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

AB-9339
File: 21-451302 Reg: 12077417

EL RIO LIQUOR, INC.,
dba El Rio Liquor
2910 Vineyard Avenue, Oxnard, CA 93036-1633,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 7, 2013
Los Angeles, CA

ISSUED DECEMBER 26, 2013

El Rio Liquor, Inc., doing business as El Rio Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its 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 El Rio Liquor, Inc., appearing through its counsel, Ralph Barat Saltsman and Jennifer L. Carr, 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 January 22, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on April 24, 2007. On August 29, 2012, the Department filed an accusation charging that appellant's clerk, Alejandro Rivas (the clerk), sold an alcoholic beverage to 18-year-old Jason Abboud on April 18, 2012. Although not noted in the accusation, Abboud was working as a minor decoy for the Ventura County Sheriff's Department at the time.

At the administrative hearing held on December 5, 2012, documentary evidence was received, and testimony concerning the sale was presented by Abboud (the decoy) and by Christine Rettura, a Ventura County Sheriff's deputy. Appellant presented no witnesses.

Testimony established that on April 18, 2012, Deputy Rettura entered the licensed premises followed seconds later by the decoy. The decoy went to the cooler and selected a 6-pack of Bud Light beer which he took to the counter. The clerk rang up the sale without asking for identification and without asking any age-related questions. After the decoy had paid for the beer, but before he received change, he pulled up the hood on his sweatshirt. The decoy exited the premises, after which the deputy identified herself to the clerk and explained the violation. The decoy reentered the premises with another deputy and was asked who had sold him the beer. The decoy identified the clerk while standing approximately 3 feet from him. A photo of the decoy and clerk was then taken (Exhibit A) and the clerk was cited.

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

Appellant filed a timely appeal contending: (1) The decoy operation was unfair,

and did not comply with rule 141(a),[2] because the decoy did not display the appearance required by rule 141(b)(2); (2) the ALJ abused his discretion by failing to make any findings on the credibility of the decoy; and (3) the face-to-face identification was unduly suggestive.

DISCUSSION

I

Appellant contends that the decoy did not display the appearance which could generally be expected of a person under the age of 21, and therefore the decoy operation was unfair.

Rule 141(a) provides:

> A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

Rule 141(b)(2) provides:

> The decoy shall display 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 at the time of the alleged offense.

Appellant contends the ALJ failed to consider evidence that the decoy was nearly 6 feet tall and weighed over 200 pounds; that he wore a hood on his head during part of the operation; and that he had been a police Explorer for 2 ½ years. (App.Br. at pp. 5-6.) The decoy's appearance and experience, it contends, contributed to the decoy appearing over the age of 21, and made the decoy operation unfair.

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[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.

This Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our 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.4th [1250,] 1254 [122Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.4th 364, 367 [3 Cal.Rptr.2d 770;. . . 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. of 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 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*. (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826] (*Masani*).)

The ALJ made the following findings about the decoy's appearance (Findings of Fact ¶¶ 5, 10, and 11):

> FF 5. Abboud appeared and testified at the hearing. On April 18, 2012, he was 5'11" tall and weighed approximately 205 pounds. He wore a black sweatshirt, jeans, and black Vans. His hair was cut very short. (Exhibit 2.) At the time of the hearing he was 6' tall and weighted 195 pounds.
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> FF 10. Prior to April 18, 2012, Abboud had been an Explorer for 2½ years. He had never been a decoy before, nor had he participated in a shoulder-tap operation.
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> FF 11. Abboud appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of Rivas at the Licensed Premises on April 18, 2012, Abboud displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Rivas.

Appellant contends that the decoy's large physical stature and experience as an

Explorer gave him an appearance which is not generally associated with someone under the age of 21. It maintains that such an appearance runs contrary to the promotion of fairness. Appellant also contends that by pulling up the hood on his sweatshirt during the operation, the decoy made it more difficult for the clerk to determine his age. The ALJ made the following finding and came to the following conclusion on this point (Finding of Fact ¶ 9 and Conclusion of Law ¶ 5):

