

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

AB-7843

File: 21-310807 Reg: 00048224

MI CHA CHON and MUN SAM CHON dba Bunny's Minimart
906 South Willowbrook Avenue, Compton, CA 90220,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: May 9, 2002
Los Angeles, CA

ISSUED JULY 26, 2002

Mi Cha Chon and Mun Sam Chon, doing business as Bunny's Minimart (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk having sold an alcoholic beverage (beer) to Alberto Castaneda, a minor, 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 appellants Mi Cha Chon and Mun Sam Chon, appearing through their counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated June 14, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on December 27, 1995.

Thereafter, the Department instituted an accusation against appellants charging, in count 2, the sale of an alcoholic beverage to Alberto Castaneda, a minor.²

An administrative hearing was held on May 2 and December 14, 2000, and April 18, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Castaneda, the minor; by Claud Robert, appellants' clerk; and by Department investigators Eric Hirata, Gary Smith, and Rene Guzman, all in rebuttal.

Castaneda testified that he was born on March 5, 1980. He was accompanied to the store by friends, but he was the only one who entered the store. He testified that he purchased a 22-ounce bottle of Corona without having been asked his age or for identification. He also purchased a 60-cent cigar, which he called a "blunt". When he left the store he was stopped by a man he later learned was a police officer, and was asked his age. He was searched, his pockets were emptied, he was photographed, the beer was confiscated, and he was cited. Castaneda was later recalled to testify, and identified Claud Robert as the man who sold him the beer.

Claud Robert, the clerk named in the accusation, testified that he first saw Castaneda in the store when he was brought in handcuffed and accompanied by a Department investigator. Robert further testified that the investigator announced that someone had sold an alcoholic beverage to Castaneda. As Castaneda was "pulled"

² The accusation also charged, in count 1, the sale of an alcoholic beverage to a second minor, initially identified as Oscar Henriquez, but later amended to name Ernesto Henriquez. The Department elected to go forward with the hearing without pursuing that charge, and it was dismissed.

and “tugged” around the register, Robert testified that he leaned over and said “Man, you said I sold you something?” Robert testified that Castaneda replied “I didn’t say you sold me nothing.” Robert denied selling anything to Castaneda, and said the other clerk had also denied selling to Castaneda.

Department investigator Hirata testified that the citation issued to Robert was intended to pertain to the transaction involving Ernesto Henriquez, the subject of count 1 of the accusation, because that was the only sale the investigators had actually witnessed.

Investigator Gary Smith testified that he accompanied Castaneda into the store, and that Castaneda, from a distance of about 20 feet, identified Robert as the person who sold to him. Investigator Guzman also identified Robert as the clerk who dealt with Castaneda, and added that he had engaged in conversation with Robert in the follow-up phase of the investigation.

Subsequent to the hearing, the Department issued its decision sustaining the charge of count 2 of the accusation, concluding that the evidence supporting the Department’s case was internally consistent and credible, and rejecting appellants’ contention that Castaneda had stolen the beer and his testimony was not credible.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the decision is not supported by substantial evidence; and (2) the decision fails to comply with case law and statutory provisions regarding the credibility of witnesses.

DISCUSSION

I

Appellants contend that the decision is not supported by substantial evidence. They assert that there is insufficient evidence that Castaneda ever purchased an alcoholic beverage, claiming that only Castaneda's testimony supports such a finding, and it is not to be believed.

"Substantial evidence" is relevant evidence which reasonable minds would 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].) As appellants correctly observe, a reviewing body may not overturn a finding of fact simply because "a contrary finding would have been equally or more reasonable," citing Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 437 [102 Cal.Rptr. 857].

When, as here, 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].)

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 Administrative Law Judge (ALJ) was confronted by conflicting testimony from Castaneda and Robert, and chose to believe that of Castaneda. Based upon our own review of the record, we cannot say this was an unreasonable choice.

Castaneda's testimony on cross-examination was consistent with his direct testimony, and, other than appellants' suggestion that he had stolen the beer, nothing was revealed that might suggest he had a motive to lie.

Robert, on the other hand, remained appellants' employee. As such, it was in his self-interest to deny any involvement with the transaction.

The evidence revealed that, when Castaneda left the store, he was carrying the beer in a brown paper sack. Appellants' explanation that Castaneda might have supplied his own sack to conceal the beer, or used the sack that accompanied his cigar purchase to conceal the beer, leaves us unpersuaded.

Appellants make much of investigator Guzman's testimony that he did not see what Castaneda placed on the counter, and did not see money change hands. However, Guzman also testified that he saw Castaneda at the counter, saw hands moving as if a transaction was underway, and then saw Castaneda leave the counter and walk in the direction of the door, carrying a brown paper sack holding the bottle of beer. We find it impossible to believe, as appellants would have us do, that Castaneda would stop at the counter while engaged in the theft of the beer, purchase a cigar (which appellants seem to concede he did) and leave the counter, carrying in open view the supposedly stolen beer.

Robert's testimony about the store's alarm system tends to undermine his credibility. According to Robert, the store has a bell that alerts him of anyone coming in

the door. When he hears it, he said, he sees who is coming in, watches where that person goes, watches what is picked up, and watches the person come to the counter. How then, one may ask, could Castaneda have entered the store and not been seen or noticed, and how could he have been able to steal beer without alerting Robert to his presence? Further, Castaneda's testimony that he also purchased a cigar is corroborated by the investigator's testimony that one of the things Castaneda was carrying was a cigar, and Robert's testimony that the store sells the type of cigar Castaneda said he had purchased.

II

Appellants claim the ALJ failed adequately to explain why he chose to believe Castaneda and not Robert on the crucial question whether Robert had sold Castaneda beer.

As our discussion in part I suggests, there was ample basis for the ALJ to choose Castaneda's testimony, supported by the testimony of the Department investigators, over that of Robert. Findings 6, 7, and 8 sufficiently indicate how and why the ALJ concluded as he did.

Appellants have cited Holohan v. Massanari (9th Cir. 2001) 246 F.3d 1195, for the proposition that an ALJ may not reject the testimony of a Social Security disability claimant without giving clear and convincing reasons, and must specifically identify the testimony he or she finds incredible and explain what undermines the testimony.

The Appeals Board has consistently expressed its view that the Holohan case does not govern Board proceedings, and we continue to hold that view. Having said that, we could add that we have no difficulty understanding the ALJ's reasoning. While he could have been even more explicit, we do not think he needed to do so.

ORDER

The decision of the Department is affirmed.³

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

³ 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.