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

AB-8417
File: 21-334347 Reg: 04058018

GRACE LIU, dba U.S. Liquor
12403 Washington Boulevard, Culver City, CA 90066,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 3, 2005
Los Angeles, CA

ISSUED DECEMBER 29, 2005

Grace Liu, doing business as U.S. Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license, with revocation stayed provided appellant serves a 25-day suspension and completes three years of discipline-free operation, for selling or furnishing alcoholic beverages to persons under the age of 21 on two successive days, violations of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Grace Liu, appearing through her counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, 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 March 3, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on November 24, 1997. On September 10, 2004, the Department filed a two-count accusation against appellant charging that she sold an alcoholic beverage on March 11, 2004, to 20-year-old Bobby R. Rivero (count 1), and that she furnished alcoholic beverages on March 12, 2004, to 16-year-old Jennifer A. Contreras (count 2).

At the administrative hearing held on January 5, 2005, documentary evidence was received and testimony concerning the violations charged was presented by Rivero and Contreras, the "minors"; by Department investigators Gerrardo Sanchez and Tom Pellegrini; and by the appellant.

Investigator Sanchez testified that, in the course of a field investigation on March 11, 2004, he and his partners observed a young-looking person, later identified as Rivero, enter appellant's premises. Sanchez observed Rivero go to the counter where appellant was working and point to a display of alcoholic beverages behind the counter. He saw appellant take down two bottles, put them on the counter, and ring up the sale. He did not see appellant ask Rivero anything. Rivero paid for the alcoholic beverages and left the store with them. Sanchez and his partners stopped Rivero outside and determined that he was 20 years old. He had his purchases – a bottle of vodka and a bottle of tequila – in his backpack.

Rivero testified that he had previously purchased alcoholic beverages from appellant and she had also cashed checks for him. He said that he had never been asked for or shown identification when he purchased alcoholic beverages, but he had been asked for identification once, the first time he cashed a check. On that occasion he showed appellant his California identification card showing his true date of birth. He

stated that he had never possessed a false identification showing him to be over the age of 21.

Investigator Pellegrini testified that on March 12, 2004, he noticed a man and a very young woman enter appellant's premises. The man was later identified as Robert Medina, who was over the age of 21, and the young woman was Contreras. Pellegrini watched Medina and Contreras walk to the cooler, where Medina took out a six-pack of bottles. Medina then spoke to appellant and she went out of sight for a few minutes, returning with two more six-packs. Medina and Contreras had moved to the counter with the original six-pack, and appellant brought the additional six-packs to the counter. Pellegrini saw another brief conversation between Medina and appellant, following which appellant took two bottles down from a display behind the counter and placed them on the counter. Pellegrini testified that he saw appellant ring up the purchases, and then saw Medina turn to Contreras, who was next to him, and about two feet away from appellant, directly in front of her. Contreras handed some currency to Medina, who immediately handed it to appellant. Appellant made change and handed it to Medina, who immediately gave it to Contreras. Appellant put the alcoholic beverages in a box, and Medina and Contreras walked out, with Medina carrying the box. Outside, Medina gave the box to Contreras, who put it in the trunk of a car. Pellegrini stopped Contreras and found out she was 16 years old. The box contained three six-packs of 12-ounce bottles of Smirnoff Ice and two bottles of Smirnoff vanilla-flavored vodka.

Contreras testified that she approached Medina, who was a stranger to her, across the street from appellant's premises and asked him to buy alcoholic beverages for her. He agreed and they entered appellant's premises together. Contreras indicated what she wanted and Medina got a six-pack from the cooler and asked

appellant to get additional six-packs, which she did. At the counter, Contreras asked Medina to get some vanilla vodka for her, which he obtained from appellant. After appellant rang up the purchase, she told Medina and Contreras the amount. Contreras took money from her pocket and handed it to Medina and Medina handed it to appellant. Appellant put the money in the register and gave change to Medina, who handed it immediately to Contreras. Contreras testified that neither she nor Medina were asked their age or for identification, that she provided all the money for the purchase, and that appellant was standing in front of her, about two feet away, and was facing her when she gave the money to Medina and when he returned the change to her.

Subsequent to the hearing, the Department issued its decision which determined that the violations charged were proved and no defense was established for either one.

Appellant appealed the decision, contending that the Department violated appellant's right to due process and the prohibition against ex parte communications; part of Finding of Fact 8 (concerning count 1) and the conclusion that appellant furnished alcoholic beverages (count 2) to a minor are not supported by substantial evidence; and the Department abused its discretion in imposing the penalty.

DISCUSSION

I

Appellant asserts the Department violated her right to procedural due process when the attorney (the advocate) representing the Department at the hearing before the ALJ provided a document called a Report of Hearing (the report) to the Department's decision maker (or the decision maker's advisor) after the hearing, but before the Department issued its decision. Appellant also filed a Motion to Augment Record (the

motion), requesting that the report provided to the Department's decision maker be made part of the record.

