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

AB-8233
File: 21-379023 Reg: 03055690

MARY ABDULNOUR and WAEL HADDAD, dba Santa Fe Liquor
1108 West Fifth Street, San Bernardino, CA 92411,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: September 2, 2004
Los Angeles, CA

ISSUED NOVEMBER 18, 2004

Mary Abdulnour and Wael Haddad, doing business as Santa Fe Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Mary Abdulnour and Wael Haddad, appearing through their counsel, Jeffrey S. Weiss, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on November 9, 2001. On August 15, 2003, the Department filed an accusation charging that, on April 18, 2003,

[1]The decision of the Department, dated December 31, 2003, is set forth in the appendix.

appellants' clerk, Norris Youssef (the clerk), sold an alcoholic beverage to 19-year-old Fernando Urquidy. Although not noted in the accusation, Urquidy was working as a minor decoy for the San Bernardino Police Department at the time.

At the administrative hearing held on November 4, 2003, documentary evidence was received, and testimony concerning the sale was presented by Urquidy (the decoy) and by Ramon Rocha, a San Bernardino police officer.

The decoy testified that, upon entering the premises, he went to the cooler, got a six-pack of Corona beer, and took it to the counter. He paid for the beer, the clerk put the six-pack in a bag, and the decoy left the store. He later returned to the store with officer Rocha and identified the clerk, who was then issued a citation.

The actual bottles purchased by the decoy were not brought to the hearing. The decoy identified exhibit 2 as a photograph of himself "holding the Corona" and pointing to the clerk as the seller. [RT 14.] He identified exhibit 3 as a photograph of "the six-pack of Corona." [*Ibid*.] The photograph shows a six-pack of bottles labeled "Coronita Extra." Both Polaroid photographs have writing under the pictures. Exhibit 2 has the clerk's name, the date, time, address, and case number, and exhibit 3 has the date, case number, address, name of the business, and the words "6 pack 7 oz Corona beer."

Officer Rocha testified that he watched the decoy go to the cooler and then go to the counter with a six-pack of Corona. He witnessed the sales transaction and saw the decoy leave the store with the six-pack. He took the six-pack from the decoy and re-entered the store with him.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants filed a timely appeal raising the following issues: (1) The Department did not prove that the product sold to the decoy was an alcoholic beverage, and (2) the decoy's appearance violated rule 141(b)(2).

DISCUSSION

I

Appellants contend that no legal evidence was presented at the hearing that what the clerk sold the decoy was an alcoholic beverage. The only evidence, appellants assert, was the photographs, and they show only the words "Coronita Extra." They point out that neither the bottles nor the carton indicate the capacity of the bottles, state that the bottles contain "beer," or make any reference to an alcoholic beverage, and no testimony was presented regarding the size of the bottles or the writing on exhibits 2 and 3. Appellants conclude that "While Corona beer may be universally known and the name Corona symbolizes beer, the word 'Coronita' is not universally known and certainly does not signify an alcoholic product in and of itself."

In his proposed decision, which the Department adopted, the administrative law judge (ALJ) found that the decoy "removed a 6-pack of 7-ounce bottles of Corona beer labeled Coronita." (Finding of Fact 7.) In a footnote, the ALJ explained, "The legend on Exhibit 3 shows that the bottles contained just 7 ounces. This explains the label, 'Coronita.' In all other respects, the appearance of the bottles and 6-pack container appear identical to Corona beer."

Appellants argue that the ALJ's reasoning is speculation because no testimony described the bottles or their packaging.

While there was no testimony describing the size of the bottles, the legend on the bottom of exhibit 3 states that the picture depicts a six-pack of seven-ounce bottles

of Corona beer. The witnesses testified that the decoy picked up a six-pack of Corona from the beer cooler. The bottles and the packaging, as the ALJ stated in finding 7, "appear identical to Corona beer."

Appellants appear to argue that the legend on exhibit 3 was not admitted along with the photograph because there was no testimony regarding the legend. However, the exhibit was admitted without objection and without any limitation on its use. Whether or not there was testimony regarding the legend is irrelevant; the writing itself is the best evidence of its contents.

Even "[i]ncompetent or otherwise inadmissible evidence, such as hearsay or secondary evidence violating the best evidence rule, admitted without objection, is sufficient to sustain a judgment. (Evid. Code, § 140, comment; *People ex rel. Dept. of Public Works v. Alexander*, 212 Cal.App.2d 84, 98 [27 Cal.Rptr. 720]; *Sublett v. Henry's etc. Lunch*, 21 Cal.2d 273, 275-276 [131 P.2d 369].)" (*Greenfield v. Insurance Inc.* (1971) 19 Cal.App.3d 803, 811 [97 Cal. Rptr. 164].) It was not error for the ALJ to consider the evidence contained in the legend in making his decision.

