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

AB-9529
File: 21-429750 Reg: 15082139

CHAFFEY LIQUOR LLC,
dba Chaffey Liquor
10451 Lemon Avenue, Suite A, Rancho Cucamonga, CA 91737,
Appellant/Licensee

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: *Appellant:* Melissa H. Gelbart, of Solomon Saltsman & Jamieson, as counsel for appellant Chaffey Liquor LLC, doing business as Chaffey Liquor.
Respondent: Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

Chaffey Liquor LLC, doing business as Chaffey 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 in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

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

Appellant's off-sale general license was issued on October 21, 2005. On March 20, 2015, the Department filed an accusation charging that appellant's clerk, Nidal Askalan (the clerk), sold an alcoholic beverage to 19-year-old Rusty Lamn on August 28, 2014. Although not noted in the accusation, Lamn was working as a minor decoy for the San Bernardino County Sheriff's Department at the time.

At the administrative hearing held on June 18, 2015, documentary evidence was received, and testimony concerning the sale was presented by Lamn (the decoy). Appellant presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises and went to a cooler, where he selected a three-pack of Bud Light beer in 25-ounce cans. The decoy took the beer to the sales counter for purchase.

The decoy placed the beer on the counter. The clerk asked the decoy for his identification. The decoy handed the clerk his California driver's license, appeared to look at it for a few seconds, and then handed it back to the decoy. The clerk then rang up the beer on the cash register. The decoy paid for the beer, received his change, and exited the store with the beer. The clerk did not ask any questions about the identification, nor did he ask any age-related questions.

After the decoy exited the store with the beer, he met with deputies who brought him back into the store. The decoy was asked to identify the person who sold him the beer. The decoy pointed his finger at the clerk and said "He did." The clerk and the decoy were standing about five feet apart and were facing each other at the time of the identification. The clerk appeared to be aware that he was being identified as the seller of the beer. Immediately after the decoy identified him as the seller of the beer, the

clerk responded by saying “Awww man!” A photo of the clerk and the decoy was taken after the face-to-face identification.

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

Appellant filed an appeal contending: (1) The Department failed to meet its burden of proving the name of the clerk as alleged in the accusation, and further abused its discretion by including the clerk’s name in the decision based on facts not in evidence, and (2) the ALJ abused his discretion in holding appellant failed to present evidence in support of an affirmative defense where appellant relied on the decoy’s testimony to show that the decoy appeared over the age of 21.

DISCUSSION

I

Appellant contends that the decision below is not supported by substantial evidence. It argues that the Department failed to meet its burden of proof on an essential fact — specifically, the name of the clerk as pleaded in the accusation. Appellant also contends that the ALJ abused his discretion when he recited the name of the clerk eight times in the decision below despite the absence of evidence in the record establishing that fact.

When an appellant charges 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. (Cal. Const., art. XX, § 22; Bus. & Prof. Code,

§§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 229 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

Section 25658(a) provides: "Except as otherwise provided in subdivision (c), every person who sells, furnishes, gives, or causes to be sold, furnished, or given away any alcoholic beverage to any person under 21 years of age is guilty of a misdemeanor."

It is settled law that a licensee may be disciplined even where the violation was committed by an employee. "The owner of a liquor license has the responsibility to see to it that the license is not used in violation of law and as a matter of general law the knowledge and acts of the employee or agent are imputable to the licensee." (*Morell v. Dept. of Alcoholic Bev. Control* (1962) 204 Cal.App.2d 504, 514 [22 Cal.Rptr. 405]; see also *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 172 [17 Cal.Rptr. 315]; *Munro v. Alcoholic Bev. Control Appeals Bd.* (1960) 181 Cal.App.2d 162 [5 Cal.Rptr. 527]; *Quilici v. Dept. of Alcoholic Bev. Control* (1960) 178 Cal.App.2d 549 [3

Cal.Rptr. 49]; *Mack v. Dept. of Alcoholic Bev. Control* (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629].

"Unless otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (Evid. Code, § 115.) The preponderance of the evidence standard applies where, as here, an administrative agency seeks discipline against a nonprofessional license and no law mandates an alternative burden of proof. (See, e.g., *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1892-1893 [58 Cal.Rptr.2d 571]; *Mann v. Dept. of Motor Vehicles* (1999) 76 Cal.App.4th 312, 318-319 [90 Cal.Rptr.2d 277].)

Thus, in order to establish a violation of section 25658(a) sufficient to merit suspension or revocation of appellant's license, the Department must show by a preponderance of the evidence that either the licensee or its employee or agent sold alcohol to a minor.

It is indeed possible to establish that the seller was an employee of the appellant without any mention of the seller's legal name, provided there is sufficient evidence that the individual in question did in fact sell alcohol to a minor, and did so while acting as an employee of the licensee.

In this case, however, the ALJ *did* make factual findings that included the clerk's name. (See Findings of Fact, ¶¶ 7-8.) Notably, as appellant points out, the clerk's legal name only appears in the accusation, and does not appear anywhere else in the administrative record. (See generally RT; see also Exhibit 1.) Appellant is correct that the Department did not present evidence to establish the clerk's legal name.

