

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

AB-7874

File: 20-214478 Reg: 00049792

7-ELEVEN, INC., KAK S. KIM, and SOONJA KIM dba 7-Eleven Store #2237-18872
1784 West Shaw Avenue, Fresno, CA 93711,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: M.J. Fine

Appeals Board Hearing: July 11, 2002
Los Angeles, CA

ISSUED OCTOBER 3, 2002

7-Eleven, Inc., Kak S. Kim, and Soonja Kim, doing business as 7-Eleven Store 2237-18872 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their off-sale beer and wine license for 10 days for appellants' clerk selling an alcoholic beverage to a person under the age of 21, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, section 22, arising from a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Kak S. Kim, and Soonja Kim, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

¹The decision of the Department, dated August 16, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' license was issued on September 26, 1983. Thereafter, the Department instituted an accusation against appellants charging that, on June 26, 2001, appellants' clerk, ("the clerk"), sold an alcoholic beverage to 18-year-old "the minor".

An administrative hearing was held on June 13, 2001, at which time documentary evidence was received, and testimony concerning the transaction was presented by "the minor" and Fresno police officer Michael Aaron Moore, and co-appellant Kak S. Kim testified about the clerk's training.

Subsequent to the hearing, the Department issued its decision which determined that the violation occurred as charged in the accusation and no defense was established.

Appellants have filed a timely appeal raising the following issues: (1) appellants' due process rights were violated by the police officer's failure to preserve exculpatory evidence, and (2) the minor was not credible.

DISCUSSION

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. The Board may not exercise its independent judgment on the effect or weight of the evidence, but must determine whether the Department's findings of fact are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The 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.²

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 Bev. 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. Dept. of Alcoholic Bev. 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].)

I

Appellants contend that officer Moore's "failure to retain" exculpatory evidence violated their rights to due process. They argue that Moore failed to search the minor or his vehicle for a fake ID and failed to ask the minor whether he had used a fake ID previously, either at this store or elsewhere, to buy beer. Appellants state, at pages 7-8 of their brief:

Thus, Sergeant Moore had in his grasp different forms of exculpatory evidence, at least in the potential. Sergeant Moore could have obtained a statement from [the minor] right at the scene concerning false identification. Sergeant Moore could have obtained false identification directly from [the minor] had he only looked for it since he had [the minor] detained at the scene at the time. Sergeant Moore's failure to retain such evidence constitutes, at this point, a violation of appellants' rights to due process.

The "exculpatory evidence" referred to by appellants is false identification appellants seem to allege that the minor had in his possession. However, the evidence

²Cal. Const., art. XX, § 22; Bus. & Prof. Code §§23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

shows that the minor neither used false identification to make his purchase nor even possessed false identification at that time. Additionally, the evidence shows that the clerk did not ask to see the minor's identification before selling him the beer. [RT 10.]

The minor's testimony was, admittedly, somewhat confusing. Some of the confusion was caused by the minor's assumption, when he was asked at the hearing about whether he had ever possessed a fake ID, that a fake ID was "something you had made with your name" [RT 25]. The only false identification he had ever possessed was someone else's expired driver's license [RT 23-24].

The minor's testimony was not so confusing, however, to justify appellant's statement in its brief at page 13, that the officer had "constructive possession of false identification where that false identification was held by [the minor] while [he] was detained by [the officer]."

It is the responsibility of the ALJ to resolve conflicts and inconsistencies in the evidence, and the ALJ did so here in Conclusions of Law VI:

[Appellants] argue that because the minor is not credible and has used a false ID in the past, the Administrative Law Judge should infer that the clerk asked for his ID and he produced a false ID. [Appellants] introduced no actual evidence of a false ID. The clerk did not testify, as he was not present at the hearing. The clerk no longer works for [appellants]. However, [appellants] did not even produce hearsay evidence that the clerk told [appellants] that the minor produced a false ID. It seems likely that if this happened, the clerk would have told [appellants] this. Sergeant Moore had no reason to search for a false ID in the absence of any assertion that one was produced. It is one thing to not believe the minor when he testified that he was not asked for an ID but it's quite another to conclude on this record that the minor produced a false ID. The weight of evidence is that the minor was not asked his age or asked for an ID. A prudent person would conclude that he could be underage and ask for proof of age. As the minor testified he bought the beer and the officer testified the clerk said he sold the beer to the minor, the Department has established a sale of an alcoholic beverage to a minor in violation of Business and Professions Code Section 25658(a). [Appellants] have not met [their] burden of establishing that the minor used a false ID.

Our reading of the record convinces us that the ALJ was correct. The clerk did not ask the minor for identification and the minor did not possess false identification. There was no "exculpatory evidence" for the officer to find.

II

Appellants contend the minor was not credible and it was error for the ALJ to rely on his testimony in making his determination.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) We see no reason to question the ALJ's determination as to credibility in this case.

Appellants make no effort to explain the basis for their contention that the minor was not credible. There were some inconsistencies and contradictions in the minor's testimony, but the ALJ resolved those, as noted in the discussion of the preceding issue, and we believe his resolution was not only reasonable, but correct.

The Appeals Board decision relied upon by appellants, *7238 Reseda Boulevard, Inc.* (1998) AB-6975, has no relevance whatsoever to the matter at hand. The Department's decision in that matter was reversed because of apparent perjured testimony and questionable behavior by a police officer that was completely ignored by the Department in its decision.

ORDER

The decision of the Department is affirmed.³

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

³This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.