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

AB-7727
File: 20-327523 Reg: 00048972

PRESTIGE STATIONS, INC. dba Arco Station #6313
1100 South Main Street, Manteca, CA 95337,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: October 11, 2001
San Francisco, CA

ISSUED DECEMBER 13, 2001

Prestige Stations, Inc., doing business as Arco Station #6313 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for twenty days, with five days thereof stayed, conditioned upon one year of discipline-free operation, for its clerk having sold an alcoholic beverage (a six-pack of bottled Corona beer) to Stephanie Angel, a minor decoy, 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 Prestige Stations, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert

---

[1]The decision of the Department, dated October 19, 2000, is set forth in the appendix.

Wieworka.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 19, 1997. Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to Stephanie Angel ("Angel") on November 27, 1999. Although not stated in the accusation, Angel was acting as a decoy for the Manteca Police Department.

An administrative hearing was held on August 25, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Angel and by Greg Lassell, a Manteca police officer, concerning the transaction at issue. Appellant presented no witnesses, but did introduce a video tape recording of the transaction.

Subsequent to the hearing, the Department issued its decision which determined that the transaction had taken place as alleged in the accusation, and ordered appellant's license suspended.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department violated Rule 141(b)(5); and (2) the penalty constitutes an abuse of discretion.

DISCUSSION

I

The Administrative Law Judge (ALJ) stated:

> "[I]t is clear that the identification between the decoy and the seller, though not conducted within arms length of each other, complied with the Chun holding and that the clerk either knew or should have reasonably known that the

> identification was taking place ... . There is no evidence that the identification was conducted in a surreptitious manner."

His conclusion was predicated on Finding of Fact X:

> "After leaving the premises following the sale, the decoy returned with Officer Lassell (19-35-14) to confront the seller. Officer Lassell informed the seller that she had just sold alcoholic beverages to a minor (19-35-30) and walked behind the counter while the decoy remained at the patron side of the counter. Officer Lassell and the seller walked to a corner behind the counter where he identified the decoy as the buyer and asked the decoy if this was the clerk who had sold the beer. The decoy responded affirmatively.
>
> "At this point, Officer Lassell and the clerk were behind the register no more than ten feet, and more likely six to eight feet, from where the decoy was standing. The other clerk was also behind the counter standing briefly, in the same area. She walked to another spot away from where the officer was talking with the seller. He then asked the decoy for her identification, which she handed to him. During this time, the clerk appeared to be looking at the decoy. Officer Lassell wrote a citation to the clerk after asking her to open the register."

Appellant contends that the ALJ, without explanation, "chose to ferret out one component of testimony above all other conflicting components of testimony in order to reach compliance with Rule 141(b)(5)." Further, appellant claims the testimony accepted by the ALJ is in conflict with a video recording of the transaction shown virtually frame-by-frame during the hearing.[2]

The Department contends that the ALJ had sufficient evidence from which to conclude that the face-to-face identification had occurred - the testimony of the decoy, the testimony of the officer, and the video recording of the incident.

Officer Lassell's testimony about the face-to-face identification is the clearest, and by itself enough to support the ALJ's determination that the face-to-face identification had been conducted properly. Further, despite inconsistencies developed on cross-examination, Angel's testimony corresponds in considerable detail with that of

---

[2] The numerical references in Finding of Fact X are to this video recording.

Officer Lassell. Taken together, there is little doubt that an identification took place. The attempts by counsel to use the video recording to impugn the testimony of Officer Lassell and Angel did little more than inject confusion into the hearing, and did little to expose the truth. The difficulties experienced by all concerned in understanding what could be seen and heard on the tape, apparent in a cursory reading of the testimony, underscore its unreliability as evidence.

There are portions of the testimony of the decoy which corroborate Officer Lassell's testimony, while there are other portions where it is difficult to tell whether her testimony is consistent or inconsistent with that of Officer Lassell. On direct examination, she testified that the clerk was facing in her direction when she identified her. On cross-examination, she displayed some uncertainty whether the clerk was facing her.

There is no question but that there are conflicts in the testimony. It was the ALJ's job to resolve those conflicts as best he could.

Finally, we find it hard to believe that the clerk would have been unaware that an identification process was occurring. She had been informed she had sold alcohol to a minor. Her admission to Officer Lassell that she had sold the beer, looked at the identification, but made a mistake, was made while the minor was standing two feet from the counter and no further than ten feet away. Since the decoy remained in the officer's presence up to the point where he wrote the citation [RT 37-38], the clerk could not have been unaware of her presence or its significance to what was transpiring.

II

Appellant contends that the penalty - a 20-day suspension with five of those days stayed for one year - constitutes an abuse of discretion. Appellant argues that the ALJ appears to have considered the absence of mitigation as the equivalent of aggravation.

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, 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].) In this case, that examination leads us to conclude that appellant's complaint is legitimate.

The Department recommended a 15-day suspension. The ALJ had no quarrel with that recommendation. He wrote (Determination of Issues I.4):

> "The Department, in this matter, recommended a 15 day suspension of the license assuming cause for disciplinary action exists. Based upon the experience of the ALJ, the Department regularly has recommended such discipline in first offense cases where there are no aggravating or mitigating circumstances. The Appeals Board has not held that, under such circumstances, a 15 day suspension is an inappropriate exercise of the Department's discretion."

In what we can only conclude was the equivalent of a determination that there were aggravating circumstances, the ALJ wrote (Determination of Issues V);

> "In determining an appropriate discipline for a violation of Section 25658(a), the Department may examine not only evidence of mitigation and aggravation but also evidence, if any, of the licensee's good faith efforts to assure that his employees are receiving instructions regarding sales to youthful appearing purchasers of alcoholic beverages. Recognizing that licensees cannot be present during the entire time a premises is operating, the Department is entitled to some assurance that the licensee is taking adequate steps to prevent violations of said section.
>
> "In the case at bar, respondent offered no evidence to show that it has or is now taking such steps. The Department may exercise reasonable discretion in

> imposing a discipline that is warranted not only by the nature of the violation but also satisfies its concern that the licensee is taking reasonable steps to prevent a recurrence of the disciplinable conduct."

The Department's recommendation of a 15-day suspension followed the close of the evidence. Department counsel was well aware that there had been no evidence of employee training offered by appellant, yet, presumably, was satisfied with the recommendation he made.

The Department has routinely considered the existence and degree of employee training, such as attendance at Department LEAD programs, as an element of mitigation, sometimes resulting in a lessening of the penalty which otherwise would have been suggested. We are unaware of any instance where the absence of employee training has been considered an aggravating factor, except, perhaps, where there have been earlier licensee violations resulting from the same absence of training. In such cases, the Department may well believe that a licensee who has ignored warnings in prior disciplinary proceedings warrants an enhanced penalty. But where, as here, the licensee has committed no similar violations, we cannot approve of a harsher discipline that "standard," simply because there is no evidence that the licensee has trained its employees sufficiently.

Nor does it necessarily follow that the failure of appellant to offer evidence of employee training is evidence that there was no such training. It may well be that appellant had trained other clerks but not the clerk who made the sale. It may also be the case that appellant did not believe it had enough evidence of mitigation to offer. Its failure to do so should not result in a sanction. Whatever the case, we think the enlargement of the penalty beyond that recommended by the Department lacks a valid or reasonable basis, so, to that extent, constitutes an abuse of discretion.

ORDER

The decision of the Department is affirmed except as to penalty, which is reversed, and the case is remanded to the Department for reconsideration of the penalty in light of the comments herein.[3]

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

---

[3] 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.