The Appeals Board discussed these issues at some length, and reversed the Department's decisions, in three appeals in which the appellants filed motions and alleged due process violations virtually identical to the motions and issues raised in the present case: *Quintanar* (AB-8099), *KV Mart* (AB-8121), and *Kim* (AB-8148), all issued in August 2004 (referred to in this decision collectively as "*Quintanar*" or "the *Quintanar* cases").[2]

The Board held that the Department violated due process by not separating and screening the prosecuting attorneys from any Department attorney, such as the chief counsel, who acted as the decision maker or advisor to the decision maker. A specific instance of the due process violation occurs when the Department's prosecuting attorney acts as an advisor to the Department's decision maker by providing the report before the Department's decision is made.

The Board's decision that a due process violation occurred was based primarily on appellate court decisions in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 [5 Cal.Rptr.2d 196] (*Howitt*) and *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 [133 Cal.Rptr.2d 234], which held that overlapping, or "conflating," the roles of advocate and decision maker violates due process by depriving a litigant of his

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[2]The Department filed petitions for review with the Second District Court of Appeal in each of these cases. The cases were consolidated and the court affirmed the Board's decisions. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. The cases are now pending in the California Supreme Court and, pursuant to Rule of Court 976, are not citable. *(Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615, review granted July 13, 2005, S133331.)

or her right to an objective and unbiased decision maker, or at the very least, creating "the substantial risk that the advice given to the decision maker, 'perhaps unconsciously' . . . will be skewed." (*Howitt*, *supra*, at p. 1585.)

Although the legal issue in the present appeal is the same as that in the *Quintanar* cases, there is a factual difference that we believe requires a different result. In each of the three cases involved in *Quintanar*, the ALJ had submitted a proposed decision to the Department that dismissed the accusation. In each case, the Department rejected the ALJ's proposed decision and issued its own decision with new findings and determinations, imposing suspensions in all three cases. In the present appeal, however, the Department adopted the proposed decision of the ALJ in its entirety, without additions or changes.

Where, as here, there has been no change in the proposed decision of the ALJ, we cannot say, without more, that there has been a violation of due process. Any communication between the advocate and the advisor or the decision maker after the hearing did not affect the due process accorded appellant at the hearing. Appellant has not alleged that the proposed decision of the ALJ, which the Department adopted as its own, was affected by any post-hearing occurrence. If the ALJ was an impartial adjudicator (and appellant has not argued to the contrary), and it was the ALJ's decision alone that determined whether the accusation would be sustained and what discipline, if any, should be imposed upon appellant, it appears to us that appellant received the process that was due her in this administrative proceeding. Under these circumstances, and with the potential for an inordinate number of cases in which this due process argument could possibly be asserted, this Board cannot expand the holding in *Quintanar* beyond its own factual situation.

Under the circumstances of this case and our disposition of the due process issue raised, appellant is not entitled to augmentation of the record. With no change in the ALJ's proposed decision upon its adoption by the Department, we see no relevant purpose that would be served by the production of any post-hearing document. Appellant's motion is denied.

II

Appellant contends that the decision errs when it states in Finding of Fact 8 that Rivero showed his true identification to appellant on prior *occasions*, because the evidence shows he only showed his true identification to appellant once. This is essentially an assertion that the finding is not supported by substantial evidence. Appellant also contends the conclusion that appellant furnished alcoholic beverages to Contreras is not supported by substantial evidence.

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of

the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

A. FINDING OF FACT 8 (COUNT 1)

Finding of Fact 8 reads as follows:

> 8. The minor [Rivero] concedes that he had purchased alcoholic beverages on prior occasions, but denies showing the licensee any false identification for he never carried such identification. The minor testified that in addition to purchasing alcoholic beverages at the location, the licensee extended to him check-cashing privileges. The minor would cash his paychecks and on those occasions the licensee required him to produce evidence of identification. He would use his authentic and valid State of California identification card on those occasions which showed his true date of birth as May 2, 1983.
>
> In resolving the conflict in the evidence, the credibility of the witnesses as well as the internal consistency of their testimony has been taken into account. Minor Rivero is believed and respondent Liu is not.

Appellant argues that, relying on the "false premise" that Rivero showed his true identification on several occasions before the sale at issue here, the ALJ must have reasoned that appellant was not credible in asserting Rivero had shown her identification indicating that he was at least 21, because she had been "put on notice by the several 'occasions' that the minor showed his true identification with his true and accurate birth date. (Finding of Fact 8)." The implication of this argument is that the ALJ would not have reached the same conclusion if he had based his reasoning on Rivero showing his true identification only once.

