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

AB-9144
File: 21-428809 Reg: 10072802

LAMEES SAMAAN and NIDAL MATANOUS SAMAAN, dba Castle Liquor & Mini Mart
8655 19th Street, Rancho Cucamonga, CA 91701,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 1, 2011
Los Angeles, CA

ISSUED OCTOBER 18, 2011

Lamees Samaan and Nidal Matanous Samaan, doing business as Castle Liquor & Mini Mart (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their off-sale general license for 15 days for their clerk Andrew Killion having sold an alcoholic beverage (beer) to David J. Vargas, a non-decoy minor, and their clerk Ayman Ibrahiem Jweinat having sold an alcoholic beverage (beer) to William McGuigan, a 19-year-old Department minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Lamees Samaan and Nidal Matanous Samaan, appearing through their counsel, Soheyl Tahsildoost and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated November 23, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on August 22, 2005. On April 12, 2010, the Department instituted a three-count accusation, alleging separate sales of alcoholic beverages to non-decoy minors David J. Vargas and Jasmine Jamili on November 6, 2009, and to William McGuigan, a 19-year-old Department minor decoy, on November 17, 2009.

At the administrative hearing held on October 14, 2010, documentary evidence was received and testimony concerning the violations charged was presented by Department investigators Heather Castaneda and Scott Stonebrook, and the three minors. Andrew Killion and Nidal Matounas Samaan testified on behalf of appellants.

Subsequent to the hearing, the Department issued its decision which determined that the charges involving sales to Vargas and McGuigan (counts 1 and 3) had been proven, and that an affirmative defense under Business and Professions Code 25660 had been established with respect to the sale to Jasmine Jamili (count 2).

Appellants have filed an appeal making the following contentions: 1) appellants established a defense under Business and Professions Code section 25660 with respect to the sale to Vargas; (2) the Department abused its discretion by failing to provide an adequate foundation for discounting Andrew Killion's testimony; (3) Rules 141(a) and 141(b)(2) were violated by the Department's use of a professional decoy and by a Department investigator's active involvement in the decoy transaction; and (4) the decision fails to account for all the mitigating factors presented in the evidence. Issues 1 and 2 are related and will be discussed together.

DISCUSSION

I

The accusation alleged separate sales of alcoholic beverages on November 6, 2009, by appellants' clerk, Andrew Killion, to David Vargas, age 20, and Jasmine Jamili, age 19, without identification from them having been requested.[2] Appellants asserted a defense under Business and Professions Code section 25660[3] as to each of the transactions. Killion testified that he relied on identification that had been shown to him on prior occasions showing Vargas to be 22 years of age and Jamili to be 24. The defense was sustained with respect to the sale to Jamili, but not as to the sale to Vargas.[4]

Vargas purchased a bottle of Corona beer, an alcoholic beverage. He testified

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[2] Interestingly, both Vargas and Jamili were in line at the register at the same time, with one person in line between them, but there is nothing in the record to suggest they were there together.

[3] Section 25660 provides that reliance upon bona fide evidence of majority and identity, defined in the statute as a document issued by any federal, state, county or municipal government, including, but not limited to, a motor vehicle operator's license, which contains the name, date of birth, description and picture of the person, as well as a valid United States or foreign passport, or an Armed Forces identification card, shall be a defense to any criminal prosecution or license disciplinary proceeding based upon an alleged violation of Business and Professions Code section 25658.

[4] Jamili was stopped by Department investigators upon leaving the store with her purchase. She was asked for her "I.D.", and produced her sister's California identification card (Exhibit 7). Jamili admitted having displayed it at the store a month earlier, and that Killion was the clerk. The Administrative Law Judge (ALJ) found that Jamili had the appearance of someone who could be 24 years of age (the age the bearer of the card would have been at the time of the sale); that there was a close resemblance between Jamili's appearance and that of her sister's photograph on the identification card; and that Killion had reasonably relied upon it from having seen it a month earlier. Thus, the ALJ found that a section 25660 defense had been established.

that after he completed his purchase and left the store, he was confronted by an undercover officer. He was searched, as was his car, and no false identification was found. He testified that he had never owned a false identification or used one at appellants' store. On cross-examination Vargas testified that he frequented the store once or twice a month, the first time probably two years earlier, had seen Killion before, but had never been asked by him for identification.

