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

AB-9534
File: 21-168611 Reg: 15081849

MICHAEL STEVEN SAPON,
dba Nicks Liquor
11 Washington Boulevard, Venice, CA 90292,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: March 3, 2016
Los Angeles, CA

ISSUED APRIL 19, 2016

Appearances: *Appellant:* Michelangelo Tatone, of Solomon Saltsman & Jamieson, as counsel for appellant Michael Steven Sapon, doing business as Nicks Liquor.
Respondent: John Newton as counsel for the Department of Alcoholic Beverage Control.

OPINION

Michael Steven Sapon, doing business as Nicks Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 10 days, all conditionally stayed, because its clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 1, 1985. On January

[1]The decision of the Department, dated August 5, 2015, is set forth in the appendix.

14, 2015, the Department filed an accusation charging that appellant's clerk sold an alcoholic beverage to 18-year-old Alondra Rodriguez on September 12, 2014. Although not noted in the accusation, Rodriguez was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on May 13, 2015, documentary evidence was received, and testimony concerning the sale was presented by Rodriguez (the decoy); by Julia Vincent, a Los Angeles Police officer; and by Reynaldo Torres, a cashier employed by appellant who was on the premises when the sale took place.

Testimony established that on the date of the operation, the decoy entered the licensed premises and went to the beer coolers. She selected a can of Bud Light beer, which she took to the counter. The clerk asked to see her ID. The decoy handed him her U.S. passport card. The clerk glanced at the ID, then handed it back to her. The decoy paid for the beer, and the clerk gave her some change. The decoy began to exit, then returned to the counter to conduct the face-to-face identification.

During the course of the operation, three of six locations sold alcoholic beverages to the decoy.

After the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant filed this appeal contending: (1) the ALJ abused his discretion by failing to analyze the decoy's "success rate," and (2) the ALJ failed to proceed in the manner required by law when he failed to consider the testimony offered by a second clerk employed at the premises regarding the decoy's apparent age.

DISCUSSION

I

Appellant contends that the ALJ abused his discretion by failing to analyze the decoy's so-called "success rate." Appellant argues that the fact that three out of six stores — including appellant's — sold alcohol to the decoy during the course of the operation supports the inference that she appeared over the age of 21. (App.Br. at p. 6.) Although appellant acknowledges the ALJ made a factual finding regarding the decoy's success rate, appellant cites *Topanga* and objects to the ALJ's failure to "analyze" the success rate as part of his conclusions of law. (App.Br. at p. 5, citing *Topanga Assn. for a Scenic Community* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836].) Appellant insists that according to this Board, evidence of a decoy's success rate "cannot be ignored." (App.Br. at p. 1, citing *7-Eleven, Inc.* (2002) AB-7835.)

Rule 141, subdivision (b)(2), states:

> 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.

The rule provides an affirmative defense, and the burden of proof lies with the party asserting it. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

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

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] 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. [Citations.] 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 Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, that will support the findings. When two or more competing inferences of equal persuasiveness can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; see also 9 Witkin, Cal. Procedure (5th ed. 2008) *Appeal*, § 365 [observing that "[t]his fundamental doctrine is stated and applied in hundreds of cases"].)

In this case, the ALJ made the following findings of fact regarding the decoy's appearance and her so-called "success rate":

> 5. Rodriguez appeared and testified at the hearing. On September 12, 2014 she was 5'11" tall. She wore blue jeans, a red sweater with a black shirt underneath it, tennis shoes, and a necklace. She had long hair which she wore down, such that it came to her chest. She wore mascara and foundation, but no other make-up. (Exhibit 2 & 4.) At the hearing her appearance was the same, other than her weight, 240 pounds. She weighed less on September 12, 2014, but could not remember how much.
>
> [¶ . . . ¶]
>
> 9. Rodriguez had been a decoy before September 12, 2014, but could not remember how many times. She learned of the decoy program through her role as an LAPD cadet. As a cadet, she attended an 18-week

> academy, took a variety of classes, and engaged in physical training. She was nervous every time she worked as a decoy. On September 12, 2014, three of six locations sold alcoholic beverages to her.
>
> [¶ . . . ¶]
>
> 11. Rodriguez appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of the clerk at the Licensed Premises on September 12, 2014, Rodriguez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk.

