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

AB-9359
File: 21-441104 Reg: 11075117

SUE HUI LEE,
dba Gin's Liquor
11001 Crenshaw Boulevard, Inglewood, CA 90303,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 6, 2014
Los Angeles, CA

Redeliberated April 3, 2014
Sacramento, CA
ISSUED APRIL 16, 2014

Sue Hui Lee, doing business as Gin's Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license for her 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 Sue Hui Lee, appearing through her counsel, Ralph Barat Saltsman and Jennifer Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

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[1]The decision of the Department, dated May 30, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general license was issued on July 12, 2006. The Department filed an initial accusation on May 25, 2011. It amended the accusation four times, on August 17, 2011, January 9, 2012, January 13, 2012, and March 30, 2012.

The accusation presented two counts. Count 1 alleged appellant's clerk, Seung Ho Ha (the clerk), sold an alcoholic beverage to 19-year-old Richard Smith on November 10, 2010. Although not noted in the accusation, Smith was working as a minor decoy for the Inglewood Police Department at the time. Count 2 consisted of 23 subcounts alleging that appellant permitted the licensed premises to be used in such a manner that it created a law-enforcement problem in violation of section 24200(a).

The administrative hearing was held over the course of four days, October 24 and 25, 2012 and March 6 and 13, 2013. At the hearing, documentary evidence was received, and testimony concerning the sale was presented by Smith (the decoy); by Luis Jaramillo, Shaun Jennings, Tia Dixione, Eric Tapper, Aaron Escobedo, Shea McCurdy, Keith Rankin, Eric Hunt, Loren Robinson, Cesar Jurado, Dustin Wise, Kerry Tripp, Steve Romero, Frederick Osorio, Fernando Vaszquez, David Trujillo-Dailey, and Hector Villavicencio, all Inglewood Police Officers or Detectives; and by Patrick Bullock, a Department of Alcoholic Beverage Control Agent. Appellant presented no witnesses.

With regard to count 1, testimony established that on the date of the operation, the decoy entered the licensed premises, followed a few seconds later by Detective Shaun Jennings. The decoy selected a six-pack of Corona beer and took it to the counter. The decoy was separated from the clerk by a ceiling-high clear protective barrier on top of the counter. The clerk rang up the beer and told the decoy how much it cost. The decoy paid with a $10 bill. The clerk bagged the beer. The decoy picked

up the bag of beer and exited the premises.

Testimony regarding count 2 was complex and involved numerous separate instances of criminal activity that allegedly occurred within the vicinity of the premises. For purposes of this appeal, the only relevant testimony involves an incident which took place on October 24, 2009. On that date, officers responded to a call reporting a shooting victim at the licensed premises. Emergency medical personnel were already on the scene. Further investigation revealed that the victim had been shot while walking down Crenshaw Boulevard by someone driving by in a car. These events formed the grounds for subcount 13 of the second count of the Department's accusation.

In support of subcount 13, the Department introduced a police report completed by Officer Hector Villavicencio. The report was marked Exhibit 21. At the conclusion of the third hearing session on March 13, 2013, counsel for appellant objected to Exhibit 21 on the grounds that it was cumulative and lacked foundation. In light of the fact that testimony on the incident had been provided by other officers, counsel for the Department withdrew the report. The ALJ noted that he was leaving the exhibit marked in order to prevent confusion, but was not admitting it into evidence. It is undisputed that the report was included in the administrative record provided to the Department Director.

Subsequent to the hearing, the Department issued its decision which determined that count 1, the sale to minor in violation of section 25658(a), was proved and no defense was established. The decision also found that cause for suspension or revocation did not exist with regard to count 2, which alleged a law-enforcement problem in violation of section 24200(a). The decision dismissed all subcounts of count

2, including count 13, which involved the events described in Exhibit 21.

The decision imposed a penalty of revocation, as the sale to minor was appellant's third such violation in 34 months.

Appellant then filed this appeal contending (1) the Department's inclusion of the investigative report, Exhibit 21, in the administrative record constitutes an ex parte communication meriting reversal of the entire decision, and (2) the ALJ abused his discretion by disregarding appellant's defense under rule 141(b)(2).

DISCUSSION

I

Appellant contends that the inclusion of Exhibit 21 in the administrative record constitutes an impermissible ex parte communication. Appellant argues that the inclusion of the report merits reversal of the entire decision and dismissal of all counts.

An ex parte communication is broadly defined as "[a] generally prohibited communication between counsel and the court when opposing counsel is not present." (Black's Law Dictionary (7th ed. 1999) p. 597.) Section 11430.10 of the Government Code provides, in relevant part:

> (a) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.
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> (b) Nothing in this section precludes a communication, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing.

Section 11430.70 extends the prohibition on ex parte communications to agency heads:

> (a) Subject to subdivision (b) and (c), the provisions of this article governing ex parte communication to the presiding officer also govern ex parte communications in an adjudicative proceeding to the agency head

> or other person or body to which the power to hear or decide in the proceeding is delegated.

The California Supreme Court, in *Quintanar*, reinforced the language of section 11430.70 and further held that ex parte communications are forbidden not only during the trial stage, but at any point in the course of adjudication, including the decisionmaking phase. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Board (Quintanar)* (2006) 40 Cal.4th 1, 11-14 [50 Cal.Rptr.3d 585]; see also *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th 116 [57 Cal.Rptr.3d 6] [ex parte hearing reports require reversal even where Department accepts the ALJ's decision].)

