

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

AB-8521

File: 20-284612 Reg: 05060248

ELIZABETH HICKS and RANDALL HICKS, dba Rowdy Randy's
650 High Street, Auburn, CA 95603,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: October 5, 2006
San Francisco, CA

ISSUED JANUARY 16, 2007

Elizabeth Hicks and Randall Hicks, doing business as Rowdy Randy's (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 20 days for their 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 appellants Elizabeth Hicks and Randall Hicks, appearing through their counsel, Raphael L. Rosingana, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

¹The decision of the Department, dated January 19, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 28, 1993. On July 20, 2005, the Department filed an accusation against appellants charging that, on April 17, 2005, their clerk, Donald P. Hoskin (the clerk), sold an alcoholic beverage (beer), to 19-year-old Michelle Ryan. Ryan was working as minor decoy for a law enforcement agency at the time.

At the administrative hearing held on October 25, 2005, documentary evidence was received, the parties entered into a stipulation as to the facts, and co-licensee Randall Hicks (Hicks) testified about their efforts to prevent sales to minors.

At the inception of the Department's case, the ALJ suggested that it would be "an appropriate time to pursue the matter of stipulation and waiver as to the alleged facts in the accusation, as we discussed before we went on the record." [RT 5.] The Department's attorney, Lueders, responded, in pertinent part, "Prior to going on the record today we held brief conversations in which Mr. Hicks, the licensee, indicated that he does not dispute the sale of the alcoholic beverage occurred as alleged in the accusation, which is part of the jurisdictional documents that has been marked as the Department's Exhibit 1." [*ibid.*]

Lueders also described the agreement reached by the parties as to the correct date of a prior violation, and stated that the minor involved, Michelle Ryan, was present and ready to testify if called. The ALJ asked Hicks to confirm the type of license held and the location of the licensed premises. Then he asked Hicks, "And do you agree that the alleged facts in Count I of the present accusation are true and correct?" to which Hicks responded, "Yes."

The Department then moved to have its exhibits admitted into evidence, consisting of the jurisdictional documents (i.e., the accusation, notice of defense, etc.; Ex. 1), a certified copy of the prior disciplinary action (Ex. 2), a photocopy of the decoy's driver's license (Ex. 3), a photograph of the decoy and appellants' clerk (Ex. 4), and the minor's statement, written following the decoy operation (Ex. 5). "Taken cumulatively," Lueders said, those [latter] three exhibits are self-explanatory." [RT 8.] All the exhibits were admitted without objection, and the Department rested its case.

Hicks then testified, recounting the discipline imposed following their prior sale-to-minor violation and the measures they have taken since then to prevent further sales to minors. He also explained the circumstances of the violation at issue, the eventual dismissal of the criminal charge against the clerk, and why he thought the Department's penalty recommendation of a 25-day suspension was unfair.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged in the accusation and that appellants had not established a defense to the charge.

Appellants have filed an appeal contending the case should be remanded for rehearing because: 1) the stipulation upon which the decision is based was improper; 2) the hearing was unfair because the Department and the ALJ took advantage of or ignored appellants' inexperience and lack of legal knowledge; and 3) the Department's evidence was insufficient to satisfy its burden of proof. The first two contentions are related and will be discussed together.

DISCUSSION

I

Appellants contend that the stipulation the parties agreed to is "questionable" because the discussion about it took place off the record; appellants believed they were stipulating merely to the "background facts," not eliminating the need for the Department to prove its case; the stipulation was not reduced to writing and signed by the parties; and the ALJ did not himself recite the terms of the stipulation, or ask appellants if they understood the impact and agreed to it. The implication of this argument is that appellants were treated unfairly and their ignorance of the law was taken advantage of by the Department and the ALJ.

They also contend that they were subjected to this same unfairness throughout the hearing by Lueders and by the ALJ. Lueders, they assert, "acted in a way that deprived the petitioners of their rights of a fair trial," although they fail to specify any actions that might support that assertion. The ALJ, according to appellants, abused his discretion and aided the Department by failing to acknowledge that Lueders was an attorney representing the Department, failing to note that appellants represented themselves in the prior disciplinary proceeding, failing to acknowledge appellants' unfamiliarity with the legal process, and failing to provide them with "some level of explanation" about the process and these proceedings.

