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

AB-8144
File: 21-374403 Reg: 02053744

IBRAHIM RAMON FASHEH dba Primarily Wine and Spirit
22744 Ventura Boulevard, Woodland Hills, CA 91364,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: April 8, 2004
Los Angeles, CA

ISSUED JULY 19, 2004

Ibrahim Ramon Fasheh, doing business as Primarily Wine and Spirit (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 15 days for his clerk having sold a six-pack of Modelo beer to Eric Herrera, a 19-year old minor acting as a decoy for the Los Angeles Police Department, a violation of Business and Professions Code section 25658, subdivision (a) .

Appearances on appeal include appellant Ibrahim Ramon Fasheh, appearing through his counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 8, 2001. Thereafter, the Department instituted an accusation against appellant charging that, on May 30, 2002,

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[1]The decision of the Department, dated May 8, 2003, is set forth in the appendix.

appellant sold an alcoholic beverage to a minor.

An administrative hearing was held on March 7, 2001, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the decoy operation did not comply with the fairness requirement of Rule 141; (2) the police engaged in gross misconduct; (3) appellant was entrapped; (4) Business and Professions Code section 24210 is unconstitutional; and (5) the penalty is excessive. The first three of these issues are interrelated, and will be discussed together. We will not address the issue of the constitutionality of section 24210, because the California Constitution, article III, section 3.5, bars us from doing so.

DISCUSSION

I

Appellant contends that the decoy operation violated the fairness requirement of Rule 141(a)[2] when it sent in a second decoy, who was successful in making a purchase of alcoholic beverages, after two earlier decoys had been unsuccessful. He further contends that the police were guilty of gross misconduct, and that he was entrapped. The Department contends the operation was conducted fairly, and denies there was any police misconduct or entrapment.

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[2] Rule 141(a) (4 Code Cal. Regs, §141, subd. (a)) provides, in pertinent part, that "a law enforcement agency may use a person under the age of 21 years to attempt to purchase alcoholic beverages ... in a fashion that promotes fairness."

The administrative law judge made extensive factual findings, and our review of the record satisfies us that there is substantial support in the testimony for those findings. He resolved issues of credibility adversely to appellant,[3] and it is well established that 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. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640].) And, 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 App. Bd.* (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, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

With this in mind, we address the somewhat unusual facts of this case as reflected in the ALJ's findings in order to determine whether there is any basis for appellant's claims of unfairness under Rule 141(a), police misconduct, or entrapment.

Findings 4, 5, and 8 summarize the transaction which formed the basis for the Department's accusation:

> The facts underlying the accusation are that the LAPD was conducting a minor decoy operation and had minor Eric Herrera enter the premises to attempt to purchase some beer. The minor went to the refrigerated section; obtained a

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[3] In Conclusion of Law 4, the ALJ stated that "the licensee's testimony lacked credibility and is disbelieved."

> 6 pack of Modelo beer and proceeded to the checkout counter. The licensee Fasheh was working the counter and asked the minor for evidence of identity and majority.
>
> There is a conflict in the evidence of what took place next, however it is found that the minor presented his authentic underage California Driver's license to Mr. Fasheh who stated "Oh you're 18." In response the minor asked Fasheh if he would still sell him the beer to which the latter asked the minor if he was a "cop". The minor denied that he was. Thereafter Fasheh told the minor that he was going to charge him extra for the beer for a total of $10.00. The minor paid and thereafter left the store with his purchase.
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> In his defense, the licensee testified that at the time of the Herrera transaction he was preoccupied with an argument he was having with a female friend who was of romantic interest and who was with him behind the counter. He claims he had not fully comprehended that he had just sold beer to an underage individual, and hurried outside the store to retrieve the beer and rescind the sale, where instead he was apprehended by police.

Appellant's claims of unfairness, police misconduct and entrapment are based upon events which preceded the sale to Herrera, as well as the circumstances of the sale itself.

