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

AB-7907

File: 47-139581 Reg: 01050838

EKJ, INC., dba Out of Bounds
21022 Brookhurst Street, Huntington Beach, CA 92646,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: November 14, 2002
Los Angeles, CA

ISSUED JANUARY 28, 2003

EKJ, Inc., doing business as Out of Bounds (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for its bartender, Nicole Goldstein, having sold an alcoholic beverage (a 12-ounce bottle of Budweiser beer) to Devon Tallman, an 18 year-old police decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant EKJ, Inc., appearing through its counsel, John P. Yasuda, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on April 3,

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[1]The decision of the Department, dated November 1, 2001, is set forth in the appendix.

1984. Thereafter, on May 15, 2001, the Department instituted an accusation against appellant charging that, on December 29, 2000, Nicole Goldstein sold an alcoholic beverage (beer) to Devon Tallman.

An administrative hearing was held on October 10, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Devon Tallman ("decoy Tallman"), Nicole Goldstein ("Goldstein"), and Douglas Tallman ("detective Tallman"), a Huntington Beach police officer and father of the decoy.

Decoy Tallman testified that when she entered the bar, there were two other people seated at the bar. Goldstein approached her and asked if she could get decoy Tallman anything to drink. Decoy Tallman ordered a Budweiser, Goldstein brought her a bottle of Budweiser, was given a $10 bill, gave decoy Tallman change, and did not ask for identification. Detective Tallman then came and took possession of the beer and asked decoy Tallman to identify the seller, which she did while approximately two feet from Goldstein. Decoy Tallman was photographed (Exhibit 3) as she pointed to Goldstein as the seller. Asked if Goldstein was aware she was being identified, decoy Tallman said she thought that Goldstein appeared to be shocked and surprised. This was decoy Tallman's first experience as a decoy. She visited 14 locations and made purchases at five.

Detective Tallman had entered the bar five minutes before decoy Tallman, and was seated in a booth. Detective Tallman testified that he and another officer were seated to the north side of the bar. One other patron was seated toward the south end of the bar. Detective Tallman saw Goldstein lean over the counter toward decoy Tallman, and decoy Tallman asked for a Budweiser. Goldstein immediately uncapped

a bottle of Budweiser and gave it to decoy Tallman. Detective Tallman then notified officers outside the bar that there had been a violation. He asked decoy Tallman to identify the bartender, who was standing next to decoy Tallman. Detective Tallman told Goldstein she had sold an alcoholic beverage to a minor. Goldstein said words to the effect that she realized that, but refused to discuss the incident. Detective Tallman discussed the matter with Mark Larson, appellant's president, and, at Larson's request, showed him decoy Tallman's identification. According to detective Tallman, Larson then told him that decoy Tallman "looks young," and referring to the bartender said "she deserves it." [2] Detective Tallman acknowledged that there was a large number of young people south of the bar in the booth area, but did not see her ask anyone for identification. Detective Tallman testified the group of young people was in the booth area before decoy Tallman entered the premises.

On cross-examination, detective Tallman said both he and officer Rowland ordered beers while seated at the bar, and were not asked for identification. Nor did he observe the bartender ask anyone else for identification. He said there may have been sporting events on television, but he did not recall any music. He heard Goldstein ask decoy Tallman what she wanted. He enlisted the services of his daughter as a decoy, so that she could perform community service.

Goldstein testified she had been a bartender 13 years, and this was the first time she was charged with having sold to a minor. She recalled serving detective Tallman while he was seated at the far end of the bar. Another man standing near detective Tallman said he was waiting for someone. He declined to order anything, and

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[2] RT 40.

appeared to be looking around. She also noticed detective Tallman had not yet touched his beer. She testified that she became concerned and scared, thinking she was going to be robbed.

Goldstein testified that when she first noticed decoy Tallman, there were seven or eight people seated at the bar. A group of young people entered the bar after she served detective Tallman his beer. She further testified that she served three or four drinks to the young people who had come in, then went back to see if the second officer was ready to order. She noticed decoy Tallman at the bar, and thought she was one of the young people whose identification she had requested and been shown moments earlier. Goldstein testified that decoy Tallman asked for a beer, and that she had not first asked decoy Tallman if she wanted anything. Goldstein repeated her concern she was going to be robbed.

Goldstein acknowledged she had been mistaken in believing she had already asked decoy Tallman for her identification.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and determined that no defenses had been established. The Department imposed a 25-day suspension based upon the fact that the violation was appellant's second within a 32-month period.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) there was no compliance with Rule 141(a) in that the decoy operation was not conducted fairly; (2) there was no compliance with Rule 141(b)(5) in that the face-to-face identification was insufficient to inform Goldstein she was being accused and pointed out as the seller; (3) there was no compliance with Rule 141(b)(2)

because, under the actual circumstances presented to the seller, the appearance presented by the decoy was not that of a person under 21 years of age; and (4) the penalty was excessive.

DISCUSSION

It will be useful to set forth the general principles which govern this appeal.

