

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

AB-7834

File: 21-271113 Reg: 00049820

VICTOR GRAYR dba Valley Liquor
7357 Van Nuys Boulevard, Van Nuys, CA 91405,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: May 9, 2002
Los Angeles, CA

ISSUED JULY 26, 2002

Victor Grayr, doing business as Valley Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 15 days for his clerk, Hugo A. Quintanilla, having sold an alcoholic beverage (two 40-ounce bottles of beer) to Carlos Guerrero, 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 Victor Grayr, appearing through his counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

¹The decision of the Department, dated May 31, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on April 2, 1992. Thereafter, on October 30, 2000, the Department instituted an accusation against appellant charging that, on or about August 17, 2000, appellant, through his agent, employee, or servant, Hugo A. Quintanilla, caused beer to be sold, furnished, or given away to Carlos Guerrero, who was then approximately 18 years of age.

An administrative hearing was held on April 24, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Armando Gonzalez, an investigator employed by the Department of Alcoholic Beverage Control; by Carlos Guerrero, the minor; by Hugo A. Quintanilla, the clerk; and by Gabriel Alcala, a store patron.

Investigator Gonzalez testified that, upon arriving at appellant's store, accompanied by two other investigators, he saw four youthful looking individuals standing in front. One of the four, Guerrero, entered the store. Gonzalez exited his vehicle and also entered the store. He saw Guerrero and an unidentified adult male standing at the counter. He also observed two 40-ounce bottles of Mickeys on the counter, along with an undetermined amount of currency. Gonzalez observed, but could not hear, a conversation between the clerk, the adult male, and Guerrero. The beer and the currency remained on the counter while Guerrero left the premises and returned about 30 seconds later. Guerrero placed an undetermined amount of change on the counter. Quintanilla picked up the money from the counter and placed it in the cash register. When Guerrero grabbed one of the bottles, Quintanilla said, in Spanish, "outside." Guerrero returned the beer to the counter, and the adult male picked up both bottles. Guerrero, while still in the presence of the clerk, said he would get the beer

outside, and the two left the store. Outside the store, the adult male placed the two bottles on the ground. Guerrero placed one of the bottles in a pocket, and the other on the ground. At this point, Gonzalez identified himself to Guerrero, asked Guerrero his age, and was told he was 18. Gonzalez searched Guerrero for identification, and found his wallet and high school identification card.

Gonzalez reentered the store, advised the clerk of a violation, and was told by the clerk that he had sold the beer to the adult male. Quintanilla was later cited.

On cross-examination, Gonzalez said he first saw the adult male after entering the premises. He did not see the two together outside the store. When Gonzalez entered the store, the beer was already on the counter, as was the money. Gonzalez admitted he did not know who placed the money on the counter. Gonzalez conceded there could have been other words spoken by the clerk in addition to the word "outside," but he could not recall if there had been. Gonzalez did not speak with the adult male, who walked away after setting the beer on the ground, nor did he attempt to follow him. He explained that there were the four individuals outside the store, plus the adult male and a second adult male who joined him, so, for reasons of officer safety, neither he nor the other investigators attempted to follow the adult males.

Guerrero testified that he, his cousin, and two friends went to the store to get cigarettes and beer. He said that he and the other three all entered the store, bought cigarettes, and went back outside. He met two black adult males passing by, and asked them if they would buy some beer for him. They agreed to do so, and the three of them went into the store. He told one of the men what to get from the cooler, the man did so, and they went to the counter, where the man placed the beer and the money to pay for it. Guerrero had given him the money outside the store. The clerk

told the man he was short 50 cents, so Guerrero left the store and returned with the additional 50 cents, which he placed on the counter. Guerrero grabbed one of the two bottles, and the clerk said "Don't touch it" in Spanish. Guerrero could not recall if the clerk said anything else.

The adult male then picked up the beer, and the three then left the store. The adult male placed the beer on the ground, Guerrero put one of the bottles in his pocket, and his cousin picked up the other bottle. At this point, the investigators approached.

