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

AB-9527
File: 21-375416 Reg: 15082141

MTANOS HAWARA and SUSAN ISSA HAWARA,
dba Mega 10 Liquor
3610 Valley Way, Jurupa, CA 92509,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: February 4, 2016
Los Angeles, CA

ISSUED MARCH 10, 2016

Appearances: *Appellants*: Michelangelo Tatone, of Solomon Saltsman & Jamieson, as counsel for Mtanos Hawara and Susan Issa Hawara, doing business as Mega 10 Liquor.
Respondent: John P. Newton as counsel for the Department of Alcoholic Beverage Control.

OPINION

This appeal is from a decision of the Department of Alcoholic Beverage Control[1] suspending appellants' license for 15 days because their clerk sold an alcoholic beverage to a police minor decoy in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general (type-21) license was issued on June 13, 2001. On

[1]The decision of the Department, dated July 22, 2015, is set forth in the appendix.

March 20, 2015, the Department filed an accusation against appellants charging that appellants' clerk, Hani Hannoun (the clerk), sold an alcoholic beverage to 18-year-old Curtis Clesceri on December 12, 2014. Although not noted in the accusation, Clesceri was working as a minor decoy for the Riverside County Sheriff's Department at the time.

At the administrative hearing held on June 16, 2015, documentary evidence was received and testimony concerning the sale was presented by Clesceri (the decoy), and by Sergeant Andrew Elia of the Riverside County Sheriff's Department. Appellant Mtanos Hawara also testified.

Testimony established that on the date of the operation, the decoy entered the licensed premises and went to a cooler, where he selected a twelve-pack of Bud Light beer in bottles. The decoy took the twelve-pack to the sales counter for purchase and placed it on the counter. The clerk asked the decoy for his identification, and the decoy handed the clerk his California driver's license. (Exhibit 4.) The clerk took possession of the license, appeared to look at it for a few seconds, and then handed it back to the decoy. The clerk then rang up the sale without asking any questions about the identification, or asking the decoy any age-related questions. The decoy paid for the beer, received his change, and exited the store.

The Department's decision determined that the violation charged was proved and no defense to the charge was established. The Department imposed a penalty of 15 days' suspension with 5 days stayed subject to one year of discipline-free operation.

Appellants filed a timely appeal contending: (1) the ALJ abused his discretion by failing to analyze and take into consideration the evidence presented at the hearing; and (2) the ALJ's decision is not supported by substantial evidence. These issues will

be discussed together.

DISCUSSION

Appellants contend that the ALJ outright ignored testimonial evidence pertinent to their rule 141(b)(2)[2] defense, including the decoy's background with the Explorer program and his level of sophistication with decoy operations. (App.Br. at p. 5.) They argue that these factors were specifically addressed in their closing argument during the administrative hearing, and yet the ALJ failed to expressly consider them in his proposed decision. (*Id*. at p. 6.) Appellants also claim the ALJ abused his discretion when he misstated the decoy's previous experience in finding that the subject operation was the decoy's first, when, in fact, he had been on nine previous operations consisting of ten locations each. (*Ibid*.)

As the Board has explained many times over, in reviewing the Department's decision,

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

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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.

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

As we have explained in several recent decisions,

> [T]his Board is entitled to review whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. (Cal. Const. art. XX, § 22; Bus. & Prof. Code. § 23084, subd. (c) and (d).) If this Board observes that the evidence appears to contradict the findings of fact, it will review the ALJ's analysis — assuming some reasoning is provided — to determine whether the ALJ's findings were nevertheless proper. Should this Board be faced with evidence clearly at odds with the findings and no explanation from the ALJ as to how he or she reached those findings, this Board will not hesitate to reverse. (See, e.g., *Block v. Nicholson Corp.* (1947) 77 Cal.App.2d 739, 747 [176 P.2d 739] [reversing and remanding trial court's decision where findings were wholly inconsistent with the evidence].) This should not be read to require an explanation or analysis to bridge any sort of "gap"; typically, the evidence an appellant insists is essential and dispositive is either irrelevant or has no bearing whatsoever on the findings of fact. While an ALJ may better shield himself against reversal by thoroughly explaining his reasoning, he is not required to do so. The omission of analysis alone is not grounds for reversal, provided findings have been made.

(*Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2015) AB-9514, at pp. 6-7.)

