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

AB-9468
File: 47-509269 Reg: 13079366

ISLANDS RESTAURANTS, L.P.,
dba Islands Fine Burgers and Drinks
23397 Mulholland Dr., Woodland Hills, CA 91364-2734,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: March 5, 2015
Los Angeles, CA

ISSUED MARCH 24, 2015

Islands Restaurants, L.P., doing business as Islands Fine Burgers and Drinks (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 15 days because its clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellant Islands Restaurants, L.P., appearing through its counsel, Ralph Barat Saltsman of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated July 28, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on May 27, 2011. On October 16, 2013, the Department filed an accusation charging that appellant's bartender, Vernon Taylor, sold an alcoholic beverage to 19-year-old Christian Alvarez on June 7, 2013. Although not noted in the accusation, Alvarez was working at the time as a minor decoy for the Los Angeles Police Department (LAPD).

At the administrative hearing held on January 14, 2014, documentary evidence was received, and testimony concerning the sale was presented by Alvarez (the decoy); by Jessie Simon, an LAPD officer; by Jeff Scharbrough, appellant's Regional Manager; and by Siobhan Moser and Andrew Fox, both of whom were working as servers at the licensed premises on the date of the sale.

Testimony established that on the date of the operation, the decoy entered the licensed premises and took a seat at the bar counter. Officer Clymer of the LAPD sat at a nearby table. The decoy ordered a Bud Light from the bartender, Taylor. The bartender asked to see his identification. The decoy handed his California driver's license to the bartender. The bartender looked at the identification for a few seconds, then handed it back to the decoy. The bartender then poured a drink from a tap labeled "Bud Light" and served it to the decoy.

The decoy waited for the officers. Officer Jessie Simon entered the licensed premises, approached the decoy, and secured the glass of beer. Officer Simon asked the decoy to identify the person who served him the beer. The decoy pointed to the bartender and said that he had. The decoy and the bartender were standing across the bar from each other at the time, approximately five feet apart.

According to the decoy's testimony, he made eye contact with the bartender

while pointing at him.

Officer Simon advised the other officers that the decoy had identified the bartender. They contacted the bartender and explained the violation to him. A group of them moved to an empty part of the licensed premises, where a photograph of the decoy and the bartender was taken, after which the bartender was cited.

After the hearing, the ALJ submitted a proposed decision to the Department, which it declined to adopt pursuant to Government Code section 11517(c)(2)(E). The Department later issued its own decision finding that the charge was proven and no defense was established. The Department's decision imposed a fifteen-day suspension.

Appellant filed this appeal contending that the decision issued by the Department pursuant to section 11517(c)(2)(E), which concluded the decoy operation complied with rule 141(b)(5),[2] was not supported by substantial evidence.

DISCUSSION

Appellant argues that the evidence in the record is insufficient to support the Department's determination that there was compliance with rule 141(b)(5). Appellant contends the testimony from the Department's two witnesses did not establish reasonable awareness on the part of the bartender the identification was being made. (App.Br. at p. 8.) Specifically, appellant maintains that the Department's finding that the decoy made eye contact with the bartender during the identification is insufficient to establish that the bartender was reasonably aware the "identification" was occurring in light of the other factual circumstances surrounding the identification, including: the

[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.

physical separation between the two, Officer Simon's act of pulling the decoy away from the bar, the bartender's interaction with Officer Clymer, the fact that Officer Simon was in plain clothes, and the fact that two of appellant's other employees testified that they did not see the identification take place. (*Id*. at pp. 8-11.)

As an initial matter, the Appeals Board reviews only the Department's decision, *not* the ALJ's proposed decision. Government Code section 11517, subdivision (c), provides that the Department may adopt a proposed decision in its entirety, adopt it with some modification, or reject it. If the Department rejects the decision, it may refer the matter back to the ALJ to take additional evidence or it may decide the matter itself, making its own findings, determinations, and order. If the Department issues its own decision, the rejected proposed decision "serves no identifiable function in the administrative adjudication process or, for that matter, in connection with the judicial review thereof." (*Compton v. Bd. of Trustees* (1975) 49 Cal.App.3d 15, 158 [122 Cal.Rptr. 493].)

Rule 141(b)(5) states:

> 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.

