

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

AB-7744

File: 20-331475 Reg: 99047848

PALISADES GAS & WASH, INC. dba USA Mini Mart
8902 Trautwein Road, Riverside, CA 92508,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 6, 2001
Los Angeles, CA

ISSUED NOVEMBER 14, 2001

Palisades Gas & Wash, Inc., doing business as USA Mini Mart (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for one of its clerks having sold, furnished, or given, or caused to be sold, furnished, or given alcoholic beverages (a 20-pack and 18-pack of Bud Light beer) to Bryan Omori ("Omori") and Daniel F. Cooley IV ("Cooley"), both of whom were nineteen years of age, 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).

Appearances on appeal include appellant Palisades Gas & Wash, Inc., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The decision of the Department, dated November 16, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 7, 1997. Thereafter, on December 2, 1999, the Department instituted an accusation, later amended, against appellant charging the sale of alcoholic beverages to Omori (count 1) and Cooley (count 2), and charging that one of appellant's employees attempted to induce appellant's clerks to furnish false information to a Department investigator (counts 3 and 4).

An administrative hearing was held on March 14 and September 8, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Omori and Cooley; by Michael Pellissero, a police officer employed by the city of Riverside; by Eric Chavez ("Chavez"), one of appellant's clerks; by Daniel Hart, a Department investigator; and by Robert Zitkovich, appellant's retail marketing director for convenience stores.

Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation relating to the sale or furnishing of alcoholic beverages to the two minors (counts 1 and 2) should be sustained, but the charges concerning the alleged attempt to induce the giving of false information (counts 3 and 4) should be dismissed. The proposed decision was adopted by the Department on November 16, 2000.

Appellant has filed a timely notice of appeal. In its appeal, appellant contends that there is not substantial evidence to support the findings.

DISCUSSION

Appellant contends that there is not substantial evidence to support the findings. Specifically, appellant asserts that Omori, Cooley and Chavez all deny that Cooley purchased any alcohol, so that count 2 must fall, and that, since Omori and Cooley disagree on the identity of the clerk and Chavez denies making the sale, count 1 must also fall.

The Department points to the ALJ's determination that Chavez lacked credibility, and stresses the ALJ's finding that Omori and Cooley testified credibly.

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 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].)

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.2d 658].)

We accords little weight to appellant's contention that, because Omori and Cooley differ in their identification of the clerk who sold them the beer, even the charge against Omori should not be sustained. The ALJ's determination that Cooley and Omori testified credibly as to having purchased the beer at appellant's premises

satisfies the requirement that there be substantial evidence to support the findings. The evidence revealed that there were two clerks on duty at the time of the purchase. That Cooley and Omori recalled only one does negate the fact of purchase.

However, we have trouble with the decision to the extent it finds that one of appellant's clerks sold, furnished or gave an alcoholic beverage to Cooley. The only evidence that would seem to support this determination was that Cooley carried one of the packs of beer to the counter and also was handed one of the packs by Omori after Omori paid for the beer. While Omori was paying for the beer, Cooley and a third companion, also a minor, stood near the door. The clerk had no way of knowing that the three minors had pooled their funds to buy the beer, since that was done surreptitiously while the three were at the beer cooler.

Since the evidence is sufficient to sustain the charge relating to Omori, and since the penalty, fifteen days, is typical for a sale-to-minor violation, the decision of the Department can be affirmed even if, as we conclude, the charge relating to Cooley should not have been sustained.

ORDER

The decision of the Department is affirmed..²

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² 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 final 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.