On cross-examination, Guerrero confirmed that he had accompanied one of the two adult males to the cooler, where he told him the kind of beer he wanted. When the two then went to the counter, Guerrero pretended to be shopping for gum, but was watching the transaction. When he heard the clerk point out the need for an additional 50 cents, he left the store to get it. Guerrero reaffirmed his earlier testimony that the clerk had stopped him when he grabbed the beer. After the sale, he left the store, and the two adult males followed.

In response to questioning by the Administrative Law Judge, Guerrero testified he was a regular customer of the store. Guerrero said he was only a foot away from the adult male when he placed the beer on the counter. He did not speak or look at him, but felt that he had acted as if he knew them, from the fact they were standing around together. He could not recall if the clerk was looking at him when he placed the 50 cents on the counter. However, he specifically recalled the clerk saying to him "No la toques," meaning "Don't touch it."

When Guerrero concluded his testimony, the ALJ, on his own motion, recalled investigator Gonzalez, who, in response to questioning by the ALJ, again insisted that he had heard the clerk use the Spanish word "afuera," meaning "outside," when

Guerrero touched the beer.

Quintanilla testified that Guerrero bought cigarettes during his first visit to the store. Guerrero returned to the store five minutes later, and was first seen standing near the gum display. The adult male, described by Quintanilla as a regular customer, handed him \$5.00 for the beer, and when told he needed another 50 cents, he looked to the other adult male and asked if he had 50 cents. Then, 50 cents was pushed toward him, but he did not notice where it came from. He saw Guerrero grab one of the bottles, and said to him "You cannot touch the beer. Go outside." Guerrero did so. Quintanilla then testified that, because Guerrero had touched the beer, he attempted to find out who the beer was for. He asked the adult male, and was told it was for him, that it was his favorite, and that he was not buying for anyone else.

Quintanilla said he was not aware that Guerrero was with the two adult males. He also said he did not see Guerrero leave the store and return shortly thereafter. He further said he did not know where Guerrero was when the beer was being purchased.

Quintanilla testified that he remains an employee at the store.

Alcala, a regular patron who regularly stops at the store on his way to work, said he observed the two adult males enter the store, followed by Guerrero, who was two or three steps behind. He did not see them talking to each other. He saw Gonzalez enter the store, remain only 15 to 20 seconds, then leave, not to return during the 15 or 20 minutes Alcala remained in the store drinking a soda. He saw the two adult males at the counter, and Guerrero nearby. He did not see the issuance of any citation.

Subsequent to the hearing, the Department issued its decision which determined that appellant's clerk had sold and furnished the beer to Guerrero as alleged in the accusation..

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the evidence is insufficient to support the decision; and (2) appellant's due process rights were violated when the ALJ undertook the Department's responsibilities of examining the witnesses.

DISCUSSION

I

Appellant contends that the evidence is insufficient to support the decision. In brief, appellant asserts that nothing occurred to put the clerk on notice that Guerrero had any involvement in the purchase of the beer other than when he put his hand on it when the beer was on the counter. He relies on the clerk's testimony that he believed the adult male was the source of the funds used to pay for the beer; that he had no knowledge of the source of the additional 50 cents; and that he was unaware Guerrero was connected to the two adult males. After Guerrero touched the beer, and was ordered from the store, appellant argues, the clerk acted reasonably in questioning the adult males to ensure that the beer was being purchased for their own consumption, and not to be furnished to Guerrero, who he knew to be a minor.

The Department, on the other hand, relies heavily on the testimony of its investigator that, when told by the clerk not to touch the beer and to go outside, Guerrero said he would get the beer outside. Finding of Fact 7 reads as follows:

"After the clerk rang up the sale, the minor grabbed one of the bottles of beer off the counter. The clerk admonished the minor not to touch the beer and stated to the minor in Spanish "outside." The minor then told the adult male purchaser in the immediate presence of the clerk that HE WILL GET IT (THE BEER) OUTSIDE. The clerk did not lift a finger to question whether the beer was intended for the minor, and the adults left the store with the beer and the minor. The clerk never asked the minor for evidence of identity or majority." (Capitalization and italics in original.)

