

ISSUED MARCH 10, 1998

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

TOAN CONG BUI & LISA HUYNH	)	AB-6884
dba Jessie's Gas Station & Food Mart)	
710 San Benito Street	)	File: 21-307894
Hollister, CA 95023,	)	Reg: 96038338
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Michael B. Dorais
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,)	
Respondent.	)	Date and Place of the
	)	Appeals Board Hearing:
	)	San Francisco, CA
_____	)	December 3, 1997

Toan Cong Bui and Lisa Huynh, doing business as Jessie's Gas Station & Food Mart (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days, with 10 days stayed for a probationary period of one year, for co-appellant Toan Cong Bui having sold alcoholic beverages (beer and wine) to a 16-year-old minor, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, in violation of Business and Professions Code §23658, subdivision (a).

¹The decision of the Department, dated June 5, 1997, is set forth in the appendix.

Appearances on appeal include appellants Toan Cong Bui and Lisa Huynh, appearing through their counsel, Hanh Duc Tran, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 25, 1995. Thereafter, the Department instituted an accusation charging appellants with selling beer and wine to a minor on May 10, 1996.

An administrative hearing was held on April 9, 1997, at which time oral and documentary evidence was received. At the hearing, testimony was presented for the Department by the minor involved, Mike Aalgaard, and San Benito Sheriff's Department deputy Michael Rodriguez, and for appellants by private investigator Dennis Stafford and co-appellant Toan Cong Bui.

The minor testified that he bought the beer and wine from co-appellant Bui, and the deputy testified that he observed the minor as he exited from the store with the alcoholic beverages and watched as the minor joined two other youths in the parking lot. The private investigator testified regarding photographs and a videotape he had taken of the premises and co-appellant Bui testified that he sold the beer and wine not to the minor, but to a 35-year-old Hispanic man.

Subsequent to the hearing, the Department issued its decision which found that the allegations of the accusation were true and that the youthfulness of the minor involved and the minor's statement that he had purchased alcoholic

beverages previously at this premises warranted aggravation of the penalty. The Department ordered appellants' license suspended for 25 days with 10 days stayed for a probationary period of one year.

In their appeal, appellants raise the following issues: 1) whether it is possible for the officer to have witnessed the incident as he testified he did, and 2) whether the minor was credible.

DISCUSSION

Appellants argue that the private detective who testified on their behalf "proved that the officer" could not have seen the minor coming out of the store as he testified to seeing. Appellants state that "It appeared that the expert witness's testimony was not given any weight in the finding." (App. Br. 2.)

Appellants' witness (who was not qualified as an expert witness) showed a videotape he had taken of the premises while driving by. He drove by at three different speeds with the video camera resting on the open window of the driver's side of the car. He concluded that, at the speed the officer said he was going, the officer could not have seen the minor exiting the premises and walking to the car as he had described.

The ALJ did not comment upon the videotape produced by Stafford, but in reviewing the record, it seems clear that the information provided by it was not at all persuasive on the point it was designed to prove. First, the camera was pointing straight out the side, while a driver would be looking ahead and to the side.

Second, it appears that Stafford's conclusion may be based on the interference with vision posed by a building next to the premises that was not in existence at the time of the violation. It appears that the testimony of appellants' witness was given the weight it deserved.

II

Appellants contend that the minor's testimony "as recorded from page 53 to page 71 of the court transcript was very inconsistent" and that "His overall testimony was shaky at best." (App. Br. at 2-3.) Appellants note one instance of inconsistency between statements made by the minor regarding being asked for his ID on page 53 and on page 66-67.

However, our review of the hearing transcript reveals that the specific testimony referred to was not inconsistent, as clarified on page 67, lines 2-5, of the hearing transcript.

Appellants are, in any case, asking this Board to substitute its own judgment as to credibility for that of the ALJ. 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].)

Neither of appellants' arguments merits reversing the action of the Department.

CONCLUSION

The decision of the Department is affirmed.²

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

²This final order 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 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.