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[3]

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corporation* v. *National Labor Relations Board* (1951) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]

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[3]The California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; and *Boreta Enterprises, Inc.* v. *Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

and *Toyota Motor Sales USA, Inc.* v. *Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers* v. *Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." *(Brookhouser* v. *State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby* v. *Alcoholic Beverage Control Appeals Board* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse* v. *Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc.* v. *Department of Alcoholic Beverage Control* (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and *Gore* v. *Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Brice* v. *Department of Alcoholic Beverage Control* (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and *Lorimore* v. *State Personnel Board* (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

I

Appellant contends that there was no compliance with Rule 141(a) in that the decoy operation was not conducted fairly. Appellant offers three reasons why it believes the decoy operation was conducted unfairly: (a) the actions of Huntington Beach police officers Tallman and Rowland caused Goldstein to fear for her safety and prevented her from fairly dealing with the decoy; (b) the use of Tallman's daughter as a decoy created a conflict of interest which resulted in bias in the testimony of both Tallmans; and (c) the Department failed to present the testimony of another police officer who was listening to the decoy via a transmitter worn by the decoy.[4] Each of these reasons except the last will be addressed.

Actions of police officers.

Appellant contends that because detective Tallman had not begun drinking the beer he had ordered, and officer Rowland had declined to order anything, Goldstein reasonably believed she was going to be robbed, and this, somehow, caused her to sell to decoy Tallman without asking for her identification.

We do not believe that Goldstein's apprehension at being robbed, simply because one of the officers had not begun drinking his beer and the other had not ordered anything, is enough to excuse the violation. An analogy can be drawn to Penal Code section 26, which excludes, as a person capable of committing a crime, one who

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[4] This issue deserves little consideration. Although informed by detective Tallman (RT 45) that the officer who heard the transmission was "here today," appellant's counsel made no attempt to secure that officer's testimony, either as his own witness or as a witness called by the Department. Nor, apparently, had appellant subpoenaed the officer. Any issue appellant may have had relating to this witness was waived.

committed the act "under threats or menaces sufficient to show that they had reasonable cause to and did believe that their lives would be endangered if they refused." In this case, the contention is only that Goldstein was frightened by what can only be described as ambiguous behavior by plainclothed police officers, neither of whom made any demand upon her.

Moreover, Goldstein acknowledged she had made a mistake, thinking that decoy Tallman was part of a group whose identification had already been examined. The connection between her mistake and her concern she could be robbed was apparently too tenuous for the Administrative Law Judge (ALJ) to accept. His response to the evidence on this issue is much akin to a credibility determination that we are not permitted to overturn.

The decisions of the Appeals Board which appellant cites are factually distinguishable. In *Hurtado* (2000) AB-7246, a police officer was seated with the decoy when the sale was made. The Board concluded that his presence misled the seller, and rendered the decoy operation unfair. In *Mauri Restaurant Group* (1999) AB-7276, the decoy represented that he was staying at the nearby Hyatt hotel, intended to have dinner, and expected to be joined by others. These statements were untrue. The Board found, as appellant notes, that the decoy's actions crossed the line between fairness and unfairness: "We are inclined to agree with appellant that, viewed as a whole, the decoy's conduct can fairly be equated with a misrepresentation as to his age, a violation of Rule 141(b)(4)." In *McCabe* (2000), the decoy was wearing a ring on the fourth finger of her left hand. The Board felt this may have unfairly misled the bartender to think she was married, the implication being that she was also older than

21.

As appellant observes, each of these cases involved some conduct on the part of the decoy or an accompanying police officer that the Board felt might reasonably have misled the seller as to the apparent age of the decoy.

Here, appellant suggests it was the conduct of detective Tallman and his partner, manifested by detective Tallman's delay in consuming the beer he ordered, and detective Tallman's partner's declining to order a drink that misled Goldstein. The ALJ apparently did not consider this to be such an unusual behavior as to cause an experienced bartender to fear a robbery, nor do we.

Use of daughter as decoy.

Appellant contends it is inherently unfair to have a decoy be the son or daughter of the officer running the decoy operation. It seeks to distinguish *McCabe*, *supra*, where the Appeals Board ruled to the contrary, on the ground the decoy's testimony showed bias.

Appellant suggests that decoy Tallman slanted her testimony to favor the Department and please her father. Appellant has cited a number of instances in decoy Tallman's testimony where she answered "I can't recall," or words to that effect, when asked about certain details of the decoy operation, such as how many other locations she visited, or whether she listened to any of the tape recordings made in the course of the operation.

We do not find appellant's argument persuasive for at least two reasons. First, the administrative hearing was approximately 10 months after the transaction in question. It is not at all surprising that decoy Tallman was unable to remember details

of matters peripheral to the actual purchase. We are not persuaded that an inability to recall details translates to bias. More importantly, we do not see how any display of bias in her answers can be said to refute what is not even in dispute - Goldstein mistakenly thought she had already checked decoy Tallman's identification. Goldstein so testified. We find nothing in decoy Tallman's conduct on the night of the operation or in her testimony at the hearing that excuses an admitted sale of an alcoholic beverage to a minor.

