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

TONY CHANG dba George's Liquor
700 North Broadway, Los Angeles, CA 90012,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
AB-7555

File: 21-303392 Reg: 99046945

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

Appeals Board Hearing: November 3, 2000
Los Angeles, CA

ISSUED JANUARY 18, 2001

Tony Chang, doing business as George's Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 25 days for his clerk selling an alcoholic beverage to a person under the age of 21, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Tony Chang, appearing through his counsel, Rick Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated December 9, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on February 9, 1995. Thereafter, the Department instituted an accusation against appellant charging that, on March 28, 1999, appellant's clerk, Michael Trieu ("the clerk"), sold an alcoholic beverage, beer, to Hiroshi Uehara, who was then 18 years of age. Uehara was working as a decoy for the Los Angeles Police Department (LAPD) at the time.

An administrative hearing was held on October 19, 1999, at which time documentary evidence was received and testimony was presented by Elva Soriano, an LAPD officer working with Uehara; Uehara ("the decoy"); appellant, and Avedik Grigorian, one of appellant's customers.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged and no defense or evidence of mitigation was established.

Appellant thereafter filed a timely appeal in which he raises the following issues: (1) the Department did not properly consider the evidence presented in mitigation of the penalty, and (2) the decision is silent as to the basis for the determination of the Administrative Law Judge (ALJ) regarding the apparent age of the minor, violating Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)).

DISCUSSION

I

Appellant contends the ALJ and the Department should have mitigated the penalty because of the clerk's mental impairment which gave rise to the violation.

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

Appellant did not contest the violation at the hearing, but presented medical records to show that the clerk suffered from episodes of "altered consciousness" after which he did not remember events occurring during that episode. (Exhibit A.) He also introduced an order from DMV, effective March 22, 1998, suspending the clerk's driver's license because "A disorder characterized by a lapses [sic] of consciousness or control renders [the clerk] incapable [of] driving a motor vehicle safely." (Exhibit B.)

Appellant argues that the testimony supports a conclusion that the clerk suffered one of his episodes of altered consciousness at the time of this violation, since it showed that he stared at the decoy's driver's license for 15 seconds, which appellant describes as "an inordinate amount of time to stare at an identification." (App. Opening Br. at 4.) Thereafter, the clerk handed the license back and proceeded to make the sale, all without comment.

Appellant also contends that he did not know of the clerk's mental problem and had not noticed anything that would make him suspicious that the clerk might not be able to properly check identification when making a sale of an alcoholic beverage.

The ALJ dealt with all these contentions in his decision and rejected them. He pointed out that while the clerk may have a mental dysfunction, the clerk did not testify, so "one can only speculate as to what [the clerk] was thinking or not thinking at the time

he made the sale. This evidence is crucial since the medical records as they are, merely explain that [the clerk's] amnesia is episodic and not total. He may have been in a perfectly normal state of mind at the time of the sale." (Finding 10.)

In that same Finding, the ALJ noted that Grigorian, one of appellant's customers, testified that he had noted "bizarre behavior" by the clerk in October 1998 and had told appellant about it. The ALJ then said, "There is nothing in the evidence to demonstrate that the [appellant] investigated the matter or took any steps at that time to monitor or restrict [the clerk's] employment activities at anytime, including and up to the date of the herein violation. On this state of the record, evidence of mitigation was not demonstrated."

We agree with the ALJ that the evidence presented did not form a basis for mitigation.

II

Appellant contends the Department's decision violated Rule 141(b)(2) because there is no evidence to support the ALJ's finding that the decoy's appearance was that of a person under the age of 21 and no analysis showing how that finding was reached.

Finding 7 states:

> "The documentary evidence requirements of Business and Professions Code Section 25660 have been complied with and no triable issue was raised with respect to the minor decoy requirements of California Code of Regulations Rule 141. The minor displayed the appearance which could generally be expected of a person under 21 years of age."

Appellant is correct that there is no analysis of what led the ALJ to make that finding. He is also correct that the only testimony about the decoy's appearance consists of a few questions telling only the decoy's height, weight, and clothing at the

time of the sale. What appellant is wrong about is his ability to raise this issue on appeal. The reason there was no testimony and no analysis is that appellant did not raise the issue of the decoy's appearance at all during the course of the administrative proceeding in his pleadings, his questions, or his closing argument.

Numerous cases have held that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; Hooks v. California Personnel Board (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; Shea v. Board of Medical Examiners (1978) 81 Cal.App.3d 564,576 [146 Cal.Rptr. 653]; Reimel v. House (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; Harris v. Alcoholic Beverage Control Appeals Board (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

Neither party has cited any authority or presented any argument regarding what constitutes “raising an issue” at the administrative hearing. However, the reason that an issue must be raised at the trial (or administrative hearing) level, is to put everyone involved on notice that a party will be using that issue in support of his or her position so that the other party has a fair opportunity to respond to it. This also gives the trier of fact fair notice that this issue is in contention and will need to be resolved in his or her decision.

The court in Harris v. Alcoholic Beverage Control Appeals Board, supra, 197 Cal.App.2d at 187, quoting Bohn v. Watson (1954) 130 Cal.App.2d 24, 37 [278 P.2d 454], made the following statement, which appears particularly pertinent to the present appeal:

> "The rule compelling a party to present all legitimate issues before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of a mere shadow-play. Had Bohn desired to avail herself of the asserted bar of limitations, she should have done so in the administrative forum, where the commissioner could have prepared his case, alert to the need of resisting this defense, *and the hearing officer might have made appropriate findings thereon*." [Emphasis added.]

The relatively few questions asked about the decoy's appearance cannot be considered "raising the issue" such that the ALJ was fairly put on notice that appellant believed compliance with Rule 141(b)(2) was in question. We have no evidence of this issue being raised in the pleadings or otherwise before the administrative hearing. Without the issue being raised by appellant, the ALJ was under no duty to address this issue.

The ALJ made a specific finding that this decoy had the appearance which could generally be expected of a person under 21, based on the totality of the evidence. This is a finding that the Appeals Board is not in a position to second guess, not having had the opportunity that the ALJ did to observe the decoy in person.

ORDER

The decision of the Department is affirmed.[2]

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

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