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

AB-9177
File: 48-53271 Reg: 10073462

LOUEL, INC., dba Ercoles
1101 Manhattan Avenue, Manhattan Beach, CA 90266,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 3, 2012
Los Angeles, CA

ISSUED JUNE 12, 2012

Louel, Inc., doing business as Ercoles (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its bartender 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 Louel, Inc., appearing through its counsel, Ralph B. Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated June 9, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was originally issued in 1958. On August 25, 2010, the Department filed an accusation charging that appellant's bartender, Paul Stockwell, sold an alcoholic beverage to 18-year-old Dimitry Malkov on November 12, 2009. Although not noted in the accusation, Malkov was working as a minor decoy in a joint operation with the Manhattan Beach Police Department and the Department of Alcoholic Beverage Control at the time.

The testimony established that on November 12, 2009, two minor decoys and a Department investigator attempted to enter the premises, and were stopped by a doorman who asked for identification. The investigator showed identification to the doorman first, and as she did so, Malkov stepped to one side. The doorman grabbed his arm and asked him for identification, which he produced. Despite having presented identification which showed his correct date of birth and a red stripe indicating “AGE 21 IN 2012," Malkov was admitted; the second decoy was denied entry. Malkov subsequently ordered a Corona (beer) from the bartender but was not asked again for identification.

At the administrative hearing held on April 19, 2011, documentary evidence was received, and testimony concerning the sale was presented by Malkov (the decoy); by Victoria Brown, a Department investigator; and Gary Moore, the president and sole shareholder of Louel, Inc.

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

Appellant thereafter filed a timely appeal contending: (1) The decoy operation

was not conducted in compliance with rule 141(a); [2] and (2) factors in mitigation were not adequately considered by the Administrative Law Judge (ALJ).

DISCUSSION

I

Appellant contends that the decoy operation was not conducted in compliance with rule 141(a), because the decoy distracted the doorman in order to gain entry to the premises, in violation of the requirement that decoy operations be conducted in a fashion which promotes fairness.

Appellant maintains that it was error for the ALJ to conclude, without explanation, that the decoy was not attempting to distract or confuse the doorman, when security video of the event shows the opposite. (App. Open. Br. at pp. 5-7.) In particular, appellant argues that the video was the best evidence that the decoy distracted the doorman and therefore it was error for the ALJ not to consider this evidence.

Unless a clear abuse of discretion is shown, the Board is bound by the factual findings of the Department:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends,*[*Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002)] 100 Cal.App.4th [1250,]1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; . . . .) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of

[2]References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

> witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

We agree with the Department (Dept. Reply Br. at p. 4) that the fact that the ALJ did not mention the video in his decision does not mean he did not consider it. The surveillance video was viewed at the administrative hearing, and, in addition, the ALJ considered the testimony of the investigator and the decoy in determining what actually transpired on the night in question. The ALJ found as follows in Findings of Fact II-A-2: "Under cross examination, the decoy credibly testified that he did not attempt to walk past the doorman without showing his identification and that he readily showed his identification when he was asked for it."

The Board is not a finder of fact, and this is a factual question. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings.

Furthermore, as the Department's Reply Brief points out, this argument is irrelevant because it was the bartender who sold alcohol to the decoy, not the doorman. Even if we accept the argument that the doorman <u>was</u> distracted, this does not obviate the bartender's responsibility to check the identification of a person who appears to be under the age of twenty-one.

II

Appellant contends secondly that factors in mitigation were not adequately considered by the ALJ when he recommended a 20-day suspension, even though the Department's attorney recommended a 25-day suspension at the administrative hearing. This recommendation was subsequently reduced by the Department to a 15-day suspension.

Appellant maintains that the ALJ misunderstood the extent of the appellant's mitigation measures when he noted in his Findings of Fact II-D-1 that the doorman now checks identification three days per week instead of two, when in fact the doorman now checks identification five days per week. Other factors in mitigation were also noted.

The Appeals Board may examine the issue of an excessive penalty raised by an appellant (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183]), but 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].)

"'[U]nless the record affirmatively indicates otherwise, the trial court is deemed to have considered all relevant criteria, including any mitigating factors.'" (*People v. King* (2010) 183 Cal.App.4th 1281, 1322 [108 Cal.Rptr.3d 333]*; People v. Holguin* (1989) 213 Cal.App.3d 1308, 1318 [262 Cal.Rptr. 331];.)

> Where, as here, the trial court has discretionary power to decide an issue, its decision will be reversed only if there has been a prejudicial abuse of discretion. "'To be entitled to relief on appeal . . . it must clearly appear that the injury resulting from such wrong is sufficiently grave to amount to a manifest miscarriage of justice. . . . [Citations.]'" (6 Witkin, Cal. Procedure (2d ed. 1970) Appeal, § 242, at p. 4234.)

(*Mission Imports, Inc. v. Superior Court* (1982) 31 Cal.3d 921, 932 [647 P.2d 1075].)

A suspension of appellant's license for a period of 15 days is in line with the standard penalty of rule 144 (4 Cal. Code Regs. §144), and clearly within the discretion of the Department. The ALJ reduced the 25-day suspension to 20-days, and in adopting the ALJ's decision, the Department further reduced the penalty to a 15-day suspension. We do not believe this represents an abuse of discretion.

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[3]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.