Appellant seems to suggest that, because decoy Tallman was permitted to wear a necklace and mascara, in violation of guidelines of the Huntington Beach Police Department, and contrary to the instructions of detective Tallman, this, too, is evidence of bias. Perhaps detective Tallman may have been lax in enforcing his instructions, but appellant has not explained how this affected the transaction.

In effect, appellant is asking the Appeals Board to accept its conflict of interest argument as a device to second guess the ALJ on the issue of credibility. Moreover, the argument ignores the fact that Goldstein implicitly admitted that decoy Tallman should have been asked for identification when she said she thought she had previously asked for it when she served the group of young people who had come into the bar.

II

Appellant contends there was no compliance with the face-to-face identification requirement of Rule 141(b)(5), because Goldstein was not looking at decoy Tallman when decoy Tallman pointed to her and identified her as the person who sold her the beer.

Exhibit 3 is a photograph which depicts decoy Tallman as she is pointing to Goldstein. The two are, as decoy Tallman testified, two feet apart.

Appellant, citing the Board's decision in *Chun* (1999) AB-7287,[5] argues that there was no valid face-to-face identification because Goldstein was "so disoriented and shocked that she did not know what was happening, nor was she even looking at the decoy."

Goldstein did not testify about the face-to-face identification. Decoy Tallman, when asked if Goldstein was looking at her when she was identifying Goldstein, said "I don't really recall. I don't believe so." In addition, when asked if Goldstein appeared to be paying attention, decoy Tallman said: "Well, she appeared to be shocked or surprised, but that was about it."

We do not think decoy Tallman's impression that Goldstein was "shocked and surprised" is the same as "so disoriented and shocked that she did not know what was happening," appellant's characterization of her state of awareness.

Appellant asserts that the record is silent as to whether Goldstein knew she was being accused of selling to a minor. Appellant is incorrect. Detective Tallman testified that, when he told Goldstein she had sold an alcoholic beverage to a minor, "she said words to the effect that she realized that." Such a response is, in our minds, inconsistent with appellant's assertion that Goldstein did not know what was happening.

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[5] In Chun, the Board said that "the phrase 'face-to-face means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification and the seller's presence *such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller ."* (Emphasis supplied.)

It was appellant's burden of proof at the hearing to establish there had been no face-to-face identification. We are satisfied appellant failed to meet that burden.

III

Appellant contends that decoy Tallman did not, under the actual circumstances presented to the seller, present the appearance required by Rule 141(b)(2). Appellant offers a number of reasons why this is so, such as the difficulty of 40- to 50-year-old administrative law judges in assessing the age of young persons, the dim atmosphere inside Out of Bounds, the decoy's manner of dress, and her lack of significant nervousness.

Much of appellant's argument is based on surmise. Can it be said that experienced administrative law judges, charged with the responsibility of assessing the apparent age of a decoy, are unable to do so simply because they are from a different generation? We do not think so.

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 or she testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that he or she 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.

The rule, through its use of the phrase "could generally be expected" implicitly

recognizes that not every person may think that a particular decoy is under the age of 21. Thus, the fact that a particular seller 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. We have no doubt that it is the recognition of this possibility that impels many if not most sellers of alcoholic beverages to pursue a policy of demanding identification from any prospective buyer who appears to be under 30 years of age.

We think it worth noting that we hear many appeals where, despite the supposed existence of such a policy, the evidence reveals that the seller made the sale in the supposed belief that the minor was in his or her early or mid-20's, and for that reason did not ask for identification and proof of age. It is in such cases, and in those where there is a completed sale even though the buyer - usually a decoy - displayed identification which clearly showed that he or she was younger than 21 years of age, that engenders the belief on the part of the members of this Board that many sellers, or their employees, do not sufficiently take seriously their obligations and responsibilities under the Alcoholic Beverage Control Act.

We do not ignore the evidence in this case that decoy Tallman was able to purchase alcoholic beverages in slightly more than one-third of the establishments she visited. By the same token, nearly two-thirds of the establishments visited declined to sell to decoy Tallman.

IV

Appellant cites a number of reasons why it believes the penalty is excessive: the bartender has not been cited in 13 years; appellant itself has only three other violations

in 17 years; the bartender was distracted by the conduct of the officers; the decoy operation was unfair because of the conflict of interest arising from the use of the daughter of one of the officers; the number of other sellers who sold to the decoy; and counsel's failure sufficiently to argue the question of penalty.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (*Martin* v. *Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (*Joseph's of Calif*. v. *Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

This was appellant's second sale to minor violation within a 36-month period. The Department, as it did here, commonly orders a 25-day suspension in such a case.

We are not in a position to say that the Department abused its discretion in doing so. Appellant's disciplinary history is not so exemplary as to suggest that it deserves special treatment, and the other grounds asserted to illustrate the excessiveness of the penalty were resolved against appellant.

ORDER

The decision of the Department is affirmed.[6]

TED HUNT, CHAIRMAN

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[6] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.

E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD