ISSUED JUNE 30, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

SANTOKH SINGH dba Stanley's Liquor Jr. Market 1803 South Pacific Avenue San Pedro, CA 90731, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6710 File No. 21-283256 Reg. No. 95031994 Administrative Law Judge at the Department Hearing: Leslie H. Greenfield Date and Place of the Appeals Board Hearing May 7, 1997 Los Angeles, CA

Santokh Singh, doing business as Stanley's Liquor Jr. Market (appellant), appeals from a decision[1] of the Department of Alcoholic Beverage Control which ordered his off-sale general license suspended for a period of 25 days, with enforcement of 10 days of the suspension stayed for a probationary period of one year, for appellant's clerk having sold an alcoholic beverage (Cisco Berry Wine) to an 18-year-old minor, being contrary to the universal and generic public welfare and

[1] The decision of the Department, dated August 15, 1996, is set forth in the appendix.

morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include Santokh Singh, appearing through his counsel, Stephen H. Leventhal; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued May 3, 1993. Thereafter, the Department instituted an accusation alleging that appellant's clerk (appellant's brother) sold an alcoholic beverage (wine) to an 18-year-old minor, in violation of Business and Professions Code §25658, subdivision (a). An administrative hearing was held on May 7, 1996, and June 21, 1996, at which time oral and documentary evidence was presented concerning the charges of the accusation.

Steven Rose, an investigator for the Department, testified that on September 2, 1994, he and his partner were waiting in their car in a parking lot across the street from appellant's store. They observed a yellow Volkswagen occupied by two young couples pull up in front of the store. The driver, later identified as Joshua Luna, got out and went into the store. Rose followed Luna into the store a few seconds later and observed him purchase three bottles of Cisco wine and one bottle of Genuine Draft beer. Rose watched the clerk look at identification, and then complete the sale.

Luna was stopped by Rose and his partner as he left the store, before he reached his car. When asked for identification, Luna produced a driver's license and claimed to be 25. After Rose pointed out alterations to the driver's license and other discrepancies, Luna admitted to being only 18.

Rose then interviewed the clerk, who told Rose he thought Luna was of legal age to purchase alcohol. Rose called the clerk's attention to alterations on the driver's license, which included the rubbing out of the height and weight, tearing of the signature, alteration of the picture and deletion of the license number. The date of birth was clear, showing 1968 as the year of birth, indicating its owner was 25 or 26.

Luna testified that he was accompanied into the store by one of the females in the car with him, and that she helped him carry the beer and wine to the counter [RT 35]. When the clerk asked for identification, he produced his brother's driver's license [RT 36]. Luna denied having altered the license, stating the license was in the exact form it was when he got it from his brother, a construction worker [RT 36]. Luna was unable to tell from the license what height, weight or license number was depicted [RT 37]. The date of birth was legible, but the expiration date, also legible, was "kind of obstructed" [RT 37].

The license (Exhibit 2) exhibits either purposeful alteration or substantial wear and tear. What appear to be water spots obscure a portion of the photo of the license holder, and the physical description is virtually illegible. It is extremely

doubtful that anyone attempting to compare the physical description to the person presenting it could successfully do so. The portion of the license which states the date of issuance has been torn away. However, the expiration date does remain. The license, due to expire in December, 1994, would have been issued in 1990, when the brother was 22. Given the critical nature of the features of the license which were affected, it would appear that an inference could be drawn that the license had been intentionally altered. The Administrative Law Judge concluded that the driver's license number had been "etched out," the height and weight "rubbed out," and "the photo was not that of Luna." (Finding 3.)

Appellant claimed he was the victim of entrapment. He testified that he was also in the store, in addition to his clerk, and saw Rose enter the store with Luna. He further testified that Rose directed Luna to purchase the wine and beer, claiming that he observed Rose pointing and signaling to Luna [RT 43, 51, 53, 56, 60, 66].

Luna was recalled as a rebuttal witness, and denied entering the store with the investigator. He said he never saw Rose until he was approached by Rose after he left the store, and denied having received any instructions or directions from Rose while in the store [RT 74-75].

Appellant claimed that a videotape from one of the store's security cameras supported his contentions. He did not have the tape with him, but stated it had been shown to the court in the criminal proceeding, and, he believed, was still in the possession of the court. At appellant's request, the Administrative Law Judge

(ALJ) agreed to continue the hearing so that appellant could present the videotape as well as the testimony of his brother regarding the incident. However, at the continued hearing, appellant stated that the court was unable to locate the videotape, and his brother had returned to India so he was not available to testify.

The ALJ found that the alterations to the driver's license were such that any reasonable person would have been put on notice that the license was altered and would have refused the sale. On the basis of this finding, the ALJ determined that appellant violated Business and Professions Code §25658, subdivision (a). He rejected appellant's contention of entrapment as unsupported by any credible evidence, and imposed the penalty recommended by the Department. The Department thereafter adopted the ALJ's decision as its own, and appellant filed a timely notice of appeal.