> FF 9. The Respondent played a video of the sale during the hearing. [fn. omitted.] The video shows, and the witnesses confirmed, that Abboud pulled up his hood during the course of the transaction. He did this after he paid but before he received any change. Abboud's appearance with the hood up is the same in the video as it is in Exhibit A — his face is fully visible as is a portion of the top of his head (including some of this hair). At no point was his face covered.
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> CL 5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141(a) [fn. omitted] and rule 141(b)(2). Accordingly, the Respondent argued that the accusation should be dismissed pursuant to rule 141(c). The crux of the Respondent's argument is that Abboud's appearance was affected by the hood and, further, by pulling it up before the transaction was completed, Abboud made it more difficult for Rivas to determine his age.
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> This argument is without merit. First and foremost, Rivas did not testify. It is pure speculation for the Respondent to argue that Rivas' opinion of Abboud's age was affected by the hood, particularly since the video and Exhibit A clearly demonstrate that Abboud's face was fully visible at all times. Moreover, Rivas had the opportunity to view Abboud without the hood from the moment Abboud first approached the counter up until the moment he paid. In short, Abboud had the appearance generally expected of a person under the age of 21 (Finding of Fact ¶ 11) and his appearance was not affected by the hood.

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, and an equally partisan response that he did not. We have carefully observed the photographs in Exhibit A and Exhibit 2, and see no reason to depart from our general rule of deference to the ALJ's factual determination regarding the decoy's

appearance. Appellant's contentions lack merit.

II

Appellant contends that the ALJ abused his discretion when he disregarded its arguments about the credibility of the decoy and failed to make any credibility findings. It maintains that because the decoy had difficulty remembering some details about the decoy operation his credibility was called into question.

It is a fundamental precept of appellate review that it is the province of the administrative law judge (ALJ), as trier of fact, to make determinations as to witness credibility and to resolve any conflicts in the testimony. (*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.

Citing *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 596 [128 Cal.Rptr.2d 514], appellant argues that the Appeals Board is precluded from evaluating any finding made by the ALJ because he failed to make a credibility finding about the decoy's testimony. (App.Br. at p. 8.)

The argument raised by appellant in this case has been before the Board on a number of occasions, and has 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 the argument in that case, and we do so here as well.

At the administrative hearing, the ALJ was confronted with conflicting testimony in that the decoy and sheriff's deputy each recalled certain details of the decoy operation differently. The ALJ was required to decide whom to believe, and did so — as the trier of fact is entitled to do. At no point during the administrative hearing was the decoy's testimony impeached, and there was nothing in the record that would cast doubt on his testimony or to suggest that he displayed a lack of credibility.

The Board is not the finder of fact, and the question of whether the decoy's testimony was credible is a factual question to which we accord our usual deference to the ALJ.

III

Appellant contends that the face-to-face identification of the clerk failed to comply with rule 141(b)(5) because it was "unduly suggestive." (App.Br. at p. 9.)

Rule 141(b)(5) provides:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

Appellant maintains that the face-to-face identification was unduly suggestive because the sheriff's deputy made the initial contact with the clerk, and informed him that he had sold an alcoholic beverage to a minor. Appellant also alleges that the face-to-face identification failed to strictly comply with this Board's decision in *Chun* (1999) AB-7287, which defined face-to-face identification as:

> . . . the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be,

> knowledgeable that he or she is being accused and pointed out as the seller.

Appellant maintains that the identification was actually made by the deputy, rather than the decoy, and thus failed to comply with the requirement that the decoy make the identification.

Appellant fails to support either of these arguments, and as the ALJ found in Findings of Fact ¶ 7, the face-to-face identification complied with rule 141(b)(5):

> FF 7. Dep. Rettura contacted Rivas, identified herself, and explained the violation. Abboud re-entered the License Premises with another deputy. Dep. Rettura asked Abboud to identify the person who sold him the beer. Abboud pointed to Rivas and said that he had. Abboud and Rivas were approximately three feet apart at the time. A photo of the two of them was taken (Exhibit A), after which Rivas was cited.

The Board has addressed this issue before, rejecting the same argument appellant makes here. In *7-Eleven, Inc./M&N Enterprises, Inc*. (2003) AB-7983, the Board said:

> The fact that the officer first contacts the clerk and informs him or her of the sale to a minor has been used to show that the clerk was aware of being identified by the decoy. (See, e.g., *Southland & Anthony* (2000) AB-7292; *Southland & Meng* (2000) AB-7158a.) ¶ . . . ¶ As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

Appellant's contentions are not supported by the evidence. While an "unduly suggestive" identification is impermissible, appellant has presented no evidence that the identification in this instance was unduly suggestive.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, 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.