Earlier that same evening, two other decoys had been sent into the premises to attempt to purchase beer. One of the two testified that he and his fellow decoy had each selected a 40-ounce bottle of Budweiser beer and taken them to the counter. He further testified that Fasheh told them "No, I can't sell this to you at this price, but I can sell you a 12-pack of beer." The two decoys then returned the Budweiser beer to the cooler and selected a 12-pack of Coors or Bud Light. At that point, according to the decoy, the two showed Fasheh their drivers' licenses. Then, as Fasheh began to make the sale, an undercover police officer entered the store and asked Fasheh for something. When Fasheh said he did not have that item, the undercover officer left the store. According to the decoy, Fasheh asked the decoys if they knew him. He then asked if they were cops, and they told him no, they were 18, and you had to be 21 to be

a policeman. Fasheh then asked where they were in school. When they told him they attended Seasun University, he looked toward the undercover officer, then declined to make the sale.

Los Angeles police officer Anthony Ljubetic testified that after talking to the two decoys and to the undercover officer who had gone into the store, he believed that Fasheh would have sold to the decoys but for the intervention of the undercover officer. He then sent Herrera into the store one and one-half hours later.

Appellant cites the Board's decision in *7-Eleven, Inc./Mousavi* (2002) AB-7833, where the Board concluded that the fairness provision of Rule 141(a) had been violated when an unsuccessful attempt by a decoy followed on the heels of a successful purchase by an earlier decoy.

In *Mousavi*, a second decoy was sent into the store to attempt to make a purchase immediately after another decoy had already been successful in doing so, but was unsuccessful. The Board set forth three reasons why it thought the decoy operation was conducted unfairly: this was the only premises where a second decoy was sent in, and no one explained why, suggesting that this premises was unfairly targeted; had the clerk sold to the second decoy, Mousavi would be charged with two "strikes" under section 25658.1, but there would have been no educational value to the clerk, who did not yet know of the first violation; and it was unfair because the only purpose for sending in the second decoy appeared to be the possibility of an increased penalty.

In this case, according to the findings, the purpose was to confirm that the licensee had manifested a willingness to sell to minors, and had declined to do so only when he feared a police presence. Appellant contends this fear was only speculation

on the part of the decoy, but the decoy's testimony of the events preceding the seller's refusal suggest that the decoy's "speculation" was well-founded. There is no other explanation for his behavior, considering that, after having seen their identification, he was prepared to sell them a 12-pack of beer. His change of heart cannot be isolated from the appearance of the undercover officer, his questions to the decoys about the undercover officer's radio, and his questions whether the decoys were police. These facts, we think, made it permissible for the police to seek to confirm the licensee's willingness to sell to minors without violating the fairness requirement of Rule 141(a). When they sent Herrera into the store, and he was sold beer, that willingness was confirmed.

We do not think anything can be made of the fact that the decoy, after the licensee became aware he was only 18, asked "So I can't buy?" Appellant could well have declined to make a sale. Instead, after satisfying himself that the decoy was not a "cop," appellant made the sale, and imposed a surcharge on the price because of the decoy's age. The decoy's conduct falls far short of entrapment under the test of *People v. Barraza* (1979) 23 Cal.3d 675, 689-690 [153 Cal.Rptr. 459], or outrageous police conduct under the test of *People v. McIntyre* (1979) 23 Cal.3d 742 [153 Cal.Rptr. 237].

II

Appellant contends that the penalty is excessive.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. *(Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine

that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The Department recommended a 30-day penalty, contending that the violation was committed knowingly. The ALJ tempered the Department's recommendation stating:

> While the facts of this case are somewhat aggravated, by the licensee's apparent willingness to flout the law, there is an absence of an established disciplinary record which would justify the imposition of the enhanced penalty at this time. In any event, should the "pending" prior discipline for a violation of Bus. & Prof. Code Sec. 25658(a) become final, the licensee shall be only "one strike" away from the possibility of having his license revoked.

Given the facts of this case, the penalty could be described as lenient, and certainly not unreasonable.

ORDER

The decision of the Department is affirmed.[4]

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

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[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.