

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

AB-8596

File: 20-367739 Reg: 04057142

ANDY HONG and YOON JUNG HONG dba Western Supermarket
16135 South Western Avenue, Gardena, CA 90247,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: June 7, 2007
Los Angeles, CA

ISSUED AUGUST 8, 2007

Andy Hong and Yoon Jung Hong, doing business as Western Supermarket (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their off-sale beer and wine license for appellant/co-licensee Andy Hong having sold a 16-ounce can of Bud Light beer to Marisol Bazan, an 18-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Andy Hong and Yoon Jung Hong, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

¹The decision of the Department, dated August 8, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on October 26, 2000. Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on January 23, 2004.

An administrative hearing was held on October 14, 2005, at which time oral and documentary evidence was received. The decoy, Marisol Bazan, testified that she was not asked her age or for ID when she purchased the Bud Light beer, and that she returned to the store with three Gardena police detectives and identified appellant Hong as the seller. Gardena Detective Pam Robinson testified that she entered the store with the decoy and two other detectives, saw the decoy identify Hong as the seller, and wrote and issued a citation. Robinson identified Exhibit 6 as a photograph of Hong and the decoy. Detective Steve Swain was one of the three detectives. He also identified Exhibit 6 as a photograph of Hong and the decoy. Appellant Hong denied selling beer to the decoy, and claimed he made a sale to a woman with orange hair who appeared to be between 35 and 40 years of age. James Heitmeyer, a third Gardena detective, testified that he entered the store in an undercover capacity prior to the decoy, and never saw any female with orange hair in or near the store. Arthur Trinkle, president of an aerial photo company, testified that it was almost impossible to determine whether a digital photograph such as Exhibit 6 had been altered, and, while he could not tell one way or the other whether the photograph was authentic, it was possible that a digital photograph could be altered. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established and appellants had failed to prove an affirmative defense.

Appellants thereafter filed a timely appeal in which they raise the following

issues: (1) the Department violated the APA prohibition against ex parte communications; and (2) the administrative law judge (ALJ) failed to provide an adequate basis for his credibility determinations.

DISCUSSION

I

Appellants contend that the ALJ failed to provide an adequate basis for his credibility determinations. Citing Government Code section 11425.50, subdivision (b),² and *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 596 [128 Cal.Rptr.2d 514], appellants argue that the ALJ “cannot merely believe certain witnesses and disbelieved [sic] other [sic], without identifying any ‘observed demeanor, manner, or attitude’ of the witnesses.” (App. Br., p. 11.) Appellants contend the ALJ erred in determining that appellant Hong was not a credible witness when he claimed that the decoy who testified was not the person to whom he sold the alcoholic beverage in question, and, instead, accepted the testimony of the three Gardena detectives and

² Section 11425.50, a part of the APA’s Administrative Adjudication Bill of Rights provides, in pertinent part:

(a) The decision shall be in writing and shall include a statement of the factual and legal basis for the decision.

(b) The statement of the factual basis for the decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision. If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

the decoy to the contrary.

We begin by stating the general principle that it is the province of the ALJ, as the trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of abuse of discretion.

The issue raised by appellants in this case has been before the Board on a number of occasions, and the arguments made by appellants have been rejected without exception. The issue was discussed at length in *7-Eleven, Inc./Navdeep Singh* (2002) AB-7792, a case where appellants argued that, because the decoy was the only witness to testify about what occurred in the premises during the sale of the alcoholic beverage, and his testimony suffered from striking credibility defects, the ALJ was required to explain why the decoy's testimony was sufficient to support the Department's accusation. The Board rejected this argument, stating:

Section 11425.50 is silent as to the consequences which flow from an ALJ's failure to articulate the factors mentioned.³ However, we do not think that any failure to comply with the statute means the decision must be reversed. It is more reasonable to construe this provision as saying simply that a reviewing court may give greater weight to a credibility determination in which the ALJ discussed the evidence upon which he or she based the determination. We do not think it means the determination is entitled to no weight at all.

The ALJ in the present matter explained that the decoy's testimony was

³ The Law Revision Comments which accompany this section state that it adopts the rule of *Universal Camera Corp. v. National Labor Relations Board* (1951) 340 U.S. 474 [71 S.Ct. 456], requiring that the reviewing court weigh more heavily findings by the trier of fact (here, the administrative law judge) based upon observation of witnesses than findings based on other evidence.

impeached on two points, but neither point was critical. Otherwise, the ALJ found that the decoy's testimony was credible. No testimony or other evidence was introduced by appellants that contradicted anything testified to by the decoy. Having reviewed the decoy's testimony, we cannot say that the ALJ's determination was in any way unreasonable or that, even if the decision fails to fully comply with Government Code §11425.50, any such failure would warrant reversal.