(Findings of Fact, ¶¶ 5, 9, 11.) Based on these findings, the ALJ reached the following conclusion of law:

> 7. With respect to rule 141(b)(2), the Respondent argued that Rodriguez's height and weight, coupled with her confident demeanor, gave her the appearance of a person over the age of 21. This argument is rejected. First and foremost, Rodriguez did not have a confident demeanor — she testified that she was nervous the first time she worked as a decoy and did not get less nervous over time. Although Rodriguez was larger than average, there was nothing about her appearance which was inconsistent with that of a minor. In short, Rodriguez had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 11.)

(Conclusions of Law, ¶ 7.) Appellant is therefore correct that the ALJ did not "analyze" the decoy's success rate, nor did he refer to it in reaching a legal conclusion.

Appellant's reliance on *Topanga*, however, is misplaced. This Board has repeatedly rejected the argument that *Topanga* requires an explanation of the reasoning behind an ALJ's determinations and conclusions. This Board has explained, time and again, that *Topanga* "does not hold that findings must be explained, only that findings must be made." (See, e.g., *Semaan* (2011) AB-9144, at p. 6; *7-Eleven, Inc./Dhillon* (2010) AB-8893, at p. 3; *7-Eleven, Inc./Cheema* (2004) AB-8181, at p. 6.)

> This is made clear when one reads the entire sentence that includes the phrase on which appellants rely: "We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision *must set forth findings* to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga*, *supra*, 11 Cal.3d 506, 515, italics added.)
>
> In *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760], the court quoted with approval, and added italics to, the comment regarding *Topanga* made in *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909]: "'The holding Topanga was, thus, that *in the total absence of findings in any form on the issues supporting the existence of conditions justifying a variance*, the granting of such variance could not be sustained.'" In the present appeal, there was no "total absence of findings" that would invoke the holding in *Topanga*.

(*7-Eleven, Inc./Cheema*, *supra*, at pp. 6-7.) The same reasoning applies here. The ALJ made a clear factual findings regarding the decoy's success rate. (See Findings of Fact, ¶ 9.) *Topanga* does not apply.

Appellant nevertheless insists the omission constitutes an abuse of discretion. "Although the ALJ analyzed every other bit of minutiae regarding the decoy's appearance, he failed to analyze that three out of six locations sold to the decoy, *which this Board has stated cannot be ignored*." (App.Br. at p. 1, interpreting *7-Eleven, Inc./Dianne Corp.* (2002) AB-7835, emphasis added, and *7-Eleven, Inc./Williams* (2001) AB-7591.) According to appellant's interpretation of this Board's prior holdings, where a decoy's so-called success rate is raised, an ALJ *must* analyze the effect of that success rate on the decoy's appearance, and has no discretion to do otherwise.

Appellant's interpretation is incorrect. In *Dianne Corporation*, the Appeals Board case appellant relies on, the decoy was able to purchase alcohol at eight of ten locations. At none of the locations did anyone ask to see his identification. (*Id.* at p. 3.) This Board wrote only that "[t]he extremely high (80 percent) purchase rate in the

present case (including the fact that the decoy was not even asked for identification in any of the premises that sold to him) is a very strong indication that this decoy did not display the appearance that could generally be expected of a person under the age of 21." (*Id.* at p. 5.) The Board therefore found cause to question the reasonableness of the ALJ's determination that the decoy appeared under the age of 21 — especially in light of other contradictory factual findings.[2] (*Id.* at p. 6.) Ultimately, the Board reversed based on a *number* of troubling elements in the case:

> [I]t is not only the exceedingly high "success rate" that casts doubt on the ALJ's determination of the decoy's apparent age; the ALJ's analysis itself is flawed. The ALJ found that, except for his height, weight, and being clean-shaven, the decoy's physical appearance at the hearing was "not similar at all" to his physical appearance at the time of the sale. [Citation.] He also found that, had the decoy been dressed at the time of the sale as he was at the hearing, "he clearly would not have displayed the appearance which could generally be expected of someone under the age of twenty-one years old." [Citation.] Besides the physical differences noted by the ALJ, the decoy testified to being calm at the time of the sale, but nervous at the hearing [citation]. In other words, *the decoy did not look substantially the same at the hearing as he did at the time of the sale*.

(*Id.* at p. 7, emphasis added.) It was not solely the decoy's exceptionally high success rate, but his success rate *in conjunction with other discrepancies* surrounding the ALJ's evaluation of the decoy's apparent age that led the Board to reverse. (See *id.* at p. 8.)

At no point in *Dianne Corporation* did this Board dictate that a decoy's success rate must *always* be analyzed or even noted in the decision, let alone that the failure to do so constitutes an abuse of discretion.