In this case, the essence of appellants' attack is not on the ALJ's failure to bridge his findings to his conclusions of law, but on his failure to address the testimony and arguments appellants raised altogether. On direct examination, the decoy's testimony concerning his experience as a minor decoy and with the Explorer program proceeded as follows:

> [BY MS. CASEY, COUNSEL FOR THE DEPARTMENT:]
> Q. Was this your first time working as a decoy?
>
> [THE DECOY:] A. No.
>
> Q. How many times before December 12, 2014 have you served as a decoy?
>
> A. I don't know the exact number.

Q. Is it more than five?

A. Around five.

Q. How did you become a decoy?

A. The Explorer Program.

Q. Are you an Explorer?

A. Yes.

(RT at p. 26.) On cross-examination, the decoy confirmed:

[BY MS. ROSE, COUNSEL FOR APPELLANTS:]
Q. Good morning.
You testified earlier that you had been on approximately five decoy operations prior to December 12, 2014?

A. Yes.

Q. And do you recall approximately how many locations you visited during each of those operations?

A. I do not.

Q. Is it more than five?

A. Yes.

Q. Was it more than 10?

A. Cumulatively?

Q. For each operation.

A. I don't know the exact amount.

Q. But more than five locations on —

A. Yes.

Q. — each operation?
And you stated that you were an Explorer?

A. Yes.

Q. And that was how you became involved with the decoy program?

A. Yes.

Q. And which police department are you an explorer for?

A. Jurupa Valley.

Q. So that's the Riverside Sheriff —

A. Yes.

Q. And how long prior to December 12, 2014 had you been an Explorer?

A. Three years.

Q. So does that mean you started as an Explorer when you were 15?

A. Yes.

Q. And in the Explorer Program, could you brief — or give a summary of the activities that you do in the Explorer Program?

A. Teamwork building, communication building, and assisting deputies on their day-to-day duties, and assisting the public.

Q. And how do you assist the deputies in their day-to-day activities?

A. Ride-alongs.

Q. How many ride-alongs had you done prior to December 12, 2014?

A. About 15.

Q. And throughout your time as an Explorer before December 12, 2014, would you say that your work as an Explorer included law enforcement training?

A. Yes.

Q. And what sort of law enforcement training did you have?

A. We train on building clearing, vehicle stops, active shooter.

Q. And you do these activities in teams?

A. Yes.

Q. And you had been an Explorer, you said, for three years prior to December 12, 2014. Are you any sort of ranking in the Explorer Program?

A. Yes.

Q. And what is your ranking?

A. Captain.

Q. And where is captain situated in the ranking system?

A. The highest.

Q. And how long had you been a captain prior to December 12, 2014?

A. Around two months.

Q. Do you have any additional duties as a captain with regard to the Explorer Program?

A. No.

Q. Does it involve leadership?

Q. Yes.

Q. How does it involve leadership?

A. Everybody looks to me for leadership, and I am a resemblance of what to do and what not to do.

Q. Do you think your participation in the Explorer Program and in this leadership position helped your confidence?

A. Yes.

Q. Do you think this confidence helped you in your role as a decoy?

A. Yes.

(RT at pp. 39-42.) As to the decoy's previous experience, Sergeant Elia testified that he believed he had worked with the decoy on a total of nine previous minor decoy operations, and that there was an average of ten locations visited during each

operation. (RT at p. 54.)

During closing arguments, counsel for appellants alleged:

> In addition, the department omitted — and it's very important here — [the decoy's] significant prior experience as a decoy. He testified that he'd been on approximately five operations, yet the police officer, Sergeant Elia, stated that he, in fact, worked with [the decoy] on at least nine prior operations with 10 locations each, so that would bring the total to almost 90 operations prior to the December 12, 2014 incident.
>
> In addition, he had the highest ranking in the Explorer Program. You could see this in his — in the confidence that he had while he testified. He said that this leadership experience did help his confidence, and it made him comfortable while he was in — while he was in the respondent's store on December 12, 2014.
>
> And I think all of these factors together — this is an individual who did not — is not what would generally be expected of a person under the age of 21. He's a very experienced individual with law enforcement training. He was dressed in a mature way. And he did, indeed, have facial hair on his face.

(RT at pp. 74-75.)

With regard to the decoy's appearance and law enforcement experience, the ALJ found:

> 9. [The decoy] appears his age, 18 years of 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/conduct in front of the clerk at the Licensed Premises on December 12, 2014, [the decoy] displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to [the clerk]. [The decoy] appeared his true age.
>
> 10. This was the first time that Clesceri operated as a decoy. During this operation on December 12, 2014, Clesceri attempted to purchase beer at ten different stores. This was the only store of the ten that sold beer to Clesceri.