Killion was shown Exhibit 2, a photograph of Vargas. Killion testified that, while he did not know Vargas' name, he had seen him in the store "about five times a week." The first time he saw Vargas was his first day on the job, a year prior to the sale. At that time, he was shown a California I.D. card. The card was not inside a wallet. He looked at it for 20 seconds. He recalled the height shown on the card as "five-seven" and the weight "like 170." Killion remembered that Vargas' eyes and hair were brown, saying they were a match to those in Exhibit 2. Based on that inspection, he sold Vargas an alcoholic beverage.

Killion testified he again asked Vargas for identification the next time he was in the store. He was shown the same identification, again sold him an alcoholic beverage, and never asked him again.

On cross-examination, Killion said he was not sure Vargas bought alcohol his first day at the store; it was in the first couple of months he worked there. Killion again testified that Vargas came into the store and bought alcohol five times a week.

Vargas was recalled as a witness by appellants' counsel, and testified he was five feet seven inches and weighed approximately 145 to 150 pounds, and that his hair and eyes were black. In response to additional questions from Department counsel, Vargas repeated his denial of having displayed any identification in appellants' store.

The ALJ rejected the claimed defense, and in doing so, addressed the conflicting testimony of Vargas and Killion in his findings (IV-A., paragraphs 1 and 2):

> A. As to Count 1, there was a conflict in the evidence as to whether Vargas had presented a false identification at the premises prior to November 6, 2009 indicating that he was over the age of twenty-one. After evaluating the credibility of the witnesses pursuant to the factors set forth in Evidence Code Section 780, including their demeanor, their capacity to recollect and the existence or nonexistence of a bias or motive, greater weight was given to the testimony of Vargas than to the testimony of Killion in resolving the conflict in the evidence.
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> 1. Vargas credibly testified that he had been to the premises on many occasions, that he had seen the same clerk before, that the clerk had never asked him for identification, that he had never showed a false identification at the premises and that he had never carried a false identification. Furthermore, the investigators searched Vargas' wallet and his car on November 6, 2009 and they did not find a false identification.
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> 2. The preponderance of the evidence presented at the hearing did not establish a defense under Section 25660 of the Business and Professions Code as to Count 1.

Appellants argue that the decision fails to give any weight to Killion's testimony, or explain why Killion's testimony should be given less weight than Vargas' testimony.

It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*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].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

Appellants assert that the Department has a duty to bridge the analytical gap between raw evidence and conclusions, citing *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] (*Topanga*), and that the Department must explain why Killion's testimony was discounted.

Appellant's reliance on *Topanga* is misplaced. The Board has repeatedly rejected the argument that *Topanga* requires explanations of the reasoning behind the ALJ's determinations and conclusions. In *7-Eleven, Inc./Cheema* (2004) AB-8181, in response to a similar argument, the Board, drawing on its earlier decision in *Sharmeens Enterprises, Inc*. (2011) AB-9062, explained that *Topanga* "does not hold that findings must be explained, only that findings must be made." The Board went on to say:

> Appellants' demand that the ALJ "explain how [the conflict in testimony] was resolved" (App. Br. at p. 2) is little more than a demand for the reasoning process of the ALJ. The California Supreme Court made clear in *Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 778-779 [122 Cal.Rptr. 543], that, as long as findings are made, a party is not entitled to attempt to delve into the reasoning process of the administrative adjudicator:
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> > As we stated in *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836, 522 P.2d 12]: "implicit in [Code of Civil Procedure] section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order."
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> > In short, in a quasi-judicial proceeding in California, the administrative board should state findings. If it does, the rule of *United States v. Morgan* [(1941)] 313 U.S. 409, 422 [85 L.Ed. 1429, 1435 [61 S.Ct. 999]] precludes inquiry outside the administrative record to determine what evidence was considered, and reasoning employed, by the administrators.

"The thrust of the decision is on the need for findings, and not at all with the agency's rationale in relating the findings to the ultimate decision." (*7-Eleven, Inc./ Parstabar* (2008) AB-8614.)

Simply because the ALJ does not explain his analytical process does not invalidate his determination or constitute an abuse of discretion.

II

Appellant contends that Department Rule 141(a)[5] was violated in two respects: it employed a "professional decoy" who did not display the appearance required by rule 141(b)(2),[6] and a Department investigator was actively involved in the sale.

Neither contention has merit.

Appellants do not explain why they consider this decoy to be "professional"--there is no evidence he was paid for his services as a decoy -- other than to characterize as "massive" the experience he acquired serving as a decoy while he was a police Explorer between 2004 and 2008.