The rule provides an affirmative defense. As such, the burden of proof is on the appellant. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

In *Chun* (1999) AB-7287, this Board held:

> The phrase "face to face" means that the two, 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.

(*Id.* at p. 5 [reversing where decoy testified he "didn't approach the clerk at all"].)

In *Greer* (2000) AB-7403, the appellants argued that the face-to-face identification did not comply with rule 141(b)(5) because "the police officer had no recollection whatsoever if there was a face to face identification," and because "at no time was it ever brought out by any witness that the clerk was facing the minor and was observing this so-called pointing out." (*Id.* at p. 3.) We rejected that position and observed:

> Appellants' argument turns the requirement of the rule on its head. The minor decoy must identify the seller; there is no requirement that the seller identify the minor, nor is it necessary for the clerk to be actually aware that the identification is taking place.

(*Id.* at p. 4.)

Subsequent cases have consistently emphasized that it is not necessary for the clerk to *actually* be aware of the identification taking place; it is enough that he *reasonably ought to be* aware that he is being pointed out as the seller. (See, e.g. *7-Eleven, Inc./Sawaya* (2014) AB-9364; *Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2013) AB-9347; 7-*Eleven, Inc./The Eleventh Dimension, Inc.* (2011) AB-9097; *7-Eleven, Inc./Christensen* (2003) AB-7908.) Compliance with rule 141(b)(5) "does not require a 'face-off' or any overt 'acknowledgement' to accomplish these purposes." (*7-Eleven, Inc./Sawaya*, *supra*, at p. 5.)

Indeed, if the rule were interpreted to require direct acknowledgment, it would be very easy for a seller to entirely undermine a decoy operation simply by remaining wordless and feigning utter ignorance of the decoy's presence — for example, by maintaining a studious gaze at his own feet. For that very reason, this Board has held that eye contact between decoy and seller is not required:

> Strict adherence to Rule 141(b)(5) does not require, as appellant seems to suggest, an "eyeball to eyeball" confrontation. We do not find it surprising that a seller may avert his or her eyes away from a person pointing to her moments after being apprised she has made an illegal sale. By no means does that suggest any unawareness of what is happening and why.

(*G4 Consortium, LLC* (2010) AB-9061, at p. 4.)

The Department's decision adopts, with no changes, the vast majority of the factual findings outlined in the ALJ's proposed decision. The sole exception is Finding of Fact 7, to which the Department added a single sentence regarding eye contact between the decoy and the bartender:

> 7. Alvarez waited for the officers. Officer Jessie Simon entered the Licensed Premises, approached Alvarez, and secured the glass of beer. Officer Simon asked Alvarez to identify the person who had served him the beer. Alvarez pointed to Taylor and said that he had. *While pointing to Taylor, Alvarez made eye contact with him.* Alvarez and Taylor were across the bar from each other at the time, approximately five feet apart.

(Findings of Fact ¶ 7, emphasis added.) Additionally, the Department adopted, with no changes, the following finding relevant to a rule 141(b)(5) analysis:

> 8. Ofcr. Simon advised the other officers that Alvarez had identified Taylor. They contacted Taylor and explained the violation to him. The group of them moved to an empty part of the Licensed Premises, where a photograph of Alvarez and Taylor was taken (Exhibit 4), after which Taylor was cited.

(Findings of Fact ¶ 8.)

Appellant's case relies largely on a comparison of the Department's final decision and the ALJ's Proposed Decision. Appellant correctly points out that the Department's decision adds only a single fact (the decoy's eye contact with the bartender), yet reaches a conclusion opposite that of the ALJ. According to appellant, "[t]he Department's Section 11517 decision, therefore, demonstrates a lack of understanding of the ALJ's decision and the bases therefor." (App.Br. at p. 3.)

We do not review the ALJ's decision for error, however; as explained above, we review only the Department's decision. We do not ask whether the Department's decision is a better decision than the ALJ's, but rather, whether the Department's inferences and conclusions, standing alone, are reasonable, and whether its findings are supported by substantial evidence. The existence of a proposed but rejected decision reaching a different conclusion does not function as a evidentiary presumption bolstering appellant's case.