In the wake of the *Quintanar* decision, the Department issued a general order outlining the documents to be included in the record provided to the Director: "The Administrative Hearing Office shall forward proposed decisions, together with any exhibits, pleadings and other documents or evidence *considered by the administrative law judge*, to the Hearing and Legal Unit which shall forward them to the Director's Office without legal review or comment." (Department of Alcoholic Beverage Control, General Order 2007-09 (August 10, 2007), emphasis added.) By its plain language, the Department's order excludes documents *not* considered by the ALJ.

This Board has recently treated a case in which a document neither admitted nor rejected, but merely marked, was nevertheless included in the administrative record provided to the Department Director in his decisionmaking capacity. (See *Garfield Beach CVS* (2014) AB-9355.) The Department argued that the inclusion was inadvertent. This Board reversed, noting that lack of intent was no defense to an ex parte communication in light of the potential for abuse.

In some respects, this case is similar. Exhibit 21 was included in the administrative record provided to the Department Director in his decisionmaking capacity despite appellant's objection and the Department's withdrawal. While the ALJ noted that the document would be marked, this was merely to prevent confusion. [See RT at pp. 60-61.] Appellant had no reason to believe Exhibit 21 would become part of the record sent to the Director, since counsel for the Department withdrew it from evidence. Based on the Department's own post-*Quintanar* policy, the Director should not have received Exhibit 21.

On the other hand, this case differs in at least one significant respect. Exhibit 21 pertains *only* to events alleged under count 2, and count 2 was dismissed in its entirety. It is true that an ex parte communication cannot be excused simply because the document was not actually considered. We are, however, left without an appropriate remedy. Nothing remains of count 2 to dismiss, and Exhibit 21 was in no way related to the events of count 1.

Appellant would nevertheless have this Board reverse the decision in its entirety, and argues that the inclusion of Exhibit 21 could arguably have had some persuasive effect on the issues in count 1. We disagree. Exhibit 21 does not describe a statutory violation, but rather describes an act of violence that allegedly occurred outside the licensed premises. Neither the perpetrator nor the victim were employed by appellant. Count 1, on the other hand, addresses a simple sale-to-minor violation that took place within the premises, at the hands of appellant's clerk, more than a year after the events described in Exhibit 21. It is true that "the APA prophylactically outlaws any substantive communications." (*Quintanar*, 40 Cal.4th at p. 16.) Exhibit 21, however, holds no substantive weight whatsoever under count 1 — it is simply and totally irrelevant to a

determination of whether a sale-to-minor violation occurred.

The question of whether Exhibit 21 constituted an ex parte communication is, in this case, moot. Because count 2 was dismissed, there is simply no injury left to redress, and it would be extreme indeed for us to reverse the Department on count 1 — an unrelated charge for which Exhibit 21 offers no persuasive value whatsoever.

II

Appellant contends that the ALJ abused his discretion by disregarding appellant's defense under rule 141(b)(2). In particular, appellants take issue with the ALJ's failure to address the decoy's facial hair and with his conclusion that the decoy appeared under 21 despite his large stature.

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 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.App2d 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.

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

This Board has held that an ALJ should not focus his analysis solely on a decoy's *physical* appearance and thereby give insufficient consideration to relevant

non-physical attributes such as poise, demeanor, maturity, and mannerisms. (See, e.g., *Circle K Stores, Inc.* (2004) AB-8169; *7-Eleven Inc./Sahni Enterprises* (2004) AB-8083; *Circle K Stores* (1999) AB-7080.)

This should not, however, be interpreted to require that the ALJ provide a "laundry list" of factors he found inconsequential. (*7-Eleven, Inc./Patel* (2013) AB-9237; accord *Circle K Stores* (1999) AB-7080.) "It is not the Appeals Board's expectation that the Department, and the ALJ's, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered." (*Circle K Stores*, *supra*, AB-7080 at p. 4.)

The ALJ made the following findings of fact regarding the decoy's appearance:

> 5. Smith appeared and testified at the hearing. On November 10, 2010, he was 6' tall and weighed in the neighborhood of 210 pounds. He wore cargo shorts and a red and black sweater with a gray t-shirt underneath it. His hair was short and he was wearing glasses. (Exhibits 2-4.) At the hearing his appearance was similar.
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> ¶ . . . ¶
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> 9. Smith 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 Ha at the Licensed Premises on November 10, 2010, Smith displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Ha.

(Findings of Fact ¶¶ 5, 9.)

Large stature is not dispositive. This Board has repeatedly declined to substitute its judgment for that of the ALJ on this question of fact. 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. (See, e.g., *Garfield Beach CVS, LLC* (2013) AB-9261, at

p. 4.)

The ALJ's finding that the decoy appeared under 21, despite his physical size, is not unreasonable. The decoy appears to have round, soft facial features that one could expect to see on a minor, rather than an adult. (See Exhibit 2.)

Moreover, in the photograph taken on the date of the operation, the decoy's facial hair is barely visible. (See Exhibit 2.) We cannot speak to the decoy's appearance in person, but based on this photograph alone, it was not unreasonable for the ALJ to find the decoy's facial hair so inconsequential that it did not merit discussion in the decision — particularly since appellant made no mention of it in her closing argument. [See RT at pp. 67-76.]

As this Board has said on many occasions, the ALJ is the trier of fact and has the opportunity, which this Board does not, of observing the decoy as he testifies and making the determination whether the decoy's appearance met the requirement of rule 141 that he possessed 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.

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. This Board is not entitled to reverse the ALJ's findings of fact unless those findings are unreasonable.

ORDER

The decision of the Department is affirmed.[2]

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

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[2]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.