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[2]Specifically, the ALJ also concluded that "If, while at [appellants'] store, the decoy wore the uniform, badge and sidearm which he wore at the hearing, he clearly would not have displayed the appearance which could generally be expected of someone under twenty-one years old. However, he did not wear these items at [appellants'] store." (*Id.* at p. 3.) Such a finding only further muddled his conclusion that the decoy appeared under 21.

Appellant's confusion may arise from a quote within the *7-Eleven, Inc./Dianne Corporation* decision, drawn from a separate case:

> We do not ignore the evidence in this case that the decoy was able to purchase alcoholic beverages in more than half — seven of thirteen — of the establishments he visited. While this suggests that he presented a more mature appearance to some sellers than he did to others, we can only assume the ALJ took this into consideration in his deliberations.

(*Id.* at p. 5, quoting *7-Eleven, Inc./Williams* (2000) AB-7591, at p. 5.) In employing that language, the Board was explicitly acknowledging that it was *not* error for the ALJ to omit discussion of the decoy's success rate from the decision below. As the Board stated earlier in the *Williams* opinion,

> The rule, through its use of the phrase "could generally be expected," implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which *could* generally be expected of a person under 21 years of age.

(*7-Eleven, Inc./Williams*, *supra*, at p. 4, emphasis in original.) As we recently wrote,

> Without other, more tangible evidence that the decoy appeared over 21, there is nothing to prompt either an ALJ or this Board to favor the inference that the success rate was somehow connected to the decoy's apparent age — let alone substitute such an unsupported inference for a firsthand assessment of the physical appearance of the decoy. Without additional direct evidence that a decoy's appearance violated the rule, her success rate is indeed irrelevant.

(*Garfield Beach CVS, LLC/Longs Drug Stores Cal.* (2016) AB-9513, at pp. 5-6.)

Applying this reasoning to the facts at hand, the fact that three out of six stores — exactly half of a small sample of clerks — sold alcohol to this decoy is not a defense if, in fact, her appearance is one which could generally be expected of a person under 21 years of age. The ALJ's assessment of the decoy's physical appearance was thorough; as appellant acknowledges, the ALJ "analyzed every other bit of minutiae

regarding the decoy's appearance." (App.Br. at p. 1.) We are confident that his conclusion that the decoy appeared under the age of 21 is reasonable.

The success rate in this case is so unimpressive and equivocal that it invites no inferences whatsoever. Indeed, we are unsure what "analysis" appellant would have the ALJ make of such a meaningless piece of data — particularly where, as here, the clerk requested and viewed the decoy's identification and nevertheless proceeded with the sale. As we have observed many times before, "[a]n ALJ is not required to provide a laundry list of factors he found inconsequential." (See, e.g., *7-Eleven, Inc./Samra* (2014) AB-9387, at p. 9; *7-Eleven, Inc./Convenience Group, Inc.* (2014) AB-9350, at p. 4.) We can think of few things less consequential than the fifty-percent "success rate" in this case.

II

Appellant contends that the ALJ failed to proceed in the manner required by law by failing to consider the testimony offered by Reynaldo Torres, a second clerk who was working at the licensed premises when the sale took place. According to appellant, he "introduced evidence that another clerk of [his], perhaps more qualified than the clerk who sold to the decoy because of his more extensive experience as a clerk at Appellant's store, believed that [the decoy] had the appearance of someone twenty-one or older," but "the ALJ completely failed to take into consideration this evidence." (App.Br. at p. 8.) Appellant further insists that "Mr. Torres was in a very similar, if not, the exact same position as Appellant's clerk who sold to [the decoy]." (App.Br. at p. 9.)

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.3d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.3d 315,

323 [314 P.2d 807].) The Appeals Board will not interfere with those determination in the absence of a clear showing of abuse of discretion.

The Evidence Code permits lay opinion testimony. (Evid. Code, § 800.) It also provides, however, that "[i]f weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (Evid. Code, § 412.)

It is true that the ALJ made no explicit credibility finding regarding Torres' testimony. Torres' testimony regarding the decoy's apparent age, however, focused almost exclusively on her size:

> BY MS. ROSE:
> Q Did you see the person that Mr. Lopez — or Mr. Garcia sold alcohol to?
>
> A Yes.
>
> Q Do you remember what — was it a male or female?
>
> A Female.
>
> Q Do you remember what she looked like?
>
> A She looks, you know, tall and big to me.
>
> [¶ . . . ¶]
>
> Q Now, you stated that you've been working at Nicks Liquor for about 20 years; is that correct?
>
> A Yes.
>
> Q And would you say that you have gained experience in telling the age of people who are attempting to purchase alcohol?
>
> A Yes.
>
> Q When you saw this girl on September 12th, 2014, did you form an opinion about how old you thought she was?