We believe appellant is correct that Rivero showed his true identification to appellant only once. He testified that he was never asked for identification when purchasing an alcoholic beverage, but the first time appellant cashed his paycheck, she asked him for identification. He testified that he showed her his true California identification card, showing his true date of birth, on that one occasion.

However, our agreement with the first part of appellant's argument does not mean that appellant prevails on this issue. Whether or not the ALJ based his credibility determination on a reasoning process similar to that described by appellant in her argument, we do not think the conclusion would have changed if the singular "occasion" were substituted for the plural "occasions" in Finding of Fact 8. Revising the last two sentences of the first paragraph in that Finding results in (italics indicate changes):

> The minor would cash his paychecks and on *the first of* those occasions the licensee required him to produce evidence of identification. He *used* his authentic and valid State of California identification card on *this occasion* which showed his true date of birth as May 2, 1983.

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. The ALJ's credibility determination in this case, we are convinced, would have been the same whether the minor showed his true identification once or more than once. Therefore, the error in this finding is inconsequential and does not constitute reversible error.

B. FURNISHING (COUNT 2)

Appellant attempts to persuade the Board that the Department failed to prove appellant was sufficiently on notice that Contreras was involved in the purchase of the alcoholic beverages to give rise to a duty to prevent the sale. According to appellant, the Department's proof fell short because it relied entirely on the money being exchanged in plain view. Appellant asserts there is no evidence that appellant saw the exchange and contends the Department violated her due process rights because it did not establish "how the exchange was in plain view."

As for evidence that the exchange was in plain view, the investigator saw Contreras give money to Medina and saw Medina give change to Contreras. If the investigator, watching from outside through the front window of the premises saw this exchange, it is a fair inference that the exchange was in plain view. And if the investigator saw the exchanges of money from his position, it is a fair inference that appellant, who was only two feet away from Contreras, facing her, also saw them.

Appellant also attempts to persuade the Board it was reasonable that she did not realize that the ostensible buyer, Montero, was purchasing the alcoholic beverages for Contreras. Therefore, she argues, she was not on notice that she needed to prevent the sale. She alleges that the investigators did not stop Contreras until she placed the alcoholic beverages in the trunk of the car because even they were unable to decide that the alcohol was for the minor based on what occurred in the store, and if they didn't know until then, there was no reason for her to suspect anything earlier. This is fantasy. It is obvious from the testimony that the investigators could tell there was a high probability that alcoholic beverages were being furnished to a minor almost from the moment they saw Montero and Contreras enter the premises. If appellant did not

realize that Contreras was involved in the purchase, she either was not being vigilant or was turning a blind eye to what was in front of her. Under the circumstances, the Department carried its burden of proving that appellant furnished alcoholic beverages to Contreras, a minor.

III

Appellant contends the Department abused its discretion in imposing a penalty of stayed revocation because this was only the second sale-to-minor accusation filed against appellant. Revocation in this case, appellant argues, violates Business and Professions Code section 25658.1, subdivision (c), which states: "For purposes of this section, no violation may be considered for purposes of determination of the penalty until it has become final." Appellant also asserts that the penalty violated the penalty guidelines (4 Cal. Code Regs., § 144), which provide that a 25-day suspension is appropriate for a second sale-to-minor violation.

The decision addresses the penalty in a section just before the order entitled "Penalty Enhancement." This section sets out appellant's prior disciplinary history, which consists of a sale-to-minor violation for which appellant signed a Stipulation and Waiver in December 2003[3], agreeing to disciplinary action and waiving her right to a hearing and an appeal. The matter was resolved by appellant paying a fine in lieu of serving a 15-day suspension.

The Order begins with the statement, "Pursuant to the penalty guidelines under Department Rule 144, the penalty for a 2nd & 3rd violation within 36 months is revocation." The Order then revokes the license, with revocation stayed for three years

[3]Exhibit 6, the documentation of the prior disciplinary action, reveals that the violation took place on November 13, 2003.

and permanently thereafter provided appellant serves a 25-day suspension and operates discipline-free for three years.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

We believe the penalty in this case must be reversed and the matter remanded to the Department. The ALJ proposed, and the Department adopted, a penalty of revocation stayed, with a 25-day suspension and a three-year probationary period. The Department's original recommendation, however, was for two 25-day suspensions to run concurrently, for an actual suspension period of 25 days. (Exhibit 7.[4]) The ALJ's penalty order was a dramatic increase in the penalty.

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[4]When the testimony concluded at the hearing, and both parties rested, there was no closing argument made by either party and the Department did not state its penalty recommendation, as is usually the case. Instead, the parties filed post-hearing briefs addressing issues raised in appellant's special notice of defense, and the Department stated its recommendation at the end of its brief:

> Due to the licensee's prior history, a 25 day suspension as to each sustained count of the accusation is warranted. Should each of the two counts be sustained, such suspension time can be ordered to be served concurrently.

