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

AB-8547
File: 20-403528 Reg: 05060312

KAYO OIL COMPANY dba Circle K #76-2705698
1403 West Country Club Boulevard, Stockton, CA 95204,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: January 11, 2007
Sacramento, CA

Redeliberation: February 1, 2007

ISSUED MAY 7, 2007

Kayo Oil Company, doing business as Circle K #76-2705698 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk Robert Huarta Gomez ("Gomez"), having sold a six-pack of Coors Light beer to Dane James Rogers, an 18-year-old police minor decoy ("the decoy"), a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Kayo Oil Company, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Julia H. Sullivan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

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[1]The decision of the Department, dated March 23, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 15, 2003. Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor.

An administrative hearing was held on January 11, 2006, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of the decoy, and that of San Joaquin County Deputy Sheriff Lance Manner. Jerry Zimowske, the district manager for the store, testified on behalf of appellant. The clerk, Gomez, did not testify. The evidence established that the clerk did not ask the decoy his age or for identification prior to making the sale.

Subsequent to the hearing, the Department issued its decision which determined that a violation had been established, and appellant had failed to establish an affirmative defense.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) there was no compliance with Rule 141(b)(2); (2) the ALJ erred in assessing witness credibility; and (3) the ALJ failed to explain his conclusion that the record showed neither aggravation or mitigation.

DISCUSSION

I

Appellant contends that the decoy lacked the appearance required by Rule 141(b)(2), *i.e.*, that he display the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller of alcoholic beverages. Appellant argues that the ALJ failed to adequately evaluate the decoy's appearance, ignoring the "military- or police attire" worn by the decoy,

mischaracterizing the BDU (battle dress uniform) pants and boots worn by the decoy as cargo pants and shoes, failing to address the fact that multiple sales occurred during the decoy operation, and inadequately explaining the non-physical aspects of the decoy's appearance.

As apparently did the ALJ, we find it difficult to accept the argument that the wearing of boots and surplus cargo style military BDU pants is enough to alter the appearance of an 18-year-old teenager such as to exceed the standards of Rule 141(b)(2). The ALJ's findings (Findings of Fact 5 and 12) demonstrate that his assessment of the decoy's appearance was more comprehensive than appellant's argument suggests:

> FF 5. Rogers appeared at the hearing. He testified that he stood about 6 feet, 1" in height and did not know his weight. He estimated his height and weight were about the same on July 26, 2004 [*sic*],[2] except that he was one inch shorter then. On July 26, 2005, at Respondent's store, Rogers wore black cargo style pants, a dark T-shirt over a white T-shirt, and black shoes. (*See* Exhibit 2.) His brown hair was closely trimmed all over as is shown in the Exhibit 2 photograph. He wore a wrist band and was clean shaven. Rogers dressed almost identically at the hearing, except that for most of the hearing he also wore a black sweatshirt over the T-shirts. At Respondent's Licensed Premises on the date of the decoy operation, Rogers looked substantially the same as he did at the hearing.
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> FF 12. Decoy Rogers is a male teenager who gave the appearance at the hearing of one less than 21 years of age. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity and mannerisms shown at the hearing, and his appearance and conduct when purchasing beer from clerk Gomez at Respondent's licensed premises on July 26, 2005, Rogers displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to Gomez.

Appellant also contends that the fact that the decoy purchased an alcoholic

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[2] In this and other references to the date of the decoy operation, the ALJ mistakenly referred to the date the accusation was filed. The decoy operation was conducted on June 1, 2005, according to the accusation, and as reflected in the testimony (see RT 6, 21). Appellant has made no issue of this, nor do we.

beverage in five of the nine locations he visited warrants a conclusion that he must have appeared to be 21 or older, and that the ALJ failed to properly evaluate this factor. We do not know quite what appellant thinks the ALJ should have said about this, but it seems to us inescapable that he accorded it such weight as he thought appropriate, since he referenced it in his proposed decision. There is no per se rule with respect to the number of purchases made by a decoy.

In *7-Eleven, Inc./Dianne Corp.* (*2002) AB-7835* ("*Dianne*"), the decoy was able to purchase alcoholic beverages in eight of ten locations visited, in none of which was he asked his age or for identification. The Board thought this "powerful evidence" that the decoy lacked the appearance required by the rule, and that such evidence, *coupled with the ALJ's faulty analysis of the decoy's appearance*, compelled the conclusion that his decision that there was compliance with the rule was unreasonable and an abuse of discretion.

The Board revisited its decision in *Dianne* in *7-Eleven, Inc./Jain and Jain* (2004) AB-8082 ("Jain"), and rejected the notion that it intended its language in *that case* to suggest a per se rule that proof of an 80-percent purchase rate compelled the conclusion that the rule was violated. Instead, the Board stated:

> Although an 80 percent purchase rate during a decoy operation raises questions in reasonable minds as to the fairness of a decoy operation, that in itself is not enough to show that rule 141(a) or rule 141(b)(2) were violated. Such a per se rule would be inappropriate since the sales could be attributed to a number of reasons other than a belief that the decoy appeared to be over the age of 21. If we did not make that clear in *7-Eleven/Dianne*, we do so now.

We do not find the other arguments appellant makes with respect to the decoy's appearance to be any more persuasive. What appellant asks the Board to do is simply to reweigh the evidence and reach a different conclusion from that reached by the ALJ.