(Findings of Fact, ¶¶ 9-10.) These findings prompted the ALJ to conclude:

> 5. Respondents argue that the decoy . . . appears older than 21 thereby violating Rule 141(b)(2). That argument is rejected. [The decoy]

> appeared and acted his true age. (Findings of Fact, ¶ 4, 5, 9 and 10). Respondents claim that [the decoy] had facial hair that made him appear older than 21. Exhibits 5 and 6 appear to show a "shadow" on [the decoy]. That is what it is, a shadow in the photo. [The decoy] testified that he only shaves once a week. Respondents' argument has no merit. [The decoy's] "facial hair" is of no significance. Respondents presented no witnesses or evidence to establish an affirmative defense.

(Conclusions of Law, ¶ 5.)

Given the extent of testimony appellants elicited on the topics (approximately six (6) pages' worth), and the fact that appellants dedicated a substantial portion of their closing argument to addressing them, we share appellants' concerns regarding the absence of findings relating to the decoy's law enforcement experience and confidence in his role as a minor decoy. This coupled with the fact that the ALJ mischaracterized the testimony covering the extent of the decoy's previous experience — finding this was his first operation when, in actuality, he had been on at least five (RT at p. 39) or even nine (RT at p. 54) previous minor decoy operations — leaves us "to guess whether the ALJ ignored appellants' [specific rule 141(b)(2)] defense, or simply overlooked it in drafting the decision." (*Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2014) AB-9381, at p. 6 [remanding a decision of the Department where the ALJ failed to make findings concerning the appellants' rule 141(b)(3) arguments].)

At oral argument, both parties conceded that the ALJ's finding that "[t]his was the first time that Clesceri operated as a decoy" was erroneous. (See Findings of Fact, ¶ 10.) The pertinent question then turned to whether that error was harmless. The Department dismissed the ALJ's error and argued that it amounted to nothing more than a typo, wherein the ALJ omitted the word "not" between the words "was" and "the" in

Findings of Fact, paragraph 10.[3] According to the Department, this error was harmless because the ALJ concluded, based on the remainder of the record, that the decoy's appearance complied with rule 141(b)(2), and appellants had presented no evidence to the contrary.

"[A]n appellate court must make every intendment in favor of the judgment and erroneous conclusions of law and unsupported or erroneous findings of fact will be disregarded as being harmless error if the judgment as rendered can be sustained on the supported and proper findings made by the trial court. [Citations.]" (*Hay v. Allen* (1952) 112 Cal.App.2d 676, 681 [247 P.2d 94].) Even under this standard, which, we admit, extends a substantial amount of deference to the Department's decision, we cannot accept the Department's position here. There is nothing evident on the face of the decision to support the Department's interpretation that the ALJ's omission of the word "not" is a mere typographical error. Indeed, inserting that simple, yet remarkably powerful, three-letter negative where the Department suggests would essentially rewrite the ALJ's finding altogether. Moreover, common sense would dictate that an ALJ's averment that this is *not* a decoy's first operation would typically be followed by some sort of quantifying phrase such as, "s/he has served as a decoy on eight prior occasions." No such quantifying phrase is present here. As such, we must reject the Department's request that the Board rewrite the ALJ's finding in favor of the Department's position.

As to the harm posed by the ALJ's error, we do not agree with the Department that the error is necessarily harmless. Neither this Board nor counsel for the

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[3]The Department's interpretation would change the ALJ's finding to read "This was *not* the first time that Clesceri operated as a decoy."

Department was privy to the ALJ's thought process when he drafted his proposed decision. We have no idea if and to what extent his apparent misconception of the decoy's previous experience played a role in his determination. Also, the ALJ's disregard for appellants' specific rule 141(b)(2) argument — which, we reiterate, was thoroughly addressed within their closing argument at the administrative hearing *and* grounded in extensive testimonial evidence elicited by appellants' counsel — leaves us to guess whether he was simply being inattentive toward this case, or considering an altogether different one. As such, to dismiss the ALJ's error as "harmless" would be to improperly compound it.

Finally, by this opinion, it is not the Board's intent to put on some sort of "decision-writing clinic" for the Department's ALJs. However, we stand firm in our expectation that the Department's decisions be well-reasoned and grounded in the evidence and arguments presented at the administrative hearing, and not leave us with the unpleasant aftertaste of perfunctoriness.

ORDER

The decision of the Department is remanded for further findings regarding the decoy's law enforcement experience and previous experience as a minor decoy, as well as a reconsideration of whether appellants successfully raised a rule 141(b)(2) defense in light of those findings. We acknowledge, however, that consideration of these additional factors will not necessarily lead to a determination that appellants' defense was successfully established.[4]

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

[4]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.