

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

AB-9429

File: 21-480615; Reg: 13079103

TRADER JOE'S COMPANY,
dba Trader Joe's #215
11775 West Olympic Boulevard, Los Angeles, CA 90064,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED FEBRUARY 24, 2015

Trader Joe's Company, doing business as Trader Joe's #215 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 25 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 Trader Joe's Company, through its counsel, Rebecca M. Stamey-White of the law firm Hinman & Carmichael LLP, and the Department of Alcoholic Beverage Control, through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated April 10, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on August 17, 2009. On August 22, 2013, the Department filed an accusation charging that appellant's clerk, José Luis Gutierrez, sold an alcoholic beverage to 19-year-old Bryan Lopez on March 15, 2013. Although not noted in the accusation, Lopez was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on February 19, 2014, documentary evidence was received, and testimony concerning the sale was presented by Lopez (the decoy); by Eddy Limon and James Gaffney, officers with the LAPD; by Gutierrez (the clerk); by Henry Valladares, a supervisor at the licensed premises; and by Dean Gasaway, the general manager of the licensed premises.

Testimony established that on the day of the operation, the decoy entered the premises, as did two LAPD officers — Officer Lopez slightly before the decoy and Officer Olivares slightly after. The decoy went to the alcohol section and selected a six-pack of Corona beer. He went to the register and stood in line. The two officers stood in line behind him.

When it was his turn, the decoy put the beer on the counter, and the clerk asked for his identification. The decoy gave the clerk his California driver's license, which had a vertical orientation. The license showed his correct date of birth, July 1, 1993, and bore a red stripe indicating "AGE 21 IN 2014." The clerk entered the date October 20, 1983 into the register, returned the identification to the decoy, and completed the sale. The decoy exited the premises and the two officers remained inside.

The officers contacted the clerk and explained the violation to him. The decoy re-entered the premises with Officer Gaffney and made a face-to-face identification of

the clerk. The clerk was later cited.

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

Appellant then filed a timely appeal contending: (1) the decoy operation was not conducted in a fashion that promotes fairness, in violation of rule 141(a),² and (2) the decision is not supported by substantial evidence. These issues will be discussed together.

DISCUSSION

Appellant contends that the decoy operation was not conducted in a fashion that promotes fairness, in violation of rule 141(a), because the two undercover officers distracted the clerk with their presence. Appellant maintains that the presence of these two large men, dressed all in black, who were not holding anything to purchase, and who were carefully watching the transaction at close range, led the clerk to fear he was about to be robbed and therefore distracted him from properly confirming the age of the minor. (App.Br. at pp. 1-2.)

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*.

(Emphasis added.) The rule provides an affirmative defense. The burden is therefore on the appellant to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

²References 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 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.]

(*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 an appellant contends that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].)

The administrative law judge (ALJ) made the following finding about the officers' presence:

9. Gutierrez testified that the two officers, who were in line behind Lopez, made him nervous. Both officers were big, dressed in black, and were empty handed (as opposed to the typical patron, who would have some products ready to purchase). Because he was nervous, he entered the wrong month, the wrong day, and the wrong year into the register.

(Findings of Fact ¶ 9.) The ALJ then reached the following conclusion on this issue:

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141(a)^[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that the officers' presence, dress, and behavior intimidated Gutierrez. This argument is rejected since the officers did nothing except stand nearby. They did not involve themselves in the purchase, talk to Gutierrez, or even get particularly close to him. The fact

that they were big and dressed in black, by itself, does not make the operation unfair.

(Conclusions of Law ¶ 5.)

Appellant cites several cases in support of its position. In *7-Eleven, Inc./Mousavi* (2002) AB-7833, two successive decoys were sent into the licensed premises, one after the other, and one of the two was able to purchase alcohol. Finding there was a lack of compliance with rule 141(a), the Board said, “it is how the decoy operation is conducted, not its result, that must be judged in determining fairness.” (*Id.* at p.8.) The Board explained, “If the police conduct a decoy operation in an unfair manner, that is a complete defense to the charge.” (*Id.* at p. 6.) This is the correct standard, and the Board must examine the specific facts in each case to ascertain whether a particular decoy operation was unfair.