This is a case in which the issue of credibility dominates over all others. The ALJ found that “[The clerk’s] testimony is inconsistent with that of the minor and the Department investigator in numerous respects and lacks credibility. The complainant’s case is internally consistent and believable.” It would appear from Finding 7 - “The clerk did not lift a finger to question whether the beer was intended for the minor” - that the ALJ rejected the clerk’s testimony that he questioned the two men to ensure they were not buying the beer for Guerrero.

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].)

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].)

That having been said, there are aspects of this case that leave us troubled. The ALJ declared (in Finding of Fact 9) the Department’s case was “internally consistent and believable,” while the clerk’s testimony was “inconsistent with that of the minor and the Department investigator in numerous respects and lacks credibility.” He did not identify the inconsistencies. In our own examination of the record, we have

found several inconsistencies between the testimony of the investigator and that of the minor, while the minor's testimony and that of the clerk are essentially consistent. For example, Gonzalez testified he saw only one adult male at the counter with the minor. He said the second adult male "met up" with the first after the first left the store.² On the other hand, Guerrero testified that both adult males went in the store, and that both were at the counter in front of the clerk at the same time. The clerk also testified there were two adult males at the counter.³

In addition, Gonzalez's ability to hear the crucial statement by the minor - that he said to the adult male, "he will get it outside" - could be questioned, since Gonzalez admittedly was unable to hear virtually anything else said by the minor, the clerk, or the adult male, the only other exception being the word "afuera." This, even though Gonzalez admitted there were conversations he could not hear, and his testimony that he was not in a position to hear them. Several examples drawn from Gonzalez's testimony typify the evidentiary voids flowing from his limited ability to hear what was transpiring.

Q. All right. What is the next thing that happened [after seeing the money and the beer on the counter]?

A. Quintanilla had a conversation with Guerrero and the unidentified male.

² Gonzalez said the reason he did not question the adult male about the transaction was because of concerns about officer safety. If, in fact, as both the minor and the clerk testified, both adult males were in the store with the minor, his explanation that the adult male was met outside by another adult male is open to question.

³ Additionally, one could question how it was that Gonzalez heard Guerrero say he would get the beer outside the store, even though he was unable to hear the conversation between the adult male and the clerk. Gonzalez was standing three feet behind the adult male and Guerrero when he heard the critical statements by Guerrero and the clerk [RT 4].

Q. Were you in a position where you could hear that conversation?

A. No, I was not. [RT 9]

...

Q. Were there any further conversations between any of the three individuals [after Guerrero was told not to touch the beer]?

A. Yes. Guerrero tells the adult male, he will get it outside. [RT 15-16]

...

Q. How long, as you arrived and you observed the black male, was Mr. Guerrero at the counter [after having acknowledged that he did not know who placed the money on the counter]? How long was Mr. Guerrero at the counter before he exited and then came back in?

A. It could have been roughly 20 to 30 seconds.

Q. Okay. And those 20 or 30 seconds, you initially observed Mr. Guerrero and an unidentified black male at the counter. You could not hear any conversation that took place between Mr. Quintanilla, Mr. Guerrero and the black male?

A. I couldn't make out what they were saying at that point. I wasn't in a good position to hear any conversation.

Q. How far were you?

A. It could have been approximately three feet.

Q. From three or four feet you could not hear what they were saying.

A. No.

Q. Were they whispering?

A. You know what, I don't remember.

Q. Then [referring to the clerk's remark to Guerrero] you heard a conversation, and the only thing you could hear from the conversation was 'afuera'; is that correct?