Appellant urges the following grounds for appeal: (1) the findings are not supported by substantial evidence; (2) exculpatory evidence was excluded; and (3) the penalty is excessive. Appellant has not raised the entrapment issue in his appeal.

DISCUSSION

I

Appellant asserts that the findings are not supported by substantial evidence in light of the record viewed as a whole.

"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 U.S. 474, 477 [71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 747].)

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 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].)

The thrust of appellant's argument is that the clerk's reliance on the driver's license which was presented to him establishes a complete defense under Business and Professions Code §25660.[2] There is no dispute that the license was presented to the clerk. The issue is whether the clerk could have reasonably relied on the driver's license as valid evidence of Luna's majority.

The Department investigator testified that the license appeared to him to have been altered in "four or five different locations," and that it "should never have been accepted" [RT 21,22]. He testified that he pointed out to the clerk that the height and weight had been rubbed out, the signature torn, the identification number altered, and the picture was of poor quality.

Appellant testified that he believed that the license matched "100 percent" the person who presented it to the clerk [RT 55]. However, when appellant was

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[2] Business and Professions Code §25660 provides:

"Bona fide evidence of majority and identity of the person is a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license or an identification card issued to a member of the Armed Forces, which contains the name, date of birth, description, and picture of the person. Proof that the defendant-licensee, or his employee or agent, demanded, was shown and acted in reliance upon such bona fide evidence in any transaction, employment, use or permission forbidden by Sections 25658, 25663 or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon."

asked to state the height shown on the license, he could not do so, blaming it on the fact he needs his glasses for small print. The ALJ was not impressed, stating [RT 55]:

> "That is a question you might want to save for his brother. It doesn't matter whether he [is] able to read it or not. It is his brother that is allegedly making the defense that, in fact, he sold it to an adult. His brother would be the one that you could cross-examine about it if he contends that he sold it to a person who matched the driver's license. This witness really can't do that.
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> "Clearly his statement that the driver's license of the individual matched a hundred percent is, on its face, incorrect. So I don't see the point in further impeaching that. We'll save that for his brother."

Investigator Rose testified that the clerk claimed at the time to have believed Luna was of legal age [RT 28]. As noted, however, the clerk (appellant's brother) did not testify, his absence said to be because he had returned to India. This, despite the fact that one of the express purposes for the continuance of the hearing, which was granted at appellant's request, was so that the brother's testimony could be presented.

The defense which is available under Business and Professions Code §25660 is an affirmative defense, and the burden is on appellant to establish it. Without the testimony of the clerk, appellant is in no position to assert such a defense, especially in light of the physical condition of the driver's license used by the minor. Without the clerk's explanation of why he was satisfied with the identification despite the absence of critical information on the document presented to him, there

would seem to be no way for appellant to meet its burden of proof, part of which is that the seller exercised reasonable care in inspecting the license. As stated in Dethlefsen v. State Board of Equalization (1956) 145 Cal.App.2d 561 [303 P.2d 7, 12], when doubt exists as to the age of the customer, and one of the documents described in the statute is presented, "the bona fides of such documents must be ascertained if the lack of it would be disclosed by reasonable inspection."

In 5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control (1957) 155 Cal.App.2d 748 [318 P.2d 820, 824], the question whether a reasonably careful inspection of the license and comparison with the minor's appearance would have done something more than raise a suspicion in the mind of a reasonably prudent man, and put him on guard that further inquiry was in order, was one for the trier of fact. Here the trier of fact clearly indicated his view that this test had not been met, finding that any responsible licensee would have been put on notice that the license had been altered and would have refused the sale.

Appellant argues, citing Conti v. State Board of Equalization (1952) 113 Cal.App.2d 465 [248 P.2d 31], that while evidence of the minor's height and weight was introduced through investigator Rose, no evidence was presented by the Department as to the physical description on the driver's license itself, or as to the minor's brother, so as to permit a comparison between the minor's appearance and that of his brother that would raise more than mere suspicion. Thus, appellant

argues, without such evidence he is entitled to a presumption of genuineness that can only be refuted by compelling evidence to the contrary. (App.Br., p. 7.)

Aside from the fact that this argument goes far beyond anything stated in the Conti decision, it does not withstand analysis on the facts. Appellant concedes by the very argument he makes - that "no evidence was presented to demonstrate that the person presenting the [license] did not fit the physical description of the true owner " - that the license does not contain a physical description of the person presenting it, as licenses ordinarily do. Consequently, the absence of such information as height and weight ought immediately to have raised a red flag, and as said in 5501 Hollywood, supra, either prompted the clerk to ask for additional identification or refuse the sale. Here the clerk did neither.

The ALJ was able to compare the photo on the license to the minor, and concluded (in finding 3) that he was not the person in the photo. Given this finding, the absence of other identity features from the license further indicates that appellant's clerk acted unreasonably.

