

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

AB-8720

File: 20-126321 Reg: 06063885

TUNG P. SUN and WEI H. SUN, dba Come N Go Food Store
4516 Freeport Boulevard, Sacramento, CA 95822,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: April 3, 2008
San Francisco, CA

ISSUED: JULY 23, 2008

Tung P. Sun and Wei H. Sun, doing business as Come N Go Food Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk selling an alcoholic beverage to an obviously intoxicated person, a violation of Business and Professions Code section 25602, subdivision (a).

Appearances on appeal include appellants Tung P. Sun and Wei H. Sun, appearing through their counsel, Robert Lee, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

¹The decision of the Department, dated July 19, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 30, 1982. The Department instituted an accusation against appellants charging that their clerk, Joann McGruder, sold an alcoholic beverage, Colt 45 malt liquor, to Martin Loftus, an obviously intoxicated person.

At the administrative hearing held on April 13, 2007, documentary evidence was received and testimony concerning the violation charged was presented by Sacramento police officer Jonathan Houston and by the clerk.

On the evening of June 27, 2006, officer Houston's attention was drawn by a man staggering and shuffling down the street. The man, later identified as Loftus, entered appellants' store with an unsteady gait and Houston entered the premises to observe Loftus. Loftus went to the beer cooler in the back of the store and the clerk walked back to the cooler in response to Loftus asking for help.

Houston then moved near enough to hear the clerk and Loftus while they were at the cooler. Loftus, with slurred speech, asked where the Colt 45 malt liquor was in the cooler. The clerk told him and pointed to it in the bottom half of the cooler. When Loftus bent over to get a can, he swayed and appeared unsteady. Loftus and the clerk were approximately two feet from each other while at the cooler.

Loftus passed within one or two feet of the officer while walking to the sales counter. He was staggering and Houston noted that he smelled of alcohol, his eyes were bloodshot and watery, his clothes were disheveled, and he had urinated in his pants.

At the sales counter, Loftus leaned against it to steady himself. Houston stood about three feet away from Loftus, and the clerk was the behind the counter, about a

foot away from Loftus. Loftus appeared to have trouble determining the denomination of the change he pulled from his pocket and finally put two dollar bills on the counter to pay for the beer. When the clerk told him he was 45 cents short, Loftus again could not determine what change he had, so he put down another dollar bill. The clerk gave him change, and Loftus left the store. He was arrested outside and Houston issued a citation to the clerk for selling an alcoholic beverage to an obviously intoxicated person.

The clerk's testimony was rather different. She did not recognize Loftus in the photograph taken of him when he was arrested. She said that when she saw Loftus enter the store, she thought he looked like a tired workman. The clerk testified that Loftus spoke clearly to her, she did not notice that he had urinated in his pants, or that he staggered or swayed, or that he had any odor, and she did not look at his eyes.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation was proved.

Appellants have filed an appeal contending that the findings are not supported by substantial evidence.

DISCUSSION

Appellants contend the findings are not supported by substantial evidence in light of the whole record because the administrative law judge (ALJ) denied them the right to present relevant evidence regarding the criminal proceeding against the clerk and the ALJ did not fairly weigh the evidence and the clerk's testimony.

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (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 an

appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].)

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, [Inc. v. Alcoholic Beverage Control Appeals Board* (2002)] 100 Cal.App.4th [1250,] 1254 [[122 Cal.Rptr.2d 914]]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Appellants argue that no evidence was presented corroborating Houston's testimony, such as a breath analysis or field sobriety test. No corroboration, however, is necessary. "[T]he testimony of one witness, if believed by the trier of fact and if not inherently improbable, is sufficient to sustain a finding." (*Alperson v. Mirisch Co.* (1967) 250 Cal.App.2d 84, 93 [58 Cal.Rptr. 178]; Evid. Code, § 411.)

Appellants contend on appeal that the ALJ erred when he sustained the Department's objection to a question regarding the outcome of the criminal case

against the clerk. At the hearing, however, appellants did not contest the ruling, apparently acquiescing in the ALJ's decision. No mention was made of the ruling during closing argument. Since this issue was not raised at the hearing, the Board is entitled to consider it waived. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §394, p. 444.)

Even if the ALJ had allowed the evidence and it had shown the clerk was acquitted in the criminal case, that information would not be controlling or even relevant. It has long been settled that, because of the higher standard of proof in criminal proceedings (beyond a reasonable doubt), a dismissal or acquittal in a criminal proceeding is not a barrier to further administrative proceedings involving the same conduct. (See, e.g., *Cornell v. Reilly* (1954) 127 Cal.App.2d 178, 187 [273 P.2d 572]: "Even if Appellant had been charged criminally and acquitted, such acquittal would be no bar to a disciplinary action based on the same facts looking towards the revocation of a license.") The ALJ did not err in sustaining the Department's objection to appellants' question.

Appellants argue that the ALJ did not fairly weigh the evidence because he disbelieved the clerk's testimony. However, it is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion. Appellants' disagreement with the credibility determinations of the ALJ does not convince us that an abuse of discretion occurred.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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.