

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

AB-9238

File: 21-416426 Reg: 11075203

THOMAS YAZEJI, dba Riverton Liquor
10800 Magnolia Blvd., North Hollywood, CA 91601,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: November 1, 2012
Los Angeles, CA

ISSUED DECEMBER 4, 2012

Thomas Yazeji, doing business as Riverton Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his off-sale general license for 15 days, with five days thereof conditionally stayed, for his clerk 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 Thomas Yazeji, appearing through his counsel, Ralph Barat Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Casey.

¹The decision of the Department, dated January 13, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on August 12, 2004. On June 10, 2011, the Department filed an accusation against appellant charging that, on February 23, 2011, appellant's clerk, Ibrahim Younan, sold an alcoholic beverage to 19-year-old Talia Lamb. Although not noted in the accusation, Lamb was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on October 18, 2011, documentary evidence was received, and testimony concerning the sale was presented by Lamb (the decoy); by Ibrahim Younan (the clerk); Steve Yaseji (store manager); and by Karen Montoya, Douglas Tanaka, and Felipe Benavidez, Los Angeles police officers.

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

Appellant has filed an appeal making the following contentions: (1) the decision erred in determining the clerk's testimony lacked credibility; and (2) the decision fails to comply with the fairness standards of rule 141(a).

DISCUSSION

Appellant challenges the ALJ's determination that the testimony of his clerk, Ibrahim Younan, regarding the transaction lacked credibility.

The Department's decision contains three references to Younan's testimony: Finding of Fact 10 refers to Younan's testimony that the decoy did not purchase an alcoholic beverage, instead purchasing an Arizona Iced Tea, and that the decoy held the can in her hand the entire time, never placing it on the counter; Conclusion of Law 5 states: "This conclusion [that cause for suspension or revocation exists] is based on the

credible testimony of all of the witnesses other than Younan, coupled with the evidence seized at the Licensed Premises. Younan's self-serving testimony to the contrary (Finding of Fact ¶ 10) is rejected."; and paragraph 4 of Conclusion of Law 6 states: "The Respondent's rule 141(a) argument is also rejected. Lamb set the can down on the counter when she first approached it, after which Younan rang it up. (Findings of Fact ¶¶ 6-7.) Younan's testimony to the contrary was not credible."

Appellant contends that the ALJ failed to provide an adequate basis for his credibility determinations. Citing Government Code section 11425.50, subdivision (b), and *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 596 [128 Cal.Rptr.2d 514], appellant argues that the ALJ "cannot merely believe certain witnesses and disbelieved [*sic*] other [*sic*], without identifying any 'observed demeanor, manner, or attitude' of the witnesses." (App. Br. at p. 4.)

The Law Revision Comments which accompany section 11425.50 state that it adopts the rule of *Universal Camera Corp. v. National Labor Relations Board* (1951) 340 U.S.474 [71 S.Ct. 456], requiring that the reviewing court weigh more heavily findings by the trier of fact (here, the administrative law judge) based upon observation of witnesses, than findings based on other evidence.

We begin by stating the general principle that it is the province of the ALJ, as the trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (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

abuse of discretion.

The arguments and theory raised by appellants in this case have been before the Board on a number of occasions, and have been rejected without exception. The issue was discussed at length in *7-Eleven, Inc./Navdeep Singh* (2002) AB-7792, a case where appellants argued that, because the decoy was the only witness to testify about what occurred in the premises during the sale of the alcoholic beverage, and his testimony suffered from striking credibility defects, the ALJ was required to explain why the decoy's testimony was sufficient to support the Department's accusation. The Board rejected this argument, stating:

Section 11425.50 is silent as to the consequences which flow from an ALJ's failure to articulate the factors mentioned. However, we do not think that any failure to comply with the statute means the decision must be reversed. It is more reasonable to construe this provision as saying simply that a reviewing court may give greater weight to a credibility determination in which the ALJ discussed the evidence upon which he or she based the determination. We do not think it means the determination is entitled to no weight at all.

This Board has consistently rejected counsel's insistence, in other appeals, that the federal appeals court case of *Holohan v. Massanari* (9th Cir. 2001) 246 F.3d 1195 requires reversal of a decision that does not explicitly explain the basis of a credibility determination. (See, e.g., *7-Eleven and Huh* (2001) AB-7680.) There is no reason to decide differently in the present appeal. (See also *Chuenmeersi* (2002) AB-7856, and *7-Eleven, Inc./Janizeh* (2005) AB-8306.)

Appellant's reliance on *California Youth Authority v. State Personnel Bd.*, *supra*, is misplaced for several reasons. First, the case declined to express any view on whether a failure of an ALJ to identify observations of witness demeanor, manner, or attitude rendered his or her decision defective. (*California Youth Authority, supra*, 104

Cal.App.4th at 596, fn. 11.) Second, there is nothing in that decision or in logic to indicate that a failure to make such observations deprives the credibility determination of any weight at all. Finally, as we shall explain, we believe the issue of credibility is no more than a red herring, a false issue that does not reach the merits.

The ALJ was confronted with conflicting testimony. He had to decide whom to believe - the police officer and the decoy, both of whom testified that the can was placed on the counter and scanned on a scanner by the clerk, or Younan, who testified the decoy held the can in one hand, a \$5 bill in the other, and never put the can on the counter.

The ALJ would have had to consider, first, why might Officer Montoya and the decoy testify falsely that the beer was placed on the counter and then scanned by Younan? The real issue, to either of them, was whether an alcoholic beverage had been sold to a minor, not whether the beverage remained in the decoy's hand during the transaction. Younan, on the other hand, was familiar with the beverage in question, Four Loko, the container of which is a bright, variegated red and yellow can with the words "FOUR LOKO" prominently displayed. (Exhibit 2.) Younan could only explain the sale as a mistake by claiming he had not been able to see clearly what the decoy was buying. Younan's bias is obvious, and a relevant factor in any credibility determination.

But mistake or not, the sale of an alcoholic beverage to a minor, even with a belief it was not alcoholic, violates the law. Careless clerks too often make mistakes, by reading a driver's license incorrectly, or failing to ask for identification when a prudent clerk would be impelled to ask.

This leaves only appellant's claim that the decoy violated the unfairness element of rule 141 by holding on to the can while making the purchase. Appellant's brief goes

well beyond what can fairly be drawn from the record evidence on this point. Assuming for purposes of argument that the decoy was holding the can, is there anything that would suggest she was trying to hide what was in her hand? According to Younan, she had money in her other hand, so she obviously intended to pay for something. But what justifies the accusations in appellant's supplemental brief (at pp. 2, 7, 8, passim) that the decoy "attempted to hide the contents of the beverage" or that the decoy was "taking advantage of the situation" by not correcting the clerk? How can a decoy have an obligation to correct a mistake of a seller when there is no reason to believe there has been a mistake?

We know from the many cases we have heard that there are more than a few instances where retail clerks have knowingly sold to minors, or have done so carelessly, even accidentally. But, in a case such as this, where a decoy is entitled to assume the clerk is doing exactly as he appears to be intending to do, we are unwilling to find from a decoy's silence or acquiescence any unfairness of the kind contemplated by rule 141(a).

What prevented Younan from asking or reaching for the beverage before he rang the sale? Appellant's attempt to shift blame to the decoy is simply wrong. Even if we were to grant Younan's testimony full credibility, we cannot infer deception on the part of the decoy or some kind of unfairness simply because Younan did not examine the product she held.

We have carefully reviewed the record, and are firmly satisfied that the decision, its findings, and the ALJ's credibility determinations are supported by substantial evidence.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
FRED ARMENDARIZ, MEMBER
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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 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.