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

AB-7758
File: 21-296499 Reg: 99048008

GEORGE FARHAN YAGHNAM dba The Wine Rack
36800 Cedar Boulevard, Newark, CA 94560,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

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

ISSUED NOVEMBER 29, 2001

George Farham Yaghnam, doing business as The Wine Rack (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for his clerk having sold an alcoholic beverage to a minor decoy, 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 George Farham Yaghnam, appearing through his counsel, Marvin B. Ellenberg, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

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[1]The decision of the Department, dated December 21, 2000, made pursuant to Government Code §11517, subdivision (c), is set forth in the appendix, together with a copy of the proposed decision of the Administrative Law Judge.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on June 30, 1994. Thereafter, the Department instituted an accusation against appellant charging that his clerk violated Business and Professions Code §25658, subdivision (a), by making a sale of an alcoholic beverage to a minor. The minor was a police decoy working with the Newark Police Department. The accusation also charged two prior sale-to-minor violations.

An administrative hearing was held on May 19, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented in support of the accusation by the decoy, Tiana Massey, and by Gregg Passama, a Newark police officer. Appellant presented the testimony of Michele Stevens and Zaki Ahmadi, store patrons; Jeff Peterson, the clerk; and appellant George Farhan Yaghnam.

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision which sustained the charge of the accusation and rejected appellant's contentions that there was no sale, or, alternatively, that there were violations of Rule 141(b)(2) and 141(b)(5). The ALJ ordered appellant's license revoked, but stayed revocation subject to a 60-day suspension, and indefinitely thereafter, until transferred to a person or persons acceptable to the Department.

The Department rejected the proposed decision, and made its own decision pursuant to Government Code §11517, subdivision (c). In so doing, it adopted the ALJ's findings with respect to the violation, made new findings of its own to the effect that appellant had exercised poor judgment and extreme carelessness in retaining in

his employ a clerk who had previously committed two sale-to-minor violations while employed by appellant, and ordered the license revoked.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) there was no sale; (2) Business and Professions Code §25658, subdivision (f), was violated; (3) Rule 141(b)(2) was violated; (4) Rule 141(b)(5) was violated; and (5) the penalty (revocation) constitutes an abuse of discretion.

DISCUSSION

I

Appellant contends that there was no sale, relying upon the testimony of the clerk and two independent witnesses to the effect that the clerk left the counter to answer the phone and go to the bathroom before the sale was completed, and returned only to find the decoy gone and police officers present.

This is the same contention which was made to the Administrative Law Judge, and again to the Department in connection with the Department's decision to decide the case pursuant to Government Code §11517, subdivision (c), and rejected both times.

The issue is largely one of credibility, an issue determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage

Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

We think the ALJ's summary of the testimony on this issue best explains why appellant's contention lacks merit:

> "A. In support of the argument that no sale to [the decoy] occurred, Respondent argues that when [the decoy] was in the premises standing at the counter, [the clerk] had left the counter because a phone rang in the back room, and after the phone call, he had to use the bathroom and [the clerk] did not sell the beer to the minor; that she walked off with the beer. In further support of that argument, Michelle Stevens testified that a few minutes after 8 o'clock, she had come into the store to pick-up the results of the Lotto drawing earlier that evening; that it was about 8:10 or 8:11 p.m. when she arrived and that she was in the premises for about four seconds, just long enough to walk to the counter and pick-up a Lotto ticket with results from the counter. While inside the store, she observed [the decoy] standing at the counter; that the clerk was not behind the counter at that time, and another customer, Zaki Ahmadi was about the area of the cooler. Mr. Zaki Ahmadi testified that he went to the premises after 8:00 p.m. that evening; that he had gone to the clerk to ask a question and an African-American lady had approached the counter at about the same time. About that time, the clerk said 'one second,' and left to go to a back room; that he, Mr. Ahmadi left shortly after that, and he believed the black girl walked out behind him. However, he did not recall whether the black girl had placed anything on the counter or had anything in her hand, either at the counter or when she walked out.
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> "The clerk ... admitted that he was not sure whether the decoy was the young lady he saw in the premises as he was leaving to go to the back room; Mr. Ahmadi was also not sure whether the African-American lady he saw was [the decoy.] Although Michelle Stevens claimed that she saw [the decoy] at the counter, it is noted that [the decoy] was the only African-American woman at the hearing, and Mrs. Stevens agreed with Respondent's counsel that [the decoy] was the person she had observed at the counter. It is noted that Mrs. Stevens testified that she was in the store for no more than four seconds. It is not clear from the evidence that she was able to, or had reasons to, observe the African-American lady's face. Furthermore, it is noted that after [the decoy] purchased the beer and left the premises, she and Officer Passama walked to the car where he secured the beer; during this period, customers were entering and leaving the premises. Finally, when [the decoy] reentered the premises,