The Board has said many times that this is not its proper role. For example, it said in *BP West Coast Products* (2005) AB-8371:

> Whether or not this decoy presented the appearance which could generally be expected of a person under the age of 21 was a finding on a question of fact, one we cannot overturn unless we are satisfied the evidence available to the ALJ (the decoy [him]self as [he] testifies, the photographs of the decoy, and the testimony about the decoy's appearance during the decoy operation and at the hearing) simply cannot support his determination that [he] met the standard set by Rule 141(b)(2).
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> Although this Board has encouraged ALJ's to consider the whole person when assessing a decoy's appearance for compliance with Rule 141(b)(2), it must be acknowledged that in the usual case, the clerk knows nothing about the decoy except what he or she sees across the counter in a transaction that, at most, lasts only a minute or two. Thus, a decoy's physical and facial appearance are, in all likelihood, the most important factors a clerk considers in making the decision whether or not the decoy is old enough to purchase an alcoholic beverage, or whether identification should be requested. In the close case, a decoy may display an appearance which could be expected of a person under the age of 21, to some yet not to others. A clerk takes a chance when he or she does not ask for identification or consider carefully any identification which is produced. By the same token, an ALJ must carefully assess the appearance of the decoy when the decoy testifies at the hearing, and usually has a considerable period of time in which to do so.
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> On the other hand, this Board never sees the decoy. That is why only where the Board finds it nearly impossible to accept the ALJ's determination is fair and correct will it express its disagreement. This is not such a case. There is nothing in any of the indicia of age to which the appellant points that persuades us the ALJ erred.

The words in the last paragraph of the quoted text are equally applicable to this case.

II

Appellant contends that the ALJ failed to explain the basis for his acceptance of the decoy's testimony, asserting that "the record indicates that he questioned the decoy's veracity in at least one instance." (App. Br., page 10.) Appellant points to Finding of Fact 9 in which the ALJ acknowledges a conflict in the testimony regarding

whether the clerk was standing behind the counter or out from behind it when the decoy identified him as the seller.

The decoy testified that the clerk was asked to come away from the counter before he identified him as the seller. [RT 13]. The police officer testified that the clerk was "on the clerk's side of the counter" when the decoy identified him as the seller. [RT 28]. Both agreed that the decoy identified the clerk as the seller.

The appellant does not claim there was no face to face identification - indeed, the police officer and the decoy both said there was - nor does appellant identify, other than by speculation and innuendo, what it might be about the other aspects of the decoy's testimony that might be said to be untrue.

The conflict in testimony, minor as it was, was resolved by the ALJ, and the Board is not inclined to question it. The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]*; Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

There is nothing in the proposed decision even intimating that the decoy intentionally testified falsely, and certainly no reason for questioning his testimony as a whole.

III

There was evidence in the record which might have justified mitigation of any penalty considered by the ALJ (employee training), and there was evidence which might have justified aggravation (violation of store policy regarding checking of identification). Appellant contends the ALJ was obligated to spell out in detail why he believed the evidence did not establish either.

The evidence the ALJ was free to consider was, with respect to either aggravation or mitigation, insubstantial, and we think it would not be helpful to require an ALJ to explain why he was not persuaded that one or the other was appropriate.

The ALJ imposed the standard 15-day penalty for a first violation. Under the circumstances, we think the ALJ acted within his discretion.

IV

Appellant has filed a motion to augment the administrative record with any form 104 (Report of Hearing) included in the Department's file, and has filed a supplemental brief regarding the recent decision of the California Supreme Court in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (November 13, 2006) 40 Cal.4th 1 [50 Cal.Rptr.3d. 585] (*Quintanar*).

The California Supreme Court held in *Quintanar* that the provision of a Report of Hearing by a Department "prosecutor" to the Department's decision maker (or the decision maker's advisors) is a violation of the ex parte communication prohibitions found in the APA. In *Quintanar*, the Department conceded that a report of hearing was prepared and that the decision maker or the decision maker's advisor had access to the report of hearing, establishing, the court held, "that the reports of hearing were provided to the agency's decision maker." *(Id.* at pp. 15-16.)

In the present case, appellant contends a report of hearing was prepared and made available to the Department's decision maker, and that the decision in *Quintanar*, therefore, must control our disposition here. No concession similar to that in *Quintanar* has been made by the Department.

Whether a report was prepared and whether the decision maker or his advisors had access to the report are questions of fact. This Board has neither the facilities nor

the authority to take evidence and make factual findings. In cases where the Board finds that there is relevant evidence that could not have been produced at the hearing before the Department, it is authorized to remand the matter to the Department for reconsideration in light of that evidence. (Bus. & Prof. Code, § 23085.)

In the present case, evidence of the alleged violation by the Department could not have been presented at the administrative hearing because, if it occurred, it occurred *after* the hearing. Evidence regarding any Report of Hearing in this particular case is clearly relevant to the question of whether the Department has proceeded in the manner required by law. We conclude that this matter must be remanded to the Department for a full evidentiary hearing so that the facts regarding the existence and disposition of any such report may be determined.[3]

ORDER

The decision of the Department is affirmed as to all issues raised other than that regarding the allegation of an ex parte communication in the form of a Report of

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[3] The Department has suggested that, if the matter is remanded, the Board should simply order the parties to submit declarations regarding the facts. This, we believe, would be wholly inadequate. In order to ensure due process to both parties on remand, there must be provision for cross-examination.

The hearing on remand will necessarily involve evidence presented by various administrators, attorneys, and other employees of the Department. While we do not question the impartiality of the Department's own administrative law judges, we cannot think of a better way for the Department to avoid the possibility of the appearance of bias in these hearings than to have them conducted by administrative law judges from the independent Office of Administrative Hearings. This Board cannot, of course, require the Department to do so, but we offer this suggestion in the good faith belief that it would ease the procedural and logistical difficulties for all parties involved.

Hearing, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[4]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4] This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.