This Board has said repeatedly that it will not second guess the ALJ's determination that a minor decoy displayed the appearance required by Rule 141(b)(2). Such a determination is one of fact. This Board will look at whether the ALJ applied the appropriate legal standards in making such a factual determination, and if it determines that the ALJ did that, it will affirm the ALJ's determination.

The ALJ's factual findings (Findings of Fact V-D, paragraphs 1 through 4) addressing the decoy's appearance satisfy us that he adhered to those principles:

V. D: The decoy's overall appearance including his demeanor, his poise,

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[5] Rule 141(a) provides:
A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages in a fashion that promotes fairness.

[6] Rule 141(b)(2) provides:
The decoy shall 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 at the time of the alleged offense.

his mannerisms, his maturity, his size and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that his hair was shorter and he was approximately eight pounds lighter on the day of the sale.

1. The decoy is a youthful looking male who was five feet six inches in height and who weighed one hundred twenty-five pounds on the day of the sale. On that day, the decoy was clean-shaven, his hair was cut in what is generally referred to as a "buzz cut" and his clothing consisted of dark jeans and a black T-shirt. The photograph depicted in Exhibit 4 was taken on the day of the sale prior to going out on the decoy operation and the photograph depicted in Exhibit 6 was taken at the premises. Both of these photographs depict what the decoy looked like and what he was wearing when he was at the premises.

2. The decoy testified that he had participated in approximately seven prior decoy operations and that he had been an Explorer with the Riverside County Sheriff's Department from 2004 until 2008. As an Explorer, he did not receive any standardized training. In February of 2009 he was hired as a cadet by the Corona Police Department and he left that employment in October of 2009. As a cadet, he worked in the detective bureau where he was mainly taught how to deal with missing persons calls.

3. There was nothing remarkable about the decoy's nonphysical appearance. He provided straight forward answers while testifying and there was nothing about his speech, his mannerisms or his demeanor that made him appear older than his actual age.

4. After considering the photographs depicted in Exhibits 4 and 6, the decoy's overall appearance when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

Appellants also contend that the decoy operation was conducted unfairly because the Department investigator stood so close to the decoy while in line at the counter that "a reasonable person might have drawn the conclusion that the investigator was somehow associated with the minor." (App. Br., page 12). He was able to view "the minutest details of the transaction ... he could actually see the

demarcation [*sic*] on the bill that the decoy allegedly handed to the clerk." (*Ibid*.)

The only evidence of where the investigator was standing, "around the candy and gum aisle ... near the counter" [RT 63], came from the investigator himself. Scott Stonebrook testified that he was able to see that the decoy handed the clerk a $5 bill and the decoy's California driver's license while standing behind and to the left of the decoy. There is no evidence that where Stonebrook was standing was "incredibly close" to the decoy, as appellants have him.

Nor do we find it at all remarkable that an attentive investigator standing near the counter would be able to see the denomination of a $5 bill, especially as our paper currency is now designed, or that he would recognize a California driver's license when it was handed to the clerk.

We are utterly unpersuaded by appellants' argument.

III

Appellants complain that the Department failed to consider all evidence that would warrant a mitigated penalty. The penalty, a 15-day suspension, is the standard first-strike penalty for the sale of an alcoholic beverage to a minor.

Appellants point to their four-year discipline-free history, training provided to their clerks, the posting of signs throughout the store announcing that the store checks I.D.'s, and the firing of one of the offending clerks.

The Appeals Board may 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 ALJ acknowledged each of the supposed mitigating factors in his proposed decision with the exception of any reference to appellants' discipline-free history. He wrote, with respect to penalty (Finding of Fact VI-B):

> The Department's attorney recommended an aggravated penalty consisting of a twenty-five day suspension with ten days stayed based upon the fact that one of Respondents' clerk [*sic*] sold alcoholic beverages to two non-decoy minors on November 6, 2009 and then another clerk sold alcoholic beverages to a minor decoy only two weeks later. The fact that the evidence established a defense under Section 25660 of the Business and Professions Code as to Count 2 was also taken into consideration in determining the appropriate penalty in this matter.

We do not believe a mere 15-day suspension is an abuse of discretion on the facts of this case. One might question the effectiveness of the training given appellants' employees, considering that each of their clerks made a sale to a minor without asking for identification, or whether firing one offending clerk and retaining the other amounts to much of a mitigating factor.

As reflected in the ALJ's remarks, appellants' clerks made three sales to minors in a two-week period, two of them in violation of the law. The 15-day penalty can only be considered lenient in the circumstances.

ORDER

The decision of the Department is affirmed.[7]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[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.