

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

HJM, INC. dba Kokpit
301 Turk Street, San Francisco, CA 94102,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
AB-7486

File: 48-307663 Reg: 99045858

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

Appeals Board Hearing: February 15, 2001
San Francisco, CA

ISSUED APRIL 17, 2001

HJM, Inc., doing business as Kokpit (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days for its bartender, Julie T. Graham, having sold an alcoholic beverage (a bottle of Budweiser beer) to Michael Hom, 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). Hom was acting as a decoy for the San Francisco Police Department when he made the purchase.

Appearances on appeal include appellant HJM, Inc., appearing through its counsel, Albert L. Boasberg, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

¹The decision of the Department, dated September 16, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on August 18, 1995. On March 9, 1999, the Department instituted an accusation against appellant charging the unlawful sale of an alcoholic beverage to a minor.

An administrative hearing was held on August 18, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Lynda Zmak ("Zmak"), a San Francisco police officer; Michael Hom ("Michael"), the minor decoy; Julie Graham ("Graham"), appellant's clerk; Abysius Gangloff ("Gangloff"), a patron; Lee Thibodeaux ("Thibodeaux"), the owner of the premises; and Jordan Hom ("J. Hom"), also a San Francisco police officer.²

Zmak testified that she followed Michael into the bar, that she observed his purchase of a bottle of Budweiser beer, and that Michael identified Graham as the seller. Zmak also testified about her prior experience in the conduct of decoy operations, the instructions she gave Michael, and her opinion that Michael appeared to be somewhere between 16 and 18 years of age. She acknowledged that she would not have heard it if Graham had asked Michael for identification.

Michael testified he was not asked his age or for identification, and that when the officers entered the bar he identified Graham as the seller. Graham was directly across the bar counter from him when he pointed to her.

Graham testified that she had been employed as a part-time bartender, that she had not attended any Alcoholic Beverage Control classes until after this incident, that she was the only employee on duty, and that, as Michael had earlier testified, she did not ask him his age or for identification. She thought he was "old enough." Graham

² Jordan Hom is Michael Hom's father.

testified she was unaware she had been identified as the seller.

Jordan Hom testified that he and Zmak entered the bar and saw a bottle of Budweiser on the bar in front of Michael, and knew by the fact that there was change in front of Michael that he had made a purchase of alcohol. They approached Michael, who then identified Graham when Zmak asked him if Graham was the person who sold to him. Michael was then instructed to leave the bar.

Gangloff described himself as a security supervisor, with experience carding people or identifying people under 21 years of age. He testified that he was in the premises when Michael purchased the beer, and saw Michael leave the premises. He did not see Michael identify Graham, but acknowledged, in response to questions from Administrative Law Judge Dorais, that he was not paying close attention to what the officers or the decoy were doing.

Thibodeaux testified he attended ABC training classes, consulted with a Department representative, posted extra signs, stressed to his employees the importance of not selling to minors, and organized a neighborhood watch group to discourage drug trafficking in the area.

Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged in the accusation, and ordered a 25-day suspension.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that it was deprived of its right to constitutional due process in two ways: (1) by the use of the police officer's son as a decoy; (2) by the Administrative Law Judge's (ALJ) finding that the testimony of one of appellant's witnesses was not entitled to any weight.

DISCUSSION

Appellant's contention that the ALJ should have believed its witnesses and not the witnesses presented by the Department flies in the face of the general rule that 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].) Appellant's claims clearly lack constitutional dimension, and do not persuade us there has been any error at the hearing level.

Citing no case or statutory law, appellant contends that the testimony of the officer who issued the citation and that of the decoy is inherently unreliable because they are father and son.

Admittedly, this is not the ordinary case. However, where, as here, there has been ample opportunity to cross-examine the witnesses in question, there is no reason why the rule on witness credibility should be any different.

The ALJ set forth his reasons for rejecting the testimony of Aloysius Gangloff, and we are not in a position to dispute them. He was in a position where he could observe Gangloff as he testified; we have only the cold record to review.

In any event, the only part of Gangloff's testimony that would be entitled to any significance in light of the issues was his opinion that the decoy appeared to be over the age of 21, an opinion with which the ALJ clearly disagreed.³ Gangloff admitted he

³ Appellant asserts in its brief (at page 2) that the ALJ "expressed the opinion that the decoy looked too mature to have been used in this role on a prior occasion, but found no fault with the Department's employment of him in the instant case." This is incorrect. In fact, the ALJ said the following:

"THE COURT: This Hearing Officer is familiar with this witness, having seen
(continued...)"

was not watching either the decoy or the officer closely, and seemed more concerned with the fact that, according to him, one of the officers went behind the bar and took something off the wall.

ORDER

The decision of the Department is affirmed.⁴

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

³(...continued)

the individual at least once and perhaps two or three times in prior hearings here in San Francisco. I can't recall what impression I formed at the time. They were also decoy operations.

But I'm able to recall only one San Francisco decoy where I formed an opinion – **and it was other than this witness** – that the decoy was too mature to be a decoy.”

⁴ 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.