Another case cited by appellant is *Hurtado* (2000) AB-7246. In that case, a 27-year-old police officer sat with the minor decoy and two beers were ordered. There was conflicting testimony on who ordered the beers. The Board found that the presence of the police officer and his active participation made the decoy operation unfair, regardless of who ordered the beers. (*Id.* at p. 5.) The Department argues that in this case, unlike *Hurtado*, the officers standing behind the decoy were not active participants in the sale, that they did nothing to interject themselves into the transaction, and therefore the operation was conducted fairly.

The facts in the instant case are similar to *EKJ, Inc.* (2003) AB-7907, in which the actions of undercover officers led a bartender to fear she might be robbed — causing her to mistakenly think she had already asked the decoy for identification. The ALJ in that case, however, did not regard the conduct of the officers to be such that an

experienced bartender would have feared a robbery, nor did the Board. Similarly, in this case, the ALJ rejected appellant's contention that the clerk was intimidated. (Conclusions of Law ¶ 5, *supra*.) However, the Department offered no rebuttal evidence in this case to establish *why* the clerk should not be believed when he said he was intimidated and feared he would be robbed, and the ALJ made no findings in this regard.

Appellant contends that the decision is not supported by substantial evidence and maintains: "The Department bears the burden of proving a violation of Section 25658(a), but it must also rebut Appellant's evidence that the operation was not conducted fairly. Without rebuttal evidence, the Decision is not supported by substantial evidence." (App.Br. at p. 8.) We agree.

As noted above, we are bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence.

Appellant maintains not only that the decision is not supported by substantial evidence, but that the testimony of the clerk and his supervisor raised a presumption that the decoy operation was conducted unfairly and that the burden of proof then shifted to the Department to rebut this presumption. Appellant maintains that since "the Department presented no rebuttal evidence after [their] testimonies, the evidence is insubstantial to rebut the presumption that the decoy operation was conducted unfairly." (App.Br. at p. 9.) Appellant cites no authority for this shifting of the burden of proof, and we know of none. Rule 141(a) is an affirmative defense, and as such, appellant bears the burden of proof.

Having said that, however, it is a fundamental precept of appellate review that it is the province of the administrative law judge, as trier of fact, to make determinations

as to witness credibility and to resolve any conflicts in the testimony. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640].) The Appeals Board will ordinarily not interfere with those determinations unless, as here, there is a clear showing of an abuse of discretion.

Abuse of discretion exists whenever in the exercise of its discretion, the court exceeds the bounds of reason, all of the circumstances before it being considered. [Citations.] To exercise the power of judicial discretion, all material facts and evidence must be both known *and considered*, together with legal principles essential to an informed, intelligent and just decision. (Italics added.) (*Martin v. Alcoholic Beverage etc. Appeals Bd.* (1961) 55 Cal.2d 867, 878 [13 Cal.Rptr. 513, 362 P.2d 337]; *People v. Surplice* (1962) 203 Cal.App.2d 784, 791 [21 Cal.Rptr. 826].)

(*People v. Davis* (1984) 161 Cal.App.3d 796, 804 [207 Cal.Rptr. 846].)

Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836] (*Topanga*), holds that "implicit in [the law] . . . 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." The court explained that

[a]mong other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. [Citations.] In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis. [Citations.] ¶ . . . ¶

Absent such road signs, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review. [Citations.] They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable.

(*Id.* at pp. 516-517, fns. omitted.) As the Board said in *Garfield Beach* (2014) AB-9178a, “the Board cannot accord deference when, as here, a factual determination essential to a legal conclusion is *absent* . . .” (*Id.* at p. 6, emphasis in original.)

We believe there was an abuse of discretion in this matter because no findings were made whatsoever regarding the credibility of any of the witnesses, and the ALJ failed to explain why he did not believe the clerk. As such, we believe the Department’s leap from evidence to conclusion — absent credibility findings of any kind, and devoid of any explanation for disbelieving the clerk — is an abuse of discretion.

We believe appellant met its burden of proving non-compliance with rule 141(a).

ORDER

The decision of the Department is reversed.³

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

³This 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.