A. That's correct.

Q. Do you know what the rest of the conversation was about?

A. There wasn't much of conversation.

Q. Was there only one word, 'afuera'?

A. That's the only word I heard, but there could have also been other words said.

Q. You don't know what they were talking about, do you?

A. I heard the word "afuera".

Q. Besides "afuera", you don't know what the other words were; isn't that true?

A. If there were other words, I don't remember. No. [RT 25-26]

On the other hand, there is no question but that the minor's involvement was such that it could not have gone unnoticed. He was very close to the counter when the transaction took place. When it became apparent that another 50 cents was needed, he left the store, returned seconds later, and, mysteriously, another 50 cents was on the counter. It is difficult to believe that, without having been seen, he could have placed it on the counter where the clerk could see it. It is equally difficult to believe that, also without having been seen by the clerk, he could have given the 50 cents to the adult male who then placed the beer on the counter. Either possibility would have put the clerk on notice that the minor was involved in some manner in the transaction, enough to warrant further inquiry. To believe that the clerk was so distracted from what was going on by the simple presence of other customers in the store, we would have to believe that he was in another reality.

Finally, the fact that the minor placed his hand on one of the bottles while it was on the counter is strong, if not conclusive, evidence that he had an involvement in the transaction. The clerk's explanation that, after this occurred, he asked the adult male to confirm that the beer was being purchased for his own use, even if true, was not

enough.

Given all the circumstances, we are able to agree with the result reached by the Department, and are satisfied that there is substantial evidence in support of the decision. This does not constitute an endorsement of the investigative skills displayed in this case. In particular, we wonder why, in the absence of any overt threatening conduct, three presumably armed Department investigators permitted the adult males simply to walk away after committing a misdemeanor in the presence of one of the investigators.⁴

We are not persuaded by appellant's argument that there could not have been a furnishing of an alcoholic beverage to a minor because the beer was sold to an adult. Once on notice that the beer could be destined to end up with the minor, the clerk had a duty to investigate further. Simply asking the question "Is this for you and not for the minor" is hardly such a step. It is clear, based on all the clerk should have seen and suspected, that it can fairly be said he "furnished" the beer to the minor, in violation of Business and Professions Code §25658, subdivision (a).

II

Appellant contends that the ALJ "acted beyond his scope, crossing the line from being an impartial referee of the hearing to become an assistant to the agency prosecutor, aiding the Department in its case." Appellant contends that this violated both the Administrative Procedure Act and principles of due process.

We have reviewed the pages of the transcript cited by appellant, and have

⁴ Given the theory of the Department's case, both the adult male and the minor also violated Business and Professions Code §25658, subdivision (a), the minor by purchasing the beer (through his "agent," the adult male), and the adult male by furnishing the beer to the minor.

compared the information elicited by the ALJ's questioning with that elicited from the witness by Department counsel in the preceding thirteen pages. To a large extent, it appears that the ALJ was exploring in somewhat more detail the general elements of proof already elicited by Department counsel. We do not see him as having acted as a prosecutor.

Appellant has not advised us of just what "essential facts" were elicited by the ALJ, understandably so, perhaps, because for appellant to attempt to do so would put him in a position of explaining how the Department's decision is supported by the record as a whole. Nonetheless, having created this dilemma, appellant cannot expect us to extricate him from it.

An ALJ, as with a judge sitting without a jury, must understand the evidence in order to decide what consequences flow from it. It is common for ALJ's and judges to interrogate a witness in order to clarify what he or she may have said, and to be sure they understand his or her testimony. While there can conceivably be situations where the ALJ or the judge goes too far, and really does assume the role of an advocate, this does not appear to have been one of them.

We note that appellant's counsel allowed the ALJ to continue with his questioning for some twelve pages of transcript before rendering any objection, and then only to a single question. The ALJ immediately sustained the objection and, when he revised the question to comply with the objection, was permitted to complete his questioning without further objection. We find it difficult to believe that, if the ALJ's action was as damaging as appellant now suggests, appellant's counsel would have waited until an appeal was taken to raise the issue.

ORDER

The decision of the Department is affirmed.⁵

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

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.