The ALJ's reasoning that the small size of the bottles (7 ounces instead of 12) would explain the designation of "Coronita" on the package, is a reasonable inference drawn from the evidence. The suffix "ita" is a well known diminutive used in Spanish; Coronita (the name of the beer, Corona, plus the suffix "ita"), therefore, means "little Corona," an apt description of the small bottles of Corona.

Appellants argue that Coronita could just as well mean that the bottles contained "near beer"[2] packaged to look similar to Corona. Whatever the merits of appellants'

[2]"Near beer" is defined as "A malt liquor that does not contain enough alcohol to be considered an alcoholic beverage." (American Heritage Dict. (4th ed. 2000).)

alternative inference, in reviewing a decision of the Department, this Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that 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]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *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].)

We conclude that the Department carried its burden of proving that the clerk sold an alcoholic beverage, Corona beer, to the decoy.

II

Appellants contend that the decoy's appearance was not that which could generally be expected of a person under the age of 21 years under the circumstances presented to the seller of alcoholic beverages, as required by rule 141(b)(2). (4 Cal. Code Regs., § 141, subd. (b)(2).) They point out that at the time of the sale he was almost six feet tall and weighed about 135 to 140 pounds. They also note that he had a faint mustache on the day of the hearing.

The ALJ made the following findings with regard to the decoy's appearance (Finding of Fact 5 and 11):

> 5. Urquidy appeared at the hearing. He stood between 5 feet, 11 inches and 6 feet in height and weighed around 145 pounds. His dark brown or black hair was closely cropped all over in a butch cut. There had been

> virtually no change in Urquidy's height since April 18, 2003. He had gained between 5 and 10 pounds and his hair had been longer and parted in the middle. (Exhibit 2.) At the Licensed Premises, Urquidy wore a dark colored, long-sleeved jacket over a dark polo shirt, khaki-colored trousers and brown leather shoes. (*Id*.) He dressed almost the same at the hearing. Urquidy had last shaved the day before the hearing and there was a faint mustache line visible on his otherwise apple-cheeked complexion. No beard line was visible at the hearing. He testified he did not recall when he had last shaved prior to visiting Respondents' Licensed Premises, but there are no whiskers visible in Exhibit 2. At the hearing, Urquidy looked substantially the same as he did at Respondents' Licensed Premises on the date of the decoy operation.
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> 11. Based on his overall appearance, *i.e*., physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance/conduct in front of clerk Youssef at the Licensed Premises on April 18, 2003, Urquidy displayed the appearance that could generally be expected of a person under 21 years of age under the actual circumstances presented to clerk Youssef. Nothing about Urquidy, either at the hearing or before clerk Youssef, made decoy Urquidy appear other than his true age.

The ALJ discussed appellants' contentions about the decoy's appearance in Conclusion of Law 5:

> Respondents contended that section 141(b)(2) of title 4, California Code of Regulations, was violated in that the apparent age of decoy Urquidy did not meet the standard of the rule. They pointed to a beard line or mustache line as the characteristic making Urquidy appear too old. The argument is not persuasive. Urquidy appeared under the age of 21 years. While he did have a faint outline of a mustache, his rosy-cheeked complexion and overall affect was that generally to be expected of one under the age of 21 years. (Findings of Fact, ¶¶ 5 and 11.) Nothing about his dress made him look over the age of 20 years. Nothing about his facial appearance or other presence in front of clerk Youssef made decoy Urquidy look older than this actual age.

In *Southland Corporation / Samra* (2000) AB-7320, the Board said that it "has looked with disfavor on those operations using decoys who had 'five o'clock shadow,' especially when the decoy was also large and/or tall." In the present case, however, the decoy was neither exceptionally large or tall. More importantly, he did not have a five o'clock shadow. At most, he had "a faint outline of a mustache" at the hearing.

(Conclusion of Law 5.) The ALJ took this specifically into consideration, but concluded that neither this, nor any other aspect of his appearance, made the decoy appear to be over the age of 21, either at the hearing or when the clerk sold him the beer.

As this Board has said on many occasions, the ALJ, as the trier of fact, observes the decoy's physical appearance, demeanor, and mannerisms as he or she testifies and, taking all indicia of age into account, makes the determination whether that decoy presented the appearance required by rule 141(b)(2). Except in extraordinary circumstances, not present here, the ALJ will not be second-guessed by the Board.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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