Appellant contends that "none of the Department's witnesses established that the alleged seller of alcoholic beverages was aware, or reasonably should have been aware, that the particular decoy in question was identifying him as the alleged seller." (App.Br. at p. 8.) It is true that, apart from the photographic evidence of the bartender standing alongside the decoy, who is holding a large mug of beer (Exhibit 4), there is no evidence that the bartender was *actually* aware that he was being pointed out as the seller. The bartender did not testify. There is, however, testimony suggesting that he *ought to have been aware* that he was being pointed out as the seller. The decoy, for instance, testified:

> [MS. BELVEDERE]
>
> Q. Now, after you had that glass served to you, what did you do next?
>
> [THE DECOY]
>
> A. Well, I just simply waited for Officer Simon to come in.
>
> Q. Okay. And did she come in?
>
> A. Yes.
>
> Q. Okay. How long would will [*sic*] you say or how much time past [*sic*] from the time that you were served that glass to the time that Officer Simon came in?

A. About 30 seconds.

[¶ . . . ¶]

Q. Okay. So after Officer Simon came in, what happened next?

A. Well, they asked me who poured me the drink.

Q. And when you say, they asked me?

A. Officer Simon.

Q. Okay. So Officer Simon asked you who poured you the drink?

A. Yes.

Q. What was your response?

A. I pointed to him, at the person, and I said, that's him.

Q. When you say you pointed at him, is that the person — is that the bartender, that served you the glass?

A. Yes.

Q. When you pointed at him and said that's him, how close were you standing to him?

A. No more than five feet.

Q. Were you facing him or were you in some other configuration?

A. Yes, I was facing him.

Q. How far apart were you?

A. No more than five feet. Just across. Just across the table.

Q. Okay. The table or was it the bar?

A. The bar.

Q. So at the time you identified him, you were still across from the bar top?

A. Yes.

Q. And when you pointed at him, did you make eye contact at all?

A. I did.

(RT at pp. 17-19.) On cross, the decoy testified that Officer Simon pulled him aside before conducting the identification:

[MR. SALTSMAN]

Q. When Officer Simon pulled you to the side, was it to the left or to the right? Do you remember?

[THE DECOY]

A. To the right.

Q. All right. And where did she pull you?

A. Well, she just pulled me two feet away from her.

Q. A couple feet from where you started?

A. Yes.

[¶ . . . ¶]

Q. Okay. All right. She pulled you a couple of feet to the right of where you were when you received the glass, is that right?

A. Yes.

Q. And you said, that's him; is that right?

A. Yes.

Q. When you said, that's him, who were you referring to?

A. The bartender.

Q. All right. And what was the bartender doing at that point, if you know?

A. I believe he was getting questioned for an ID.

Q. By whom?

A. By Officer Simon.

Q. Okay. So Simon was with you a little bit to the side of where you started. Officer Clymer was standing where you had been standing earlier?

A. Yes.

Q. And he was engaged with the bartender by asking him for his identification?

A. Yes.

(RT at pp. 28-30.)

The decoy's testimony supports the inference that the bartender reasonably should have known he was being pointed out as the seller. He was no more than five feet away. The only obstacle between them was the bar itself — which was no obstacle at all, given that the the bartender had sold alcohol to the decoy across the same bar mere moments before. The decoy testified that he made eye contact with the bartender as he identified him. (RT at p. 19.) Even if Officer Clymer was also asking the bartender for his identification at the time, the act of producing identification does not demand undivided attention. The Department could reasonably infer that Officer Clymer's conversation was not so all-consuming that it prevented the bartender from realizing he was being pointed out as the seller.

While Officer Simon's testimony is less clear, it largely supports the decoy's description of the events. On direct, the following exchange took place:

[MS. BELVEDERE]

When you got to the minor's location, what did you do?

[OFFICER SIMON]

I secured the liquid and I asked him who served him the beer.

[¶ . . . ¶]

Q. After you asked the decoy who served him the beer, what was his response?

A. He pointed at the bartender.

Q. Okay. Where [*sic*] there any other bartenders if you remember behind the bar at that time?

A. I was focused on my task. I wasn't paying attention.

Q. At the point when the decoy pointed to the bartender and said, he did — when I say they, I am speaking about the bartender and the decoy, were they across each other [*sic*] or side-by-side?

