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

AB-9321
File: 21-451302 Reg: 12076842

EL RIO LIQUOR, INC., dba EL Rio Liquor
2910 Vineyard Avenue, Oxnard, CA 93036-1633,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: June 6, 2013
Los Angeles, CA

ISSUED JULY 29, 2013

Rio Liquor, Inc., doing business as Rio Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's 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 appellant El Rio Liquor, Inc., appearing through its counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

[1]The decision of the Department, dated September 28, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on April 24, 2007. On April 19, 2012, the Department filed an accusation against appellant charging that, on November 3, 2011, appellant's clerk, Alejandro Rivas (the clerk), sold an alcoholic beverage to Alexx Chandler, a 20-year-old non-decoy minor. The transaction arose in the context of a shoulder tap operation conducted by the Ventura County Sheriff's Department. Nineteen-year-old Taylor Garst acted as a decoy in the shoulder tap operation.[2]

An administrative hearing was held on August 14, 2012, documentary evidence was received, and testimony concerning the sale was presented by Alexx Chandler, Taylor Garst, and Steven Geertman, a Department agent.[3]

Garst, in her decoy capacity, told Chandler as he was entering the store that she was underage, and asked him to buy a six-pack of Budweiser beer in cans for her. Garst testified that when Chandler came out of the store he handed her a six-pack of beer.

The events which followed are the subject of appellant's contention that, without the evidence which was admitted over its hearsay objection, there is no substantial evidence to support the Department's finding of a violation.

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

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[2]A shoulder tap operation is one which involves minor decoys who are positioned in front of a licensed premises and who ask passers-by to purchase alcohol for them, explaining that they are underage.

[3]The Department now designates as "agents" those individuals who were formerly "investigators."

Appellant has filed an appeal making the following contention: The Department's finding that a violation occurred is not supported by substantial evidence.

DISCUSSION

Appellant argues that "the entirety of the testimony regarding the sale that occurred on November 3, 2011, was from hearsay statements testified to by the minor decoy ... as well as the Department investigator ..., yet neither witness was present at the store during the transaction nor witnessed the sale from their location... their hearsay statements were offered by the Department for the truth they asserted. There cannot be a clearer example of hearsay." (App.Br. at p. 4.)

Despite the unlikely chain of events that resulted in a shoulder tap operation generating a sale of an alcoholic beverage to a person under the age of 21, we think the decision of the Department rests on a solid foundation.

Admittedly, the Department elicited much evidence that is little more than the kind of hearsay that will not support a finding. But there is also much evidence that is not hearsay, or is hearsay to which appellant's objection was withdrawn, that is enough to sustain the decision and its findings. The issues are not as complex as appellant would have us believe.

The following facts are uncontroverted. Garst asked Chandler to make a purchase of alcoholic beverages for her because she was underage. Chandler emerged from the store with a six-pack of Budweiser beer and gave it to Garst. Chandler was under 21 years of age on the day in question. Chandler testified that he purchased the beer in the licensed premises.

Geertman's testimony regarding what the clerk said about the transaction was properly admitted as administrative hearsay. It was clearly supplemental to the

testimony of Chandler that he purchased a Budweiser six-pack for Garst, and that he gave it to her. But even without it, the Department has made its case.

Garst's testimony that Chandler told her he was under 21 was also hearsay. However, appellant's counsel's objection to the question that brought out the answer was withdrawn, and there was no motion to strike the answer. (See RT 12.)

Appellant's attack on Chandler's credibility falls short. The undisputed facts are that Chandler accepted Garst's money, emerged from the store with the beer she asked him to buy, and testified without contradiction that he purchased the beer from a store clerk in the licensed premises. These non-hearsay-derived facts outweigh any doubts that might be drawn from Chandler's unwillingness to cooperate with law enforcement, or the fact that he was on probation for an unidentified criminal misdemeanor. By themselves, these uncontradicted and unrefuted facts are the substantial evidence that makes the Department's case

Appellant's reliance on the Ninth Circuit case of *Holohan v. Massanari*[4] is misplaced. *Holohan v. Massanari* involved an appeal from a termination of federal disability benefits. The case held, among other things, that, in the evaluation of disability claims, the ALJ was required to give deference to a treating physician's opinions unless there was substantial evidence to the contrary. This Board has on many occasions found that the case is inapplicable to California administrative proceedings:

> The Board has considered, and rejected, many times over, the authority cited by appellant, finding that the court's view expressed in *Holohan* "is peculiarly related to federal Social Security disability claims, and does not reflect the law of the State of California." (*7-Eleven,*

[4](9th Circuit 2001) 246 F.3d 1195.

Inc./Huh (2001) AB-7680; accord 7-*Eleven & Singh* (2002) AB-7792; *Lewis Salem, Inc*. (2003) AB-8054; *Chevron Stations, Inc.* (2005) AB-8223.)

(*Vuy Enterprises* (2007) AB-8504.)

ORDER

The decision of the Department is affirmed.[5]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[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.