Appellants' general theme of unfairness in this proceeding has no basis in fact and is legally unsound. Some of the statements made by appellants are simply allegations without any support. The "facts" they cite that purportedly support their position are almost entirely negatives, i.e., things the Department or the ALJ failed to do. However, unless the Department or the ALJ had a duty to say or do something, the failure to say or do the thing would have no legal significance.

The unfairness arises, according to appellants, from the purported failure of the Department and the ALJ to accommodate appellants' failure to retain an attorney by providing them with legal advice. Appellants argue that it was unfair to allow them to proceed without explaining about the introduction and objection to evidence, general legal tactics, and the possible impact of their choices.

Neither the Department nor the ALJ, however, was under any obligation to rectify deficiencies in appellants' legal knowledge:

It is the duty of a trial judge to see that a cause is not defeated by the mere inadvertence of a lay litigant, but such litigant is restricted to the same rules of procedure as is required of those qualified to practice before our courts. (*Lombardi v. Citizens Nat. Trust Etc. Bank* (1955) 137 Cal.App.2d 206, 208-209 [289 P.2d 823].) "A litigant has a right to act as his own attorney [citation] "but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts; otherwise, ignorance is unjustly rewarded." [Citations.] . . ." (*Doran v. Dreyer* (1956) 143 Cal.App.2d 289, 290 [299 P.2d 661].)

Plaintiff's argument that, as a litigant who appeared in propria persona he was somehow entitled to a more indulgent application of the rules than other litigants or attorneys is without merit. His propria persona status afforded him no special treatment. "When a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys [citations]." (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638 [178 Cal.Rptr. 167]; *Foster v. Civil Service Com.* (1983) 142 Cal.App.3d 444, 449 [190 Cal.Rptr. 893].)

(*Harding v. Collazo* (1986) 177 Cal.App.3d 1044, 1055-1056 [223 Cal.Rptr. 329] .)

Appellants have presented no facts or legal argument supporting their conclusion that the stipulation is "questionable." Even if appellants had shown that the stipulation was "questionable," that is not a basis for reversing or remanding the Department's decision.

They now assert that the only facts they agreed were true and correct were "just basic background facts such as that the sale occurred," but that they did not intend to

concede "all facts and argument in the case as presented in the accusation" or to waive the need for the Department to make its case. Appellants' assertion is belied by both their words and their actions at the hearing.

Lueders stated that Hicks "indicated that he does not dispute the sale of the alcoholic beverage occurred as alleged in the accusation." The ALJ subsequently asked Hicks, "And do you agree that the alleged facts in Count I of the present accusation are true and correct?" to which Hicks responded, "Yes."

We see no evidence of appellants' purported reservations about or limitations on the agreement. They certainly had the ability to question the effect or meaning of the agreement both in the discussion off the record and that on the record, but did not do so. There is no evidence in the record of overbearing conduct or coercion by the Department or the ALJ. There is nothing "questionable" about the stipulation.

II

Appellants contend the Department failed to carry its burden of proof, because Lueders did not properly introduce or authenticate the evidence he presented and did not explain what the evidence was intended to prove. They also argue that the Department failed to prove compliance with rule 141 (4 Cal. Code Regs., § 141).

The Department did not need to introduce evidence to meet its initial burden of establishing a prima facie case, because appellants agreed that the allegations of the accusation were true and correct. Appellants agreed that their employee sold an alcoholic beverage to a person under the age of 21 in violation of Business and Professions Code 25658, subdivision (a), so nothing else was needed for the Department to carry its initial burden.

At that point, the burden shifted to appellants. Since they had conceded the violation, they were essentially limited to attempting to establish an affirmative defense or argue for a reduced penalty. They chose to do the latter. As we have said many times before, rule 141 provides an affirmative defense, and it was appellants' burden to establish that the rule was violated. As the ALJ found in Finding of Fact IV, appellants did not establish a defense under rule 141.

ORDER

The decision of the Department is affirmed.²

TINA FRANK, ACTING CHAIRPERSON
SOPHIE C. WONG, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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.