The question, then, is twofold: first, did the Department establish by a

preponderance of the evidence that appellant's employee sold alcohol to a minor, and second, does the inclusion of the selling employee's name, despite its absence from the administrative record, merit reversal?

With regard to the first question, the ALJ made the following relevant findings of fact:

> 6. Decoy Lamn entered the Licensed Premises and went to a cooler. He selected a three pack of Bud Light beer in 25 ounce cans. Beer is an alcoholic beverage. Lamn took the three pack of Bud Light beer to the sales counter for purchase.
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> 7. Lamn placed the beer on the counter. The clerk, later identified as Nidal Askalan, asked Lamn for his identification. Lamn handed the clerk his California driver license. (Exhibit 2) Clerk Askalan took possession of the license, appeared to look at it for a few seconds, and then handed it back to Lamn. Clerk Askalan then rang up the beer on the cash register. Decoy Lamn paid for the beer, received his change, and exited the store with the beer. Clerk Askalan did not ask any questions about the identification nor did he ask any age related questions.
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> 8. After Lamn exited the store with the beer he met with deputies who brought him back into the store. Lamn was asked to identify the person who sold him the beer. Lamn pointed his finger at clerk Askalan and said "He did". They were standing about 5 feet apart and facing each other at the time of this identification. Clerk Askalan appeared to be aware that he was being identified as the seller of the beer. Immediately after Lamn identified him as the seller of the beer clerk Askalan responded by saying "Awww man!". A photo of clerk Askalan and decoy Lamn was taken after the face to face identification. (See Exhibit 5)

(Findings of Fact, ¶¶ 6-8.) Appellant does not challenge the finding that the clerk was acting as appellant's employee, or that the clerk did in fact sell alcohol to the decoy. Appellant's only complaint is that these findings include the clerk's name, for which the Department presented no evidence.

If, however, one redacts the legal name of the clerk from these findings and

substitutes only an anonymous title — "the clerk," for instance — the findings clearly establish a violation sufficient to merit discipline against appellant's license. Phrased another way, the Department proved its case by a preponderance of the evidence; although it failed to prove the clerk's legal name, his name was not an element of the violation, let alone an "essential fact" as appellant contends. (See App.Br. at p. 2.)

Indeed, the ALJ, in his conclusions of law, finds a violation of section 25658(a) without relying in any way on the name of the clerk:

> 4. Cause for suspension or revocation of Respondents' [*sic*] license exists under Article XX, Section 22 of the California State Constitution and Sections 24200(a) and (b) in that on August 28, 2014, Respondent, acting through its employee/agent, in the Licensed Premises, sold an alcoholic beverage to decoy Rusty Lamn, a person under the age of 21 years in violation of Section 25658(a). (Findings of Fact, ¶¶ 4 through 10.)

(Conclusions of Law, ¶ 4.) The legal conclusion that appellant's employee sold alcohol to a minor in no way depends on a factual finding regarding the clerk's legal name — ergo, a flaw in that factual finding does not constitute a flaw in the legal conclusion.

We can dispose of the first question, then: the Department did establish a violation of section 25658(a) by a preponderance of the evidence.

With regard to the second question — whether the inclusion of the clerk's legal name despite the absence of supporting evidence — constitutes error sufficient to merit reversal, the Department responds that the issue of the clerk's name was not raised below, and is therefore waived.

We agree insofar as appellant did not raise the identity of the clerk *as a defense*. However, where, as here, findings are made based on evidence entirely absent from the record, the error may not become apparent until after the Department issues its final

decision. In such instances, we must evaluate whether the error indeed prejudiced appellant; if so, reversal may be appropriate.

As the court of appeal has observed,

> If there are unobjectionable findings that amply support the judgment, findings on other issues become immaterial, and the fact that they are contrary to the evidence is not grounds for reversal. It is only when a judgment rests on some particular findings for its validity and support that lack of sufficient evidence to support the findings become material. Complaint may not be made of an unsupported finding that, had it been made the other way, would not have affected the judgment.

(*Gillette v. Gillette* (1960) 180 Cal.App.2d 777, 786 [4 Cal.Rptr. 700]; see also *Kneale v. Rhoads* (1961) 192 Cal.App.2d 764, 769 [13 Cal.Rptr. 918].) Put another way,

> Although a judgment cannot be sustained *which rests for its validity and support* upon some particular finding which is unsupported by the evidence . . . if it is amply supported by findings which are unobjectionable, findings on other issues become immaterial, and it is not ground for reversal that such other findings are unsupported by evidence, or are uncertain or otherwise defective.

(*Kreisa v. Stoddard* (1954) 127 Cal.App.2d 627, 633 [274 P.2d 164], emphasis added.)

As noted above, the legal conclusion reached regarding the violation of section 25658(a) in no way depends on the name of the clerk. (See Conclusions of Law, ¶ 4.) Appellant does not challenge the findings on which that conclusion *does* rely — specifically, that the clerk was appellant's employee, and did in fact sell alcohol to a minor. (See App.Br. at pp. 4-6.) The erroneous inclusion of the clerk's name, though perhaps careless, in no way prejudiced appellant and does not supply grounds for reversal.

