

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

AB-8035

File:20-323419 Reg: 02052197

ALI M. ALDAFARI and MOHAMED M. ALDAFARI, dba ABB Market
1839 96th Street, Oakland, CA 94603,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Robert R. Coffman

Appeals Board Hearing: June 12, 2003
Los Angeles, CA

ISSUED JULY 31, 2003

Ali M. Aldafari and Mohamed M. Aldafari, doing business as ABB Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license, with revocation stayed for 180 days conditioned upon transfer of the license during that period and suspension of the license for 15 days, for Ali M. Aldafari committing a food stamp violation and for both appellants pleading guilty to violations of Welfare and Institutions Code section 10980, subdivision (g) (unlawful use of food stamps), public offenses involving moral turpitude.

Appearances on appeal include appellant Mohamed M. Aldafari,² appearing through his counsel, Michael B. Levin, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

¹The decision of the Department pursuant to Government Code section 11517, subdivision (c), dated October 9, 2002, and the proposed decision of the administrative law judge, dated April 4, 2002, are set forth in the appendix.

²Co-licensee Ali M. Aldafari, although having notice of the hearing, did not attend the hearing and was not represented by counsel. He also did not make an appearance in the present appeal. "Appellant" in this opinion shall refer to Mohamed M. Aldafari.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 9, 1996.

Thereafter, the Department instituted an accusation against appellants charging that both committed food stamp violations and that both pled guilty to food stamp violations.

An administrative hearing was held on March 29, 2002, at which time oral and documentary evidence was received. At that hearing, testimony was presented by appellant Mohamed M. Aldafari.

Mohamed Aldafari (Mohamed) and Ali Aldafari (Ali) are brothers and co-licensees. From September 1996 through September 1998, Ali operated the licensed premises by himself pursuant to an agreement between the brothers. During part of that time, Mohamed was in Yemen, and another brother, Thabet Aldafari (Thabet), helped Ali run the market. Mohamed resumed control of the premises in October 1998.

On April 17, 2000, an amended complaint was filed in the Alameda County Superior Court charging Mohamed, Ali, and Thabet, as well as 11 others, with numerous violations, over the course of about two years, of state and federal law involving food stamps.

Mohamed and Ali pled guilty to one count each and the other charges against them were dropped³. Mohamed pled guilty to count 2 of the complaint, which charged him with a violation occurring on or about November 28, 1997. Mohamed was in Yemen on November 28, 1997.

Subsequent to the hearing, the administrative law judge (ALJ) submitted a proposed decision to the Department which it declined to adopt. The Department later

³Both were placed on probation for three years and required to make restitution.

issued its own decision pursuant to Government Code section 11517, subdivision (c), imposing the penalty noted above.

Much of the Department's decision corresponds to the proposed decision of the ALJ. Both found that Ali committed and pled guilty to a felony food stamp violation which involved moral turpitude, and that Mohamed pled guilty to unlawful use of food stamps, a misdemeanor involving moral turpitude. Both also found that Mohamed was out of the country and not involved in the operation of the licensed premises from September 17, 1996, until October 5, 1998.

There are, however, significant differences between the two decisions. The ALJ's proposed decision included Finding 11, the second paragraph of which found that Ali "has abandoned his interest in the licensed business within the meaning of the Department's Rule 60(l)⁴," leaving Mohamed with ownership and control of the business, "within the meaning of the Department's Rule 60(m)⁵."

In his Legal Conclusions, the ALJ treated the license as being held solely by Mohamed. The ALJ stated that the evidence showed Mohamed's "lack of culpability in the food stamps scheme," and that while this did not negate Mohamed's conviction pursuant to his guilty plea, "the substantial evidence of mitigation, rehabilitation and present fitness that was presented" should "temper" the fact of his conviction. He ordered the license revoked, but stayed the revocation, conditioned upon a 15-day

⁴California Code of Regulations, title 4, section 60, subdivision (l), provides that if a partner has abandoned his interest in the business for at least six months, the remaining partners may sign an application to transfer the partnership license.

⁵California Code of Regulations, title 4, section 60, subdivision (m), provides that a license may be issued or transferred only to a person who has actual, or a right to, possession and control of the premises where the license will be located.

suspension, a prohibition against either Ali or Thabet taking an active part in the operation or management of the business, and Mohamed's application to the Department for transfer of the license to him. The Department was directed that, if Mohamed submits an application for transfer of the license to him, "he shall be considered a person acceptable to the Department and the Department shall forthwith process the application," with Mohamed's conviction not to be used as a ground for refusing to transfer the license. Subsequent transfer of the license to Mohamed would be subject to a stayed revocation for two years.