The Board has considered similar situations in prior appeals where ALJ's have ordered penalties greater than those recommended by the Department at the hearings.

- In *Jillian's Billiard Club of Pasadena* (1998) AB-6868, the Department recommended a 15-day suspension with 5 days stayed, but then adopted the 30-day suspension proposed by the ALJ. The Board reversed the penalty, observing that the recommendation made at the hearing must be assumed to represent the Department's "best thinking" at that particular time, and where the ALJ departs from that recommendation the inquiry "is whether there is a rational basis in the record for the ALJ's determination of what he believed was an appropriate level of discipline." The Board concluded: "While the ALJ is not bound by the Department's recommendation, a departure from it invites an explanation. The explanation which has been given is not acceptable, since it assumes or speculates about a matter as to which the record is silent."

- In *Corona* (2000) AB-7329, the Department's recommendation was a 30-day suspension with 15 days stayed, but the decision ordered a 40-day suspension with 15 days stayed. The Board noted that the ALJ did not provide a reason for imposing a penalty greater than the Department's recommendation and said,

  > Our review of the record does not reveal any unusual circumstance or matter of aggravation which would not already have been known to the Department. The Department's defense on this appeal of the increased penalty, that it reflects prior disciplines, is unpersuasive, since that same explanation was offered to Judge Lo with the Department's original recommendation.

- In *Bul Ya Song, Inc*. (2001) AB-7662, the appellant's representative stipulated to the facts as stated in the accusation, knowing that the Department's penalty recommendation was a three-year stayed revocation and a suspension of 30 days. The ALJ, however, ordered the license revoked outright. Although the decision contained a lengthy section entitled "Penalty Considerations," it contained nothing more than an iteration of the facts already known to the Department when it made its penalty recommendation. The Board said:

  > The Department's initial judgment as to appropriate disciplinary measures was made based on the facts alleged in the accusation, and no other facts regarding the violations were adduced at the hearing. The Department abused its discretion in adopting the ALJ's imposition of a harsher penalty than the Department recommended at the conclusion of the hearing in this case, and the matter must be remanded to allow the Department to correct this abuse.

In the present case, the only explanation the ALJ gives for his penalty order is to refer to rule 144, the Department's Penalty Guidelines, saying that "the penalty for a 2nd & 3rd violation within 36 months is revocation." What the guidelines actually indicate, however, is:

2nd violation of Section 25658 within 36 months	25 day suspension
3rd violation of Section 25658 within 36 months	Revocation

(Note: priors must be final – B&P § 25658.1)

It is clear that the Department, in making its penalty recommendation, did not intend to treat the two counts of the accusation as separate violations, at least for purposes of imposing a penalty in the present case. The recommendation for each violation, separately, was 25 days' suspension, the guidelines' standard for a second sale-to-minor violation. Even if both counts were sustained, the Department was willing to have the suspensions served concurrently, resulting in a penalty no more severe than if just one count were sustained. In essence, the Department was treating the two violations, for penalty purposes, as one, and that one was treated as only the second sale-to-minor violation within 36 months.

In this Board's experience, where two sale-to-minor violations are charged in the same accusation, they are frequently treated as the Department intended to treat them in this case – as separate violations requiring separate proof at the hearing, but as only one violation for purposes of imposing a penalty and for purposes of section 25658.1, i.e., the two violations count as only one "strike."

Since the Department's recommendation treated appellant's violations in this way and the decision provides no explanation for the extreme departure from this treatment, we can only conclude that the penalty here was imposed arbitrarily. If there is something in the record, unknown to the Department when it made its

recommendation, which justifies an increased penalty, we are not aware of it. We agree that a meaningful penalty is required in this instance; however, an apparently arbitrary penalty imposed which far exceeds the recommended penalty based on the Department's "best thinking" is not meaningful, but punitive.

In its brief, the Department simply repeats the ALJ's statement that these are the second and third violations in 36 months.[5] As we have said before, this situation "invites explanation" and the decision completely ignores the invitation. Under the circumstances, we believe the invitation should be extended again to allow the Department to provide an acceptable explanation or to correct what we conclude is an abuse of its discretion.

ORDER

The decision of the Department is affirmed, but the penalty is reversed and the matter is remanded to the Department for further consideration.[6]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5]The Department refers to language from *In Myung Song* (1999) AB-7205, saying that each illegal sale is a violation, regardless of whether it is charged in a separate accusation. Far from being an "issue [that] was directly addressed" in that case, however, the language referred to was no more than a side comment made in response to what appeared to be one of the theories appellants suggested. In any case, the language does not resolve the issue in the present appeal, which is the discrepancy between the penalty recommended and that ordered.

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