II

Appellant contends that the municipal court judge who tried the criminal charge against appellant's clerk and who entered a judgment of acquittal viewed a videotape of the transaction which, appellant claims, was "fully exculpatory." He contends that the videotape is "conclusive," and the decision of the criminal court res judicata. The issue is presented as a question the Board may consider under

Business and Professions Code §23084, subdivision (e), which authorizes the Board, as part of its appellate jurisdiction, to consider whether there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded.

No evidence was excluded. Appellant has simply overstated the issue, and is trying to bootstrap the missing videotape into some sort of affirmative evidence.

Appellant's principal problem with this argument, but not the only one, is that he has nothing to show the Board. Without the tape, its contents are unknown. Appellant's opinion, no matter how strongly held, that the tape is exculpatory, cannot be given any weight. It cannot clearly be ascertained from the record whether the videotape supposedly reveals the conduct appellant claims constituted entrapment, or else shows only the activity at the time the false identification was presented. (See RT 69.) The ALJ found that the entrapment defense was not supported by any credible evidence, an indirect way of saying he did not believe appellant's testimony.

The fact that the clerk was acquitted in municipal court in a criminal proceeding, where the burden of proof is much higher, is not binding on the Department. (Cornell v. Reilly (1954) 127 Cal.App.2d 178 [273 P.2d 572].)[3]

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[3] The Department incorrectly asserts that appellant's clerk was not acquitted in the criminal proceeding, claiming instead that the proceeding was terminated at the close of the People's case. (Dept.Br., p. 2.) A review of the certified docket sheet accompanying appellant's brief indicates that to be factually incorrect.

The assertion that, since the tape is "fully exculpatory," there can be no reason to doubt appellant's claim that he has been unable to recover it from the court (App.Br., p. 8), proves nothing. The efforts a party may have made to obtain evidence that is relevant to an issue could be relevant in determining whether relief should be granted in the way of reopening the hearing for the presentation of such evidence, once it has been obtained. The way the law treats newly-discovered evidence is analogous. But that is not this case. In this case, the ALJ gave appellant a six-week opportunity to present the tape at a continued hearing, and appellant failed to do so.

III

Appellant contends that the penalty, a 25-day suspension with enforcement of 10 days of the suspension stayed for a one-year probationary period, was excessive in that appellant had no prior disciplinary history.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Nonetheless, the outcome of the case has no affect on the validity of the Department's case.

On its face the penalty does not appear to be out of line with penalties imposed in other sale-to-minor cases, the typical penalty being a 15-day suspension. Here the net suspension is 15 days, assuming appellant avoids another violation during the probationary period.

In the course of appellant's testimony in the administrative hearing, he accused the Department investigator of conspiring with the minor by stage-managing the minor's purchases, using a variety of hand signals. Department counsel warned appellant that if the ALJ determined he was lying in his testimony, appellant's license could be revoked.

At the conclusion of the hearing, when Department counsel made its penalty recommendation (which the ALJ adopted), he advised the ALJ that the Department's initial willingness to accept an offer in compromise was no longer extant as a consequence of appellant's conspiracy accusations. This suggests that prior to the hearing the Department was considering a penalty no greater than 15 days, the maximum period for which an offer in compromise can be effected.

It follows, then, that the Department may have increased its penalty recommendation in response to what it (and the ALJ) believed was false testimony. While appellant is still subject to a 15-day suspension, he cannot resolve the matter by payment of a fine, now has a one-year probationary period hanging over his head, and the possibility of ten additional days during which his license would be

suspended, all of which he would have avoided but for the defense he presented at the administrative hearing level.

The Department argues that any penalty short of revocation is a gift, given appellant's testimony at the hearing. The Department obviously believes appellant should be punished for lying. Questions as to a licensee's integrity may appropriately be factored in to a determination of what measure of discipline is required to encourage proper behavior in the future.

While the ALJ made no direct finding of credibility with respect to the licensee's testimony, his rejection of the entrapment defense as not supported by any credible evidence was the virtual equivalent of such a finding, since the only evidence relating to that defense was the licensee's testimony.

Another factor for consideration is that the original willingness of the Department to consider a 15-day suspension was prior to the licensee's election to insist upon a hearing. The licensee is not entitled to a risk-free hearing, i.e., no matter the outcome, he will fare no worse than before.

The Department has broad discretion in its determination of an appropriate penalty:

> "Under the constitutional and statutory provisions the propriety of the penalty is a matter vested in the discretion of the Department, and its determination may not be disturbed unless there is a clear abuse of discretion. ... If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion."

(Harris v. Alcoholic Beverage Control Appeals Board (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633, 636].) This discretion is not unlimited, however. "[W]hile the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, 'it does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion.'" (Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 217-218 [124 Cal.Rptr. 14].)

A 25-day suspension, with 10 days stayed, may seem a heavy sanction for a first-time sale to a minor by a licensee with no previous record of discipline. The standard penalty in such case is 15 days. On the other hand, the net suspension of 15 days is sufficiently equivalent to that standard that this Board is unwilling to say the Department has abused its discretion.

CONCLUSION

The decision of the Department is affirmed.[4]

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

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[4] 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 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.