> accompanied by Officer Passama, following the sale of beer to [the decoy] in order to confront the clerk, they discovered that the clerk was not behind the counter. As Officer Passama walked toward the back to attempt to locate the clerk, it is not inconceivable that [the decoy] was standing in front of the counter.
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> "[The decoy] and Officer Passama both testified that [the clerk] sold her the beer. The evidence offered by Officer Passama and [the decoy] was consistent. [The decoy]'s testimony was spontaneous and forthright, and neither she nor Officer Passama have a motive to lie. For [the clerk], this is the third time he is alleged to have sold an alcoholic beverage to a minor. Each of the two prior incidents at these premises where [the clerk] is alleged to have sold alcoholic beverages to minors resulted in a Stipulation and Waiver being signed by Respondent. Thus, [the clerk] may be concerned about the consequences and would have a motive to lie during this hearing. In any event, [the clerk] admitted that he was having difficulty recalling events, and sometimes forgets events soon after they occur. Accordingly, the testimony of [the decoy] and Officer Passama is found to be more credible. The evidence failed to establish that [the decoy] walked off the premises without the clerk having sold her the beer."

We do not attribute as much significance as appellant to the fact that Officer Passama was unable to account for the marked $5.00 bill used by the decoy to purchase the beer. We know that it is not uncommon for the marked bill to be passed out in change to a customer whose purchase occurs between the time of the sale to the decoy and the reentry into the premises by the decoy and the police officer. Whatever the explanation for its disappearance, we do not think the Department's inability to produce it outweighs the clear and direct testimony of the decoy and Officer Passama regarding her purchase of the beer.

We could add to the ALJ's analysis a critical inconsistency in the testimony of appellant's witnesses. Mr. Ahmadi testified that after having gone to the area of the cooler, he had gone up to the counter, and was standing behind the decoy, when the clerk left the counter to go to the back of the store. On the other hand, Mrs. Stevens testified that Mr. Ahmadi was in the back by the coolers, there was a black woman standing on the purchaser's side of the counter, and the clerk was nowhere to be seen.

Nor is it important that the ALJ made no specific finding that the testimony of appellant's witnesses lacked credibility. His acceptance of the testimony of the decoy and the police officer is, in our mind, the equivalent of such a determination. In order to believe appellant's version of the facts, one would have to conclude that the police officer and the decoy conspired to steal the beer, falsely accused the clerk of selling to a minor, and then testified falsely under oath, simply to make a misdemeanor arrest.

Appellant's contention is little more than an attempt to persuade this Board to conduct its own trial de novo, and must fail.

II

Appellant contends that, even if there was a sale, the failure of the Department to comply with Business and Professions Code §25658, subdivision (f), affords it a defense. That section provides, in substance, that after the completion of a minor decoy program, the law enforcement agency using the decoy shall, within 72 hours, notify licensees of the results of the program.

There is nothing in the section in question purporting to be a sanction for any failure to comply. More specifically, there is nothing in subdivision (f) that even suggests its non-compliance gives rise to a defense to a sale-to-minor charge.

Where no sanction is provided for the failure of an agency to perform an act within a specified period of time, the statute will be construed to be "'directory rather than mandatory and jurisdictional, unless a contrary intent is clearly expressed.'" (Outdoor Resorts/Palm Springs Owners' Association v. Alcoholic Beverage Control Appeals Board (1990) 224 Cal.App.3d 696, 702 [273 Cal.Rptr. 748], quoting from Woods v. Department of Motor Vehicles (1989) 211 Cal.App.3d 1263, 1267 [259 Cal.Rptr. 885].)

In any event, the decoy operation was conducted by the Newark Police Department, whose duty it was to issue the report.

III

Expressing his view that appearance is a subjective matter, appellant asserts that his attorney has never seen a decoy whose appearance and demeanor were more mature. Further, appellant asserts the decoy "would not look 'out of place'" with a 50- to 60-year-old gentleman, was wearing makeup, jewelry, and a leather jacket, and had made purchases at other establishments.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he or she testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that he or she possessed 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.

We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule.

The rule, through its use of the phrase "could generally be expected" implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of that of a person under 21 years of age. We have no doubt that it is the recognition of this possibility that impels many if not most sellers of alcoholic beverages to pursue a policy of demanding identification from any prospective

buyer who appears to be under 30 years of age, or even older.

We think it worth noting that we hear many appeals where, despite the supposed existence of such a policy, the evidence reveals that the seller made the sale in the supposed belief that the minor was in his or her early or mid-20's, and for that reason did not ask for identification and proof of age. It is in such cases, and in those where there is a completed sale even though the buyer - not always a decoy - displayed identification which clearly showed that he or she was younger than 21 years of age, that engenders the belief on the part of the members of this Board that many sellers, or their employees, do not take sufficiently seriously their obligations and responsibilities under the Alcoholic Beverage Control Act.

By the same token, we appreciate the fact that, on occasion, police have used decoys whose appearance, because of large physical stature, facial hair, or other feature of appearance, is such that a conscientious seller may be unfairly induced to sell an alcoholic beverage to that person. Within the limits that apply to this Board as a reviewing tribunal, we have attempted to deter such practices, either by outright reversal, or by stressing the importance of compliance with Rule 141. If licensees feel more is necessary, their resort must be to another body.

We do not ignore the evidence in this case that the decoy was able to purchase alcoholic beverages in, at most, three of some 15 or 20 establishments she visited. We can only assume the ALJ took this into consideration in his deliberations.

