarettes), is insufficient to support a finding against appellant. This contention is rejected. Robillard's testimony was from personal knowledge, so it is not hearsay. In addition, the ALJ specifically found that the testimony of appellant's son, including his denial of having purchased whiskey, was not credible.

The Department had a confidential informant who accompanied the investigators the first time they approached appellant's son about buying the cigarettes and whiskey. Investigator Urmanita refused to reveal the name of the informant at the hearing, and appellant moved to strike Urmanita's testimony on the basis that the refusal deprived appellant of his right to examine witnesses and corroborate testimony. The ALJ overruled appellant's motion. We conclude that she was correct in her ruling on the motion. As the ALJ explained in footnote 1 of her decision, the legal authority cited by appellant in his post-hearing brief (primarily Witkin's Summary of California Law, vol. 7, pp. 727-728), does not support his assertion that the failure to reveal the name of the confidential informant deprived him of his constitutional rights.

CONCLUSION

The decision of the Department, excluding Determination 2, is sustained, and the Department's Determination 2 is reversed. As we do not find that the reversal of Determination 2 mandates the reversal of the penalty, the penalty of revocation is sustained.[4]

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

[4]This 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.