A Yes.

Q And how old did you think she was?

[Objection; overruled.]

THE WITNESS: Basically when I saw her, my impression, she looks to me 21 and older.

Q And what about — was there anything about her physical appearance that supported that opinion?

A Yes. I guess because, you know, she's — looks tall and, you know, big. That primarily tells me that she looks older.

Q And when you say "big," what do you mean by that?

A Her size as far as, you know, her — I don't know how to say it.

THE COURT: He's trying to be nice. I understand where he's going with this.

MS. ROSE: I understand. Okay. Then we'll move on.

(RT at pp. 49-52.) Essentially, Torres believed the decoy looked over 21 because she was "big." (RT at p. 51.)

Insofar as the decoy's objective size is concerned, the ALJ's findings of fact and conclusions of law are consistent with Torres' testimony. As noted in Part I, he found that on the date of the operation, the decoy "was 5'11" tall," and though she could not recall her weight on the date of the operation, it was less than her weight at the hearing, which was 240 pounds. (See Findings of Fact, ¶ 5.)

With regard to the effect the decoy's size had on her apparent age, however, the ALJ found that she appeared her actual age. (Findings of Fact, ¶ 11.) He explicitly discussed her size in his conclusions of law: "Although Rodriguez was larger than average, there was nothing about her appearance which was inconsistent with that of a minor." (Conclusion of Law, ¶ 7.)

We find no flaw in the conclusion itself. Body proportions vary dramatically among minors. (See, e.g., *7-Eleven, Inc./NRG Convenience Stores, Inc.* (2015) AB-9477, at p. 5 ["Minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys of large stature automatically violate the rule."]; *7-Eleven, Inc./Lobana* (2012) AB-9164, at pp. 3-4.) The only question, then, is whether the ALJ erred in favoring his own impression of the decoy's appearance over the opinion testimony given by appellant's employee.

We are persuaded by the argument presented by the Department regarding the value of Torres' testimony:

> Torres' opinion was . . . highly suspect. Torres was not the clerk who sold the alcohol to the decoy on the night of the operation. (RT 48.) He did not even know that alcohol had been sold to a minor until after the fact. (RT 49.) Torres gave no explanation as to why he remembered one particular customer, who he did not help, from a night eight months prior. The simple fact that appellant could have called the clerk who actually sold the alcohol as a witness, but chose to call an uninvolved party, made Torres' testimony immediately subject to distrust.

(Dept.Br. at p. 7; see also Evid. Code, § 412.) As the Department points out, according to Torres' testimony, the selling clerk was still employed at the licensed premises shortly before the hearing:

> [BY MS. ROSE:]
> Q So you have been to the Star training since the incident on September 12, 2014?
>
> A Yes.
>
> Q Do you have any knowledge whether Mr. Rolando Garcia has also done the Star training?
>
> A Yes. He was actually sitting next to me on that day in the class.
>
> Q Which day?
>
> A About three weeks ago.

Q So he has been retrained in the Star training also?

A Yes.

(RT at pp. 53-54.)

It is not clear why appellant chose to rely on Torres' lay opinion evidence when the selling clerk was available to testify. We can speculate, of course, that it was because Torres was a more believable witness. Despite appellant's insistence that Torres "was in a very similar, if not, the exact same position" as the selling clerk, the selling clerk actually requested and viewed the decoy's identification, which visibly bore her accurate date of birth. For a selling clerk to testify that he requested a decoy's identification, but then chose to ignore the information it contained and instead base his decision to sell alcohol to her on her physical size instead would evince a disturbing level of carelessness and potentially undermine appellant's case. Torres, on the other hand, never viewed the decoy's identification; coupled with his experience, he simply cuts a more credible figure than the selling clerk. It is unsurprising, then, that appellants called him instead, regardless of the fact that his testimony constitutes "weaker and less satisfactory evidence." (Evid. Code, § 412.)

Even if we assume, for the sake of argument, that Torres' perception of the transaction truly echoes the selling clerk's — and it clearly does not — the ALJ was still entitled to put greater weight on his own impartial firsthand evaluation of the decoy's appearance than on Torres' opinion. While appellant here insists the ALJ did not proceed in the manner required by law, there is nothing in the law that mandates the ALJ grant wholesale credit to the lay opinion testimony of a licensee's employee.

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.