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

AB-7767
File: 20-260802 Reg: 00049006

PRESTIGE STATIONS, INC. dba AM/PM Mini Mart
100 Lake Boulevard, Redding, CA 96003,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: February 14, 2002
San Francisco, CA

ISSUED APRIL 18, 2002

Prestige Stations, Inc., doing business as AM/PM Mini Mart (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days for its clerk having sold an alcoholic beverage to a minor, being 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).

Appearances on appeal include appellant Prestige Stations, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

---

[1]The decision of the Department, dated January 25, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on April 23, 1992. Thereafter, the Department instituted an accusation against appellant charging that, on or about March 10, 2000, appellant's agent, employee, or servant, Kathy Chisom, sold, furnished, or gave, or caused to be sold, furnished, or given away, an alcoholic beverage (beer), to Nicole Borba, a person then approximately 19 years of age, in violation of Business and Professions Code §25658, subdivision (a). Although not stated in the accusation, Borba was working as a decoy for the Redding Police Department.

An administrative hearing was held on September 8, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Nicole Borba; by Brett Price, a second decoy; and by Allan Mellon, a Redding police officer. Except for disagreement as to whom the change from the purchase was given, there is no significant factual dispute.

Two underage decoys, Nicole Borba and Brett Price, entered appellant's premises. Borba was nineteen years of age, Price eighteen. They took a six-pack of Corona beer to the counter. The clerk asked for Borba's identification. Borba produced her driver's license and the clerk examined it. The clerk then asked Price for his identification. Price presented his California driver's license, and the clerk examined it as well. She then rang up the sale, gave change, and the two left the store with the beer. Borba's license bore a stripe with the phrase "AGE 21 IN 2001;" the corresponding phrase on Price's license read "AGE 21 IN 2002."

Subsequent to the hearing, the Department issued its decision which determined

that the sale had occurred as alleged, and that appellant had established no defense to the charge.

Appellant thereafter filed a timely notice of appeal, and raises the following contentions: (1) the accusation was defective because it failed to allege the involvement of one of two decoys who participated in the decoy operation; (2) Rule 141 was violated because of the use of two decoys; (3) the evidence does not support the finding that decoy Borba was the purchaser of the alcoholic beverage; (4) the decision failed to explain its credibility determinations; and (5) neither decoy presented the appearance required by Rule 141(b)(2). Items 1 and 2 are related and will be discussed together.

DISCUSSION

I

Appellant contends that the use by the police of two decoys violated the plain language of Rule 141. Referring to that part of the rule that states "a law enforcement agency may only use a person under the age of 21 years," appellant asserts that the rule must be strictly construed and read to mean that the use of more than one decoy is not permitted.

Appellant misreads the intent of the rule, which, as we perceive it, is to limit the use of a decoy to someone who is under the age of 21.

According to Ballantine's Law Dictionary (3d ed. 1969), the word "a" is defined as an "indefinite article," meaning "one or anyone, depending on the context in which it appears."

Read in the context of a rule permitting the use of decoys to test and reenforce the level of compliance with the law prohibiting sales to minors, it seems to us that the

real question to be asked when more than a single decoy is used is whether the second decoy engaged in some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law. The clerk did not testify, so there is no evidence or claim that the clerk was distracted.

We do not see the use of two decoys as doing anything more than replicating what is undoubtedly a common occurrence - a visit by two underage persons to the seller of alcoholic beverages hoping to buy. A clerk must be alert to such a situation, whether it be decoys or non-decoys who are attempting to purchase alcoholic beverages.

We do not read Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App. 4th 575 [73 Cal.Rptr.2d 126] as requiring a different result. Although that case held that the Department must adhere strictly to the rule, it did not say the rule must be construed so strictly as to reach an absurd result.

Little time need be spent on appellant's contention that the accusation was defective for its failure to refer to decoy Price. First, appellant did not raise this issue at the hearing. Instead, appellant's counsel conducted a lengthy cross-examination of Price, at no time complaining that his ability to do so had been impaired by the absence of any reference to Price in the accusation.

Government Code §11503, quoted by appellant, simply requires that the accusation allege enough "to the end that the respondent will be able to prepare his defense." Although appellant contends that it could not adequately prepare its defense, it has not identified any area where earlier disclosure of Price's identity, which appellant would have learned in the course of discovery, would have altered appellant's defense

preparation.

II

Appellant contends that the Administrative Law Judge (ALJ) erroneously concluded that decoy Borba was the purchaser even though the evidence shows that the clerk gave the change from the purchase to decoy Price. Appellant further contends that Price was the purchaser because, despite the fact she had already examined decoy Borba's identification, the clerk completed the sale only after also viewing decoy Price's identification.