A. Opposite sides of the bar.

Q. Okay. And what side of the bar was the bartender on?

A. The employee side.

Q. And what side was the decoy on?

A. Customer side.

Q. How far apart were they?

A. A few feet.

Q. Okay. And what did you do after that identification process?

A. I advised the rest of my unit who the decoy pointed out and they approached him and advised him what had happened and asked him for his ID and got a photograph.

Q. Okay. Excuse me. Let's break this down again. After the identification — strike that. At the time of the identification, where was Officer Clymer?

A. He was in the location, a few feet from the minor. I can't tell you specifically. I wasn't focused on his whereabouts.

(RT at pp. 39-41.) On cross, it is worth noting that Officer Simon did not recall pulling the decoy to the side:

[MR. SALTSMAN]

Okay. When you first entered the premises, you went directly to Mr. Alvarez; is that correct?

[OFFICER SIMON]

Yes.

Q. And did you pull him to the side? One side or the other in order to ask him a question?

A. No.

Q. When he testified, he said that you pulled him to the side a couple feet. Is his recollection wrong?

A. We may be talking about two different things.

Q. I don't know. When you first approached him, at some point shortly thereafter, you asked him who it was who sold him the drink; is that right?

A. Yes.

Q. Okay. Mr. Alvarez says that when you asked him that question, you had just pulled him to the side a few feet away from where he had been. Away from the beer. Away from where he had been at the bar counter. Do you recall doing that?

A. I do not recall doing that.

Q. Do you have a specific recollection one way or the other?

A. I know what I do every time. I don't have a specific recollection of doing that and I don't do that. But again, he is 20 years younger than I am. He has a better memory.

(RT at pp. 49-50.)

Officer Simon's failure to recall whether she pulled the decoy aside does not change the reasonableness of the Department's inferences. If Officer Simon *did* pull the decoy away, as he stated, he was less than five feet from the bartender, standing across the bar. If she did not, he was even closer.

The testimony of Officer Simon and the decoy supports the Department's inference that the identification took place and complied with rule 141(b)(5).

Appellant, however, directs this Board to testimony from two servers working at the time suggesting the identification did *not* take place. According to appellant, this contradicts the testimony supplied by Officer Simon and the decoy, and undermines the Department's decision.

In its substituted decision, the Department reaches the following conclusion regarding the testimony of the two servers:

> Respondent contends that two employees testified that they did not observe the decoy identifying the bartender. However, these employees also testified that they weren't focused on what was going on. As such, their testimony does not rebut both the decoy's and the officer's testimony that the identification took place.

(Conclusions of Law ¶ 8.iii.) We have reviewed the testimony and find no error in this conclusion.

Moser, for instance, testified that she saw a "commotion" in the bar area; however, she also testified she wasn't made aware that the bartender was cited. (RT at p. 75.) On direct, the following exchange took place:

> [MR. SALTSMAN]
>
> Q. You saw law enforcement people where you learned [*sic*] to be law enforcement officers come into the premises to that area; is that right?
>
> [MS. MOSER]
>
> A. Yes.
>
> Q. Did you see a photograph of him being taken together with Mr. Taylor?
>
> A. I noticed it. I wasn't paying direct attention. I was still taking care of tables at the time. But yes, i [*sic*] did notice them taking a

photograph.

[¶ . . . ¶]

Q. Did you see Mr. Taylor get a citation?

A. I saw him sit down with the officer and was filling out paperwork.

Q. You don't know exactly what it was?

A. I don't know exactly what it was. I just saw him sitting down.

Q. At any time, did you see Mr. Alvarez, our decoy, point at Mr. Taylor?

A. No.

Q. Other than in the photograph?

A. No.

Q. And were you watching the sequence as it evolved in front of you?

A. I was still, obviously, taking care of tables, so I wasn't paying direct attention. No, I did not see him identify Vernon.

Q. But you did see the officers come in?

[¶ . . . ¶]

A. Yes.

Q. You did see the paperwork being filled out?

A. Yes.

Q. You did see the photograph being taken?

A. Yes.

Q. But you didn't see Mr. Alvarez point at, other than the photograph, point at Mr. Taylor at any time?

A. Correct.

(RT at pp. 79-81.)