Nor is there merit to appellant's contention that the ALJ failed to consider the demeanor of the decoy. He did consider her demeanor, commenting on her voice and smile, and noting that he considered her physical appearance, her clothing, poise,

demeanor, maturity and mannerisms, and concluding that none of these made her appear older than her actual age of 18.

IV

Appellant's contention that there was an insufficient face-to-face identification is based upon the testimony of the clerk that he was standing a considerable distance from the decoy at the time the identification was said to have taken place. The ALJ instead chose to rely on the testimony of the decoy and the police officer that she was only eight feet from the clerk when she named him as the seller.

The issue is again one of credibility. The ALJ clearly indicated whose testimony he considered credible, and whose he did not. Again, appellant is asking the Board to conduct its own hearing and make its own factual findings, contrary to established law.

V

Appellant challenges the order of revocation as an abuse of discretion.

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].)

This case is an example of the Department's use of its power under Government Code §11517, subdivision (c), to impose a more severe penalty than the ALJ thought sufficient.

Although finding that good cause had been shown for revocation, the ALJ stayed his proposed order for 180 days to permit appellant to sell his business and transfer his

license. The ALJ was clearly impressed by appellant's concern for his employee's welfare and employability (Finding of Fact VII of Proposed Decision):

> "Although [the clerk] had sold alcoholic beverages to the minors on two separate occasions, which resulted in disciplinary action against Respondent, Respondent gave [the clerk] the opportunity to seek other employment rather than terminating his employment immediately because he was concerned about [the clerk]'s ability to find other employment. ([The clerk] eventually did obtain employment following the sale of beer to [the decoy].) Respondent was concerned for [the clerk] because of [the clerk]'s obvious physical and mental problems. Respondent's attempt to help [the clerk] is deserving of some consideration in determining the penalty to be imposed in this matter. The Department has recommended that Respondent's license be revoked. The public's interest, the public welfare and morals, could be protected just as well by a suspension of the license for a given period, followed by an indefinite suspension until the license is transferred to a person or persons acceptable to the Department. Therefore the penalty recommended is mitigated to reflect the circumstances described above."

The Department expressed a decidedly different view in its own penalty considerations (Finding of Fact VII of decision pursuant to §11517, subdivision (c)):

> "A. Respondent used extremely poor judgment by employing [the clerk] in the capacity of clerk at the premises. Prior to this incident, [the clerk] sold alcoholic beverages to minors on two separate occasions at this premises. [Exhibits 5 and 6; Finding of Fact VI.] Now he has sold alcoholic beverages to a minor for a third time within 36 months. There is further evidence that [the clerk] is on probation after being incarcerated for selling alcoholic beverages to a minor at another premises.
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> "Respondent's contention that he should be commended for hiring a person with physical and mental disabilities like [the clerk] is misplaced. Indeed, offering employment to a person with disabilities should be commended when the health and safety of the public is not compromised. This is not the situation in this case. Instead, the licensee has acted irresponsibly by placing [the clerk], a person the respondent knows has sold alcoholic beverages to minors on two prior occasions, in a position to sell alcoholic beverages to minors again. The licensee knew [the clerk] had a history of selling alcoholic beverages to minors, and it was unreasonable to put him in a position where it could happen again. As the facts indicate, [the clerk] did sell alcoholic beverages to a minor again and now the respondent must face the consequences.
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> "The licensee's negligence is exacerbated by his failure to provide any meaningful training to [the clerk] regarding the sale of alcoholic beverages to minors. The licensee failed to ensure that [the clerk] attend the Department's

> training even after [the clerk] sold to minors on prior occasions. Further, there is no compelling evidence of any training conducted by the licensee other than to tell [the clerk] to 'card everybody.' This obviously was ineffective.
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> "The totality of the circumstances indicate the licensee used poor judgment and was extremely careless by placing [the clerk] in a position where it was foreseeable that he would sell alcoholic beverages to minors.
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> "B. Respondent's economic considerations, to the extent there is any substantial evidence of those considerations in the record, are not mitigation."

The Department then buttressed its position with its recitals that reasonable minds can differ, that some may argue the discipline is too harsh, that the Department's purpose is not to punish but to insure compliance and act as a deterrent, and that, given the aggravated facts and circumstances, revocation is well within the Department's discretion. The Department's decision cites Harris v. Alcoholic Beverage Control Appeals Board/Belfiore (1965) 62 Cal.2d 589 [43 Cal.Rptr. 633]; MacFarlane v. Department of Alcoholic Beverage Control (1958) 51 Cal.2d 84, 91 [330 P.2d 768]; Rice v. Alcoholic Beverage Control Appeals Board (1979) 89 Cal.App.30 [152 Cal.Rptr. 285]; and Brown v. Gordon (1966) 240 Cal.App.2d 659, 667 [49 Cal.Rptr. 901], all of which support the concept that the harshness of a penalty is irrelevant if the penalty is within the authority extended to the agency. The Department has broad authority to suspend or revoke. Hence, there is no basis to say that its action in this case is an abuse of that discretion

ORDER

The decision of the Department is affirmed.[2]

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[2] 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

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

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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.