Officer Mellon testified [RT 106-107] that his police report identified Price as the decoy who was given the change from the transaction. The report itself was not placed in evidence, and is not part of the record.[2] Decoy Borba testified on direct examination [RT 12-13] that she paid for the beer and the clerk gave her the change; on cross-examination, she again stated that she had been given the change [RT 32], but after being told that the police report stated the change had been given to decoy Price, said she could not recall who had been given the change [RT 33]. Still later, decoy Borba testified in response to questioning by the ALJ that other customers had entered the store while the clerk was in the process of giving her the change [RT 49]. Decoy Price testified that, pursuant to their agreement, Borba selected the brand of beer, carried it to the counter, and handled the purchase [RT 67, 69-70]. Price said he could not recall to whom the change had

[2] Thus, appellant's assertion (App.Br. 7) that "Officer Mellon's police report is the only evidence in the record establishing to whom the sales clerk handed the change for the transaction" is incorrect.

been given, but assumed that, since Borba had purchased the beer, she was given the change [RT 74]. Officer Mellon conceded that his report identified decoy Price as the person to whom the change was given, but disclaimed any present recollection as to whom it was given [RT 106-107].

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, 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. 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.[3]

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]; 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]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The ALJ based his finding that Borba was the purchaser on the fact that she

---

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

carried the beer to the counter and paid for it. He essentially treated the unresolved issue as to who received the change as immaterial. We think this was a reasonable view of the evidence.

The ALJ addressed the conflict over who had been given the change this way (Finding of Fact IV, n.2):

> "Both Ms. Borba and Mr. Price testified that Ms. Borba had received change back from the clerk. Officer Alan Mellon had apparently stated in his report that Mr. Price received change back from the clerk. When confronted with his report, Ms. Borba and Mr. Price expressed uncertainty about who received the change. Officer Mellon explained, he may have made a mistake when he dictated the report, or the person who typed the report could have switched the names. Thus the evidence from the two percipient witnesses is that either Ms. Borba received the change back from the clerk, or they are uncertain who received the change. The evidence is uncontradicted that Ms. Borba carried the beer to the counter and paid for the beer, and it is found that Ms. Borba was the purchaser of the beer."

We do not think it unreasonable for the ALJ to have thought that the change might have been given to decoy Borba. There is no dispute that Borba handed the purchase money to the clerk. Officer Mellon's conclusion that the change was given to Price could have been the result of faulty note-taking. In the normal course of cash register transactions, the change is usually returned to the person who tendered the money. Other than the police report, there is little reason to believe this transaction was any different.

Appellant argues in its brief that, since the clerk rang up the sale only after having seen decoy Price's identification, an inference must be drawn that the sale was made to him. This argument ignores another possible explanation for the clerk's action - that the clerk was reluctant to make a sale when the purchaser's companion might be underage. The real question which might be asked is why, after viewing two drivers'

licenses showing the decoys to be under 21, did the clerk go ahead with the transaction.

In any event, we think the issue of who got the change is itself overblown. We think the clerk's acceptance of the purchase money from decoy Borba, coupled with Borba's testimony as to her involvement in the purchase, is substantial evidence of who actually made the purchase.

III

Appellant contends that, without the Department explaining its reasons for doing so, the Department was not entitled to rely upon the testimony of the decoys because there were contradictions in their testimony.[4]

Appellants contend that the ALJ committed reversible error by not making explicit findings regarding the credibility of the decoys' testimony pursuant to Government Code §11425.50 and provisions in other statutes and case law requiring findings in administrative adjudicatory decisions.

Government Code §11425.50 provides, in pertinent part:

> "(a) The decision shall be in writing and shall include a statement of the factual and legal basis for the decision.
> "(b) The statement of the factual basis for the decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision. If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the

[4] It is not clear from appellant's brief which of the decoys is the subject of appellant's contention. The brief (App. Br. 11-12) refers to a decoy named Padron, who had no role in the decoy operation in question.

> court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.
> "(c) The statement of the factual basis for the decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. The presiding officer's experience, technical competence, and specialized knowledge may be used in evaluating evidence."

The code section is silent as to the consequences which flow from an ALJ's failure to articulate the factors mentioned.[5] However, we do not think that any failure to comply with the statute means that the decision must be reversed. It is more reasonable to construe this provision as saying simply that a reviewing court may give greater weight to a credibility determination in which the ALJ discussed the evidence upon which he or she based the determination. We do not think it means the determination is entitled to no weight at all.