The Department's decision, however, concludes that continuance of the license would be contrary to public welfare and morals, relying on the findings that Ali had both committed and pled guilty to a food stamp violation, as well as Mohamed's guilty plea. It notes that both licensees pled guilty to crimes involving moral turpitude, and concludes that, even though "there may have been differing degrees of culpability between the co-licensees, the license itself is an indivisible entity." The Department ordered the license revoked, but stayed revocation conditioned on transfer of the license within 180 days and a 15-day suspension.

Appellant has filed a timely appeal in which he contends that the decision is not supported by the findings and the findings are not supported by substantial evidence.

DISCUSSION

Appellant contends that the decision of the Department is not supported by the findings and the Department's findings are not supported by substantial evidence, but the ALJ's proposed decision is supported by substantial evidence and should be adopted as the Department's decision. Appellant argues the evidence showed Mohamed was not in the United States during November 1997 and could not have

committed the crime of which he stands convicted. The ALJ reached that conclusion in his proposed decision and, since it is supported by substantial evidence, appellant argues, the ALJ's decision should be adopted as the Department's decision.

Appellant's reasoning appears to be that if the proposed decision of the ALJ is based on substantial evidence, the Appeals Board should direct the Department to adopt it as its decision. Appellant is incorrect. First, the Appeals Board does not have that authority; its jurisdiction and its power to order the Department to act are limited. Secondly, the Appeals Board does not decide an appeal by weighing the evidence supporting the Department's decision against the evidence supporting the rejected proposed decision.

The Appeals Board reviews only the Department's decision, *not* the ALJ's proposed decision. Government Code section 11517, subdivision (c), provides that the Department may adopt the proposed decision in its entirety,⁶ adopt it with some modification, or reject it. If the Department rejects the decision, it may refer the matter back to the ALJ to take additional evidence or it may decide the matter itself, making its own findings, determinations, and order. If the Department issues its own decision, the rejected proposed decision "serves no identifiable function in the administrative adjudication process or, for that matter, in connection with the judicial review thereof." (*Compton v. Board of Trustees* (1975) 49 Cal. App. 3d 150, 158 [122 Cal. Rptr. 493].)

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board

⁶If the Department adopts the proposed decision in its entirety, then the decision reviewed by the Appeals Board is the same as the decision proposed by the ALJ. This is the only case in which it could be said that the Board reviews the proposed decision.

may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings.⁷

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Board* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When 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].) The Board "may not confine [its] consideration to isolated bits of evidence, but must view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the [Department]. . . . [The Board] must accept any reasonable interpretation of the evidence which supports the [Department's] decision." (*Beck Development Co., Inc. v. Southern Pacific Transportation Company* (1996) 44 Cal.App.4th 1160, 1203 [52 Cal.Rptr.2d 518].)

The Appeals Board's review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of*

⁷The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the hearing. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Department of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].)

California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 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] (in which the positions of both the Department and the license applicant were supported by substantial evidence); *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) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].) As long as the Department's decision is supported by substantial evidence, we must uphold it, even if the proposed decision of the ALJ can also be said to be supported by substantial evidence.

Appellant admits that Findings 4, 6, 8, 9, 10, and 11 of the proposed decision are supported by substantial evidence in light of the whole record. Findings 4, 6, and 8 of the Department's decision are essentially the same as the corresponding findings in the proposed decision and all of the Department's Finding 9 is included in Finding 10 of the proposed decision. Therefore, appellant cannot be questioning the evidentiary basis of those findings. In fact, appellant does not point out any of the Department's findings that he believes lack the support of substantial evidence.

The real gravamen of this appeal appears to be the difference in the penalty proposed by the ALJ and that imposed by the Department. The Appeals Board may examine the issue of an excessive penalty raised by an appellant (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr.

183]), but 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].)

The Department's penalty order, which allows appellant 180 days to sell the license, is more lenient than a straight revocation would be, although it is not as favorable to appellant as the order of the proposed decision. Either of these penalties could be considered reasonable. However, if the Department's penalty is not unreasonable, we must uphold it, even if another penalty is equally, or even more, reasonable. "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.App. 2d 589, 594 [43 Cal.Rptr. 633, 636].) Given the undisputed guilty pleas of both Mohamed and Ali, and the uncontested finding that Ali committed a food stamp violation, we cannot say that the Department's penalty constitutes an abuse of discretion.

ORDER

The decision of the Department is affirmed.⁸

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

⁸This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.