Moser twice points out, unprompted, that she wasn't paying direct attention because she was tending her tables. Moreover, Moser testified that she was working the yellow section highlighted in Exhibit E (RT at p. 75), and the decoy sat in the chair marked "CA" (RT at pp. 77-78). If she was still tending her tables, it would be reasonable to infer that her view of the decoy's actions was, at best, erratic, since her section was separated from the decoy's seat by two rows of tables and half the bar itself, and serving four of her five tables would require her to turn her back on the bar altogether. (See Exhibit E.) Moser did testify that she was not at her tables, however, but in the kitchen getting ranch when "a bunch of people" rushed into the bar. (RT at p. 76.)

Moser's testimony that she didn't see the decoy point at the bartender is unhelpful. One possible inference, advocated by appellant, is that the face-to-face identification did not take place. On the other hand, it would be equally reasonable to infer — as the Department did — that she was distracted and simply missed the identification taking place.

Fox, the second server, recalled even less. He could not remember which section he was working on the day of the operation (RT at pp. 82-83), though he did recall walking back and forth near the bar area. (See RT pp. 83-84.) He concurred with Moser's placement of the decoy at the bar. (RT at p. 83.) Regarding the interaction between the bartender, the decoy, and law enforcement, he testified as follows:

[MR. SALTSMAN]

Q. And did you — you knew Vernon Taylor; is that correct?

[MR. FOX]

A. That's correct.

Q. And you saw him working that night?

A. Yes.

Q. Did you see Vernon Taylor ask for — strike that — ask for identification?

A. No.

Q. You didn't see him do that?

A. No, I wasn't — no.

Q. You weren't paying attention?

A. I wasn't paying attention.

Q. Did you see individuals who you later found out were law enforcement officers enter the bar area?

A. Did I see them enter the bar area or did I see them in the bar area?

Q. First question is, did you see them enter the bar area?

A. No.

Q. Did you see them in the bar area?

A. Yes.

Q. When you saw them in the bar area, where was Mr. Alvarez at that point?

A. Still seated.

Q. Where was Mr. Taylor if you know?

A. I don't.

Q. Okay. To your knowledge and recollection was he still in the same area near Mr. Alvarez when law enforcement officers were in the bar?

A. I can't say.

Q. You can't say?

A. I can't say.

Q. Okay. At some point, did you see a photograph taken of Mr. Taylor together with Mr. Alvarez?

A. Yes, sir.

Q. You saw that?

A. Yes, sir.

Q. All right. Do you recall whether or not you saw Mr. Taylor filling out documents or participating with [*sic*] some paperwork?

A. I did.

Q. At any time, did you see Mr. Alvarez, other than in the photograph, point at Mr. Taylor to identify him?

A. No, sir.

(RT at pp. 85-87.) On cross, the following exchange took place:

[MS. BELVEDERE]

Q. How much time past [*sic*] that — strike that — when did you first notice Mr. Alvarez at the bar?

[MR. FOX]

A. I don't know exactly what time. But when I walked by, I saw him seated there by himself.

Q. Okay. At some point, you saw the officer at the table with Mr. Alvarez?

A. That's correct.

Q. How much time would you say past [*sic*] between the first time you saw him at the bar and at the time [*sic*] you saw Mr. — I'm sorry — Vernon Taylor at the table with the officers approximately?

A. Ten, 15 minutes.

Q. Okay. During that entire 10 to 15 minutes, was your 100 percent attention fixated on what Mr. Taylor was doing?

A. No.

(RT at pp. 87-88.) On redirect, counsel for appellant clarified:

[MR. SALTSMAN]

Q. During that timeframe that you just indicated, did you see Mr. Alvarez?

[MR. FOX]

A. Yes.

Q. Okay. And even though you were doing other things, were you also noticing Mr. Alvarez and what he was doing?

A. Yes.

Q. All right. Same thing with Mr. Taylor?

A. Yes.

(RT at p. 88.)

Though Fox insists on redirect that he was noticing the bartender's actions, he didn't observe the bartender ask for the decoy's identification, and he couldn't even recall whether the bartender was in the same area of the bar, near Alvarez, when law enforcement officers were in the premises. It is, perhaps, unsurprising that he did not see the decoy point to the bartender. As with Moser, one possible inference is that the identification did not take place; however, it is also reasonable to infer that Fox, as he testified, simply "wasn't paying attention." (See RT at p. 85.)