Having reviewed the decoys' testimony, we cannot say that the ALJ's determination was in any way unreasonable or that any failure which there may be to comply with Government Code §11425.50 warrants reversal. The so-called "contradictions" reflected nothing more than the usual variations in the testimony of witnesses long after the event in question, involving matters that were not of obvious significance when they occurred.

This Board has consistently rejected counsel's insistence that the federal appeals court case of Holohan v. Massanari (9th Cir. 2001) 246 F.3d 1195 requires

---

[5] The Law Revision Comments which accompany this section state that it adopts the rule of Universal Camera Corp. v. National Labor Relations Board (1951) 340 U.S. 474 [71 S.Ct. 456], requiring that the reviewing court weigh more heavily findings by the trier of fact (here, the administrative law judge) based upon observation of witnesses than findings based on other evidence.

reversal of a decision that does not explicitly explain the basis of a credibility determination. (See, e.g., 7-Eleven and Huh (2001) AB-7680.) There is no reason to decide differently in the present appeal.

Appellants also rely on the case of McBail & Co. v. Solano County Local Agency Formation Com. (1998) 62 Cal.App.4th 1223, 1227 [72 Cal.Rptr.2d 923], in which the appellate court remanded to the Local Agency Formation Commission its decision denying the plaintiffs' annexation petition. The court stated that the agency must articulate the basis for its decision in order for a reviewing court to apply the substantial evidence rule in a meaningful way. This case is inapposite because it deals with a legislative act of an agency, not a judicial one, and it has nothing to do with the credibility of a witness. We do not disagree with the general requirement expressed in the court's opinion that an agency should articulate its reason for a decision; however, failure to do so is not a basis for reversal, as urged here by appellants, but simply for remand.

This Board previously rejected counsel's argument that a deficiency in explanation regarding a credibility determination required reversal (7-Eleven and Huh, supra) and what the Board said in that earlier case applies equally well here:

> "While it may be true that a statement of the factors behind a credibility determination may be of considerable assistance to a reviewing court, and is welcomed by this Board, we are not prepared to say that a decision which does not set forth such considerations is fatally flawed."

IV

Finally, appellant contends that Rule 141(b)(2) was violated because both decoys appeared to be over 21 years of age.

The ALJ found to the contrary with respect to each of the decoys.

The ALJ described Borba as follows (Finding of Fact VI):

"A. On May 10, 2000[6], the date of the decoy operation, Ms. Borba was 5' 4" tall and weighed about 120 pounds. Her hair was pulled back in a ponytail. She wore a black shirt, blue jeans and an overshirt. She was not wearing any makeup; she was wearing a silver ring on one finger. The photograph taken of Ms. Borba, standing next to the clerk, Ms. Chisom, accurately depicts the physical appearance Ms. Borba presented at the time of the sale of beer to her. Both the photograph and Ms. Borba's appearance when she testified at this hearing established that Ms. Borba presented the physical appearance which could generally be expected of a person under 21 years old; in fact, Ms. Borba presented the physical appearance of a person much younger than her actual age of 20 years.

"B. Ms. Borba testified that she was not nervous at the time she purchased the beer from Ms. Chisom; she had been a decoy during a number of decoy operations prior to the visit to the above-captioned premises and was calm when she purchased the beer. In addition, she had volunteered as an explorer with the Redding Police Department, and, at the time of the hearing, was working as a police cadet with the Redding Police Department.

"C. Viewing her overall appearance, including her physical appearance, her clothing, her demeanor, her mannerisms and maturity at the hearing, it is found that Ms. Borba exhibited the appearance generally expected of a person under 21 years of age; nothing apparent at the hearing indicated that Ms. Borba exhibited an appearance beyond her actual age of 20 years. There is no evidence that Ms. Borba displayed a significantly different appearance to the clerk, Ms. Chisom, at the time Ms. Chisom sold her the beer."

Additionally, the ALJ found that the second decoy, Brett Price "presented an appearance that was consistent with his actual age of 19 years at the time of the hearing," and, along with Borba, "displayed an appearance which could generally be expected of a person under 21 years of age." Appellant's assertion that the ALJ made no finding as to decoy Price is simply incorrect.

In its argument that decoy Borba appeared to be over 21 years of age, appellant

---

[6] This is incorrect. The decoy operation was conducted March 10, 2000.

refers to the same indicia of age as those discussed by the ALJ, and draws an opposite conclusion from that of the ALJ.

As this Board has said on occasions too numerous to count, it will not, in the absence of compelling circumstances, attempt to second-guess an ALJ's conclusion regarding whether a decoy's appearance complies with Rule 141(b)(2). (See 7-Eleven, Inc./Williams (2001) AB-759. It is not inclined to do so here.

ORDER

The decision of the Department is affirmed.[7]

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

[7] 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.