II

Appellant contends that the ALJ failed to proceed in the manner required by law

by considering irrelevant facts — namely, the decoy's identification and the duration of his interaction with the clerk — in evaluating appellant's rule 141(b)(2) defense, and by incorrectly asserting that appellant presented no evidence to show that the decoy appeared to be over the age of 21.

Rule 141(b)(2) provides, "A 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 licensee. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Appellant specifically takes issue with the following conclusion of law:

> 5. Respondent argues that the decoy Rusty Lamn appears older than 21 thereby violating Rule 141(b)(2). That argument is rejected. Lamn appeared and acted his true age. (Findings of Fact, ¶ 4, 5, 9, and 10). Respondent claims that Lamn's experience as an explorer make [*sic*] him appear older than 21. However Respondent presented no witnesses or evidence to show that a contact of one minute or so with the clerk where Lamn said nothing but only presented his portrait formatted driver license could somehow cause one to believe that he appeared over the age of 21. Respondent presented no witnesses or evidence to establish an affirmative defense.

(Conclusions of Law, ¶ 5.)

First, appellant argues that the decoy's identification and the duration of his interaction with the clerk are irrelevant, since appellant did not raise defenses under rule 141, subdivisions (b)(3) and (4). Subdivision (b)(3), however, only requires the decoy to carry either valid identification or no identification at all. It does not resolve the issue of whether the identification itself — including a portrait orientation and a clear, correct

date of birth indicating that the decoy is under 21 — may be considered as part of the overall appearance projected to a clerk who requests and examines it. Similarly, subdivision (b)(4) requires only that the decoy "truthfully answer any questions about his or her age." It does not resolve whether the duration and content, if any, of that exchange may be considered as part of the decoy's apparent age.

Appellant, for its part, insists that these factors are irrelevant: "The length of the interaction between Decoy Lamm [*sic*] and the clerk, and the fact that Decoy Lamm produced his identification, have nothing to do with Decoy Lamm's apparent age." (App.Br. at p. 7.)

We disagree. Where a decoy's identification bears an orientation and clear date indicating the holder is *not* of legal age to purchase alcohol, that is a far stronger indicator of the decoy's apparent age than other factors typically raised by appellants, such as whether a decoy wore makeup or had work experience. To hold otherwise would allow clerks to simply ignore the objective information on the identification in favor of their own subjective impressions. We have no desire to encourage such carelessness. The information provided on accurate identification provided to the selling clerk may therefore be considered as part of the decoy's overall appearance.[2]

Moreover, the duration of any exchange with the clerk — and, by derivation, its content — may also be considered evidence of a decoy's apparent age. A very brief,

[2]We do not, however, hold that the content of the identification is necessarily dispositive. There may indeed be cases in which the decoy's physical appearance or conduct is so misleading that a clerk genuinely believes that the identification is inaccurate and the decoy is legitimately of legal age to purchase alcoholic beverages. We expect such cases will be rare, and that clerks who request identification will actually follow through and examine the information it contains.

silent transaction will necessarily give the clerk very little information about the decoy's age, while a longer verbal exchange will allow a clerk to evaluate voice pitch, vocabulary, or other factors that might influence his impression of the decoy's age.[3]

We therefore hold that both the information included on valid identification and the duration of a transaction may be relevant to a determination of the decoy's apparent age. Their inclusion in the decision below does not constitute an abuse of discretion.

Second, appellant contends that the ALJ incorrectly held that it presented no witnesses or evidence, and ignored appellant's argument regarding the decoy's law enforcement experience.

Appellant misreads the decision below. The ALJ explicitly acknowledged evidence of the decoy's Explorer experience. (See Conclusions of Law, ¶ 5; Findings of Fact, ¶ 10.) Additionally, the ALJ did not hold that appellant present *no evidence whatsoever*. He held instead that appellant presented no evidence sufficient to establish its defense:

> Respondent claims that Lamn's experience as an explorer make him appear older than 21. Respondent presented no witnesses or evidence *to show that a contact of one minute or so with the clerk where Lamn said nothing but only presented his portrait formatted driver license could somehow cause one to believe that he appeared over the age of 21.* Respondent presented no witnesses or evidence *to establish an affirmative defense*.

(Conclusions of Law, ¶ 5, emphasis added.) While appellant may have argued the decoy's Explorer experience made him look older, this was belied by the decoy's

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[3]We emphasize, however, that in order for an appellant to rely on such exchanges in a rule 141(b)(2) defense, the clerk's testimony is necessary. Mere after-the-fact speculation regarding the clerk's subjective impressions does not constitute evidence.

appearance at the hearing, where he "appeared and acted his true age." (*Ibid.*) Appellant's very limited evidence was simply insufficient to overcome the fact that the clerk had minimal interaction with the decoy and apparently ignored the accurate, objective information provided by the decoy's identification. As such, appellant presented no evidence, in the ALJ's words, "to establish an affirmative defense." (*Ibid.*)

ORDER

The decision of the Department is affirmed.[4]

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

[4]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.