This Board has consistently rejected counsel's insistence, in other appeals, that the federal appeals court case of *Holohan v. Massanari* (9th Cir. 2001) 246 F.3d 1195 requires reversal of a decision that does not explicitly explain the basis of a credibility determination. (See, e.g., *7-Eleven and Huh* (2001) AB-7680.) There is no reason to decide differently in the present appeal. (See also *Chuenmeersi* (2002) AB-7856, and *7-Eleven, Inc./Janizeh* (2005) AB-8306.)

Appellants' reliance on *California Youth Authority v. State Personnel Bd.*, *supra*, is misplaced for several reasons. First, the case declined to express any view on whether a failure of an ALJ to identify observations of witness demeanor, manner, or attitude rendered his or her decision defective. (*California Youth Authority, supra*, 104 Cal.App.4th at 596, n. 11.) Second, it is not at all clear that the ALJ did not identify his observations of appellant Hong's demeanor when assessing his credibility. He described appellant's suggestion that someone had created Exhibit 6 by combining separate photographs of himself and the decoy as "pure fancy," another way of expressing his reasoning.

Three police detectives and the decoy testified that she purchased beer from Hong, and that she identified him as the seller immediately after the sale transaction.

Hong's fanciful claim that Exhibit 6, the photograph of Hong and the decoy, might have been altered, is supported only by his self-proclaimed expert, who admitted that he could not say one way or the other whether the critical photograph had been altered. Although he raised questions as to the time the camera recorded the taking of the various photographs in evidence, he did not identify any substantive part of the photograph that might not be genuine.

For appellant's claim to prevail, the ALJ would have had to conclude that three Gardena police officers and the decoy conspired to give false testimony in order to fabricate a case against appellant, and the Gardena Police Department joined in the conspiracy by digitally altering the photograph by inserting the decoy's image in place of that of the orange-haired, 30 to 40-year-old woman appellant claimed bought the alcohol in question.

We have carefully reviewed the record, and are firmly satisfied that the decision, its findings, and the ALJ's credibility determinations are supported by substantial evidence

II

On November 13, 2006, the California Supreme Court held that the provision of a Report of Hearing by a Department "prosecutor" to the Department's decision maker (or the decision maker's advisors) is a violation of the ex parte communication prohibitions found in the APA. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board/Quintanar* (2006) 40 Cal.4th 1[50 Cal.Rptr.3d 585].) In *Quintanar*, the Department conceded that a report of hearing was prepared and that the decision maker or the decision maker's advisor had access

to the report of hearing, establishing, the court held, "that the reports of hearing were provided to the agency's decision maker." (*Id.* at pp. 15-16.)

In the present case, appellants contend a report of hearing was prepared and made available to the Department's decision maker, and that the decision in *Quintanar*, therefore, must control our disposition here. No concession similar to that in *Quintanar* has been made by the Department.

Whether a report was prepared and whether the decision maker or his advisors had access to the report are questions of fact. This Board has neither the facilities nor the authority to take evidence and make factual findings. In cases where the Board finds that there is relevant evidence that could not have been produced at the hearing before the Department, it is authorized to remand the matter to the Department for reconsideration in light of that evidence. (Bus. & Prof. Code, § 23085.)

In the present case, evidence of the alleged violation by the Department could not have been presented at the administrative hearing because, if it occurred, it occurred *after* the hearing. Evidence regarding any Report of Hearing in this particular case is clearly relevant to the question of whether the Department has proceeded in the manner required by law. We conclude that this matter must be remanded to the Department for a full evidentiary hearing so that the facts regarding the existence and disposition of any such report may be determined.⁴

⁴ The Department has suggested that, if the matter is remanded, the Board should simply order the parties to submit declarations regarding the facts. This, we believe, would be wholly inadequate. In order to ensure due process to both parties on remand, there must be provision for cross-examination.

The hearing on remand will necessarily involve evidence presented by various administrators, attorneys, and other employees of the Department. While we do not question the impartiality of the Department's own administrative law judges, we cannot

ORDER

The decision of the Department is affirmed as to issues raised other than that regarding the allegation of an ex parte communication in the form of a Report of Hearing, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.⁵

FRED ARMENDARIZ
SOPHIE C. WONG, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

think of a better way for the Department to avoid the possibility of the appearance of bias in these hearings than to have them conducted by administrative law judges from the independent Office of Administrative Hearings. This Board cannot, of course, require the Department to do so, but we offer this suggestion in the good faith belief that it would ease the procedural and logistical difficulties for all parties involved.

⁵This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.