

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

AB-8311

File: 21-135187 Reg: 04056895

FAWZI A. ZEIDAN dba Haight & Cole Liquors
1699 Haight Street, San Francisco, CA 94117,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: April 7, 2005
San Francisco, CA

ISSUED JUNE 17, 2005

Fawzi A. Zeidan, doing business as Haight & Cole Liquors (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for five days for his having consumed an alcoholic beverage while on the premises, a violation of Business and Professions Code section 25612.5, subdivision (c)(3).²

Appearances on appeal include appellant Frank Zeidan,³ representing himself, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

¹The decision of the Department, dated July 29, 2004, is set forth in the appendix.

² Section 25612.5, subdivision (c)(3) states, in pertinent part: "No alcoholic beverage shall be consumed on the premises of an off-sale retail establishment"

³ The name in the caption is as it appears on the license. The licensee testified that he changed his name when he became a citizen.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on February 23, 1983.

Thereafter, the Department instituted an accusation against appellant charging that, on January 15, 2004, appellant consumed an alcoholic beverage (Heineken beer) while on the premises.

An administrative hearing was held on June 2, 2004, at which time oral and documentary evidence was received. At that hearing, Jennifer Hollander, a Department investigator, testified that she observed appellant drinking from a bottle of Heineken beer while standing near the store register. When she advised him it was unlawful to consume while on the premises, he told her he was checking the temperature of the beer because customers had complained it was warm. Hollander testified that she took the bottle from appellant and noticed that the outside of the bottle was "very cool." Hollander then conducted a premises inspection, and observed two Heineken bottles in separate garbage cans in the office area. Appellant testified that his daughter had informed him that customers had complained the beer was not cold. He selected a bottle from the cooler to check it, and then went down to the basement to check the cooler motors. He denied drinking from the open bottle, and disputed Hollander's testimony that the bottle was only three-quarters full when she took it from him.

Subsequent to the hearing, the Department adopted the proposed decision which sustained the charge of the accusation. The administrative law judge (ALJ) rejected the Department's recommendation of a 15-day suspension as excessive, and ordered the 5-day suspension which is the subject of this appeal.

Appellant has filed a timely notice of appeal, and renews his contention that he was only checking the beer for temperature and did not consume any of it.

DISCUSSION

It is clear from our review of the record that the ALJ was forced to choose between the testimony of investigator Hollander and that of appellant. He chose to accept Hollander's testimony that she saw appellant drink from the open bottle of Heineken, and we cannot say he acted unreasonably in doing so. Appellant's explanation that he was merely checking the temperature of the beer, but did not drink from it, reflects an understandable attempt on his part to escape discipline, yet an explanation the ALJ was not bound to accept.

There are many internal inconsistencies in appellant's testimony, while that of Hollander was consistent on all important points and there is nothing in her testimony that is improbable. That said, we are required to defer to the trier of fact on the issue of credibility (see, e.g., *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640] and *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807]), and it is obvious that the ALJ chose to believe Hollander.

Appellant asks the Board to reweigh the evidence and accept his version of what happened. This is not the role of the Appeals Board.

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 may not exercise its independent judgment on the effect or weight of the evidence, as appellant asks that we do, but its role 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. The 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 evidentiary hearing.⁴

There is substantial evidence to support the Department's decision, and we find nothing to indicate it did not proceed according to law.

ORDER

The decision of the Department is affirmed.⁵

TED HUNT, CHAIRMAN
SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

⁵ 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.