Regarding the testimony offered by Moser and Fox, the Department's inferences and conclusions are supported by substantial evidence. We see no grounds to reverse.

At oral argument on this appeal, appellant claimed that the ALJ, in his proposed decision, found the decoy not credible and gave weight to the servers' testimony instead. According to appellant, the Department was bound by these credibility

findings, and therefore could not have reached the conclusion that the operation complied with rule 141(b)(5).

Government Code section 11425.50, subdivision (b), addresses the weight to be given to a factual finding based on a witness credibility determination by the trier of fact:

> If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

The Law Revision Commission comments further explain the extent to which such observations are binding:

> Findings based substantially on credibility of a witness must be identified by the presiding officer in the decision made in the adjudicative proceeding. . . . However, the presiding officer's identification of such findings is not binding on the agency or the courts, which may make their own determinations whether a particular finding is based substantially on credibility of a witness. Even though the presiding officer's determination is based substantially on credibility of a witness, the determination is entitled to great weight *only to the extent the determination derives from the presiding officer's observation of the demeanor, manner, or attitude of the witness*. Nothing in subdivision (b) precludes the agency head or court from overturning a credibility determination of the presiding officer, after giving *the observational elements* of the credibility determination great weight, whether on the basis of nonobservational elements of credibility or otherwise. See Evid. Code [§] 780. Nor does it preclude the agency head from overturning a factual finding based on the presiding officer's assessment of expert witness testimony.

(Cal. Law Revision Com. com., Gov. Code § 11425.50.)

In *California Youth Authority*, the court held the statute's mandate that observation-based credibility determinations be given "great weight" applied not only to agency decisions, but also to proposed decisions by administrative law judges. (*Cal. Youth Authority v. State Personnel Bd.* (*CYA*) (2002) 104 Cal.App.4th 575, 595 [128

Cal.Rptr. 514].) However, citing the above language from the Law Review Commission, the court concluded that section 11425.50 did not apply to the case before it because, in the proposed decision, the ALJ "[had not identified] any 'observed demeanor, manner, or attitude' of the witnesses." (*Id*.) Therefore, the agency's decision *not* to adopt the ALJ's proposed decision and credibility determinations was within its authority. (*Id*.)

We face a similar circumstance here. Despite appellant's insistence, there are no binding credibility findings in the ALJ's proposed decision. Nowhere in his proposed decision did the ALJ make any explicit credibility findings regarding the testimony of either the decoy or appellant's servers. Indeed, he never mentions the servers' testimony at all, and in his conclusions of law, credits the testimony offered by the decoy and Officer Simon instead:

> 6. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(5)[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). *It is clear that Ofcr. Jessie Simon had Alvarez identify the person who sold him the alcoholic beverage. It is equally clear that Alvarez identified Taylor across the bar counter, at a distance of approximately five feet.* The problem is in the details. Alvarez testified that Ofcr. Clymer was interacting with Taylor during the identification. Ofcr. Simon, on the other hand, testified that the identification took place before the officers contacted Taylor. Ofcr. Simon did not know what Taylor was doing during the identification. In other words, there is no indication in the testimony of either witness that Taylor was aware, or should have been aware, that he was being identified.

(Proposed Decision, Conclusions of Law, at ¶ 6, emphasis added.) We see nothing in this conclusion or in the rest of the proposed decision that suggests the ALJ credited the server's testimony over the decoy's. Quite the opposite, in fact — the ALJ relies on the decoy's testimony, even where he found flaws in the operation itself.

As a final matter, this Board fully expects the Department to give due weight to

an ALJ's proposed decision and to refrain from overturning it unless justice so requires. In a unitary agency like the Department, reliance on an ALJ ensures impartiality. It is true that section 11517(c)(2)(E) of the Government Code clearly grants the Department the authority to substitute its own decision, and does not require the Department to find legal or factual error in the ALJ's proposed decision in order to do so. That power, however, has tremendous potential for abuse. The Department must never be cavalier in exercising it, and we do not find that it was cavalier in this case.

There is ample evidence in the record to support the Department's decision and the inferences made therein. Moreover, there are no credibility findings in the ALJ's proposed decision that might be binding on the Department's decision. Simply put, we find no error in the decision or in the Department's exercise of its discretion.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[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.