

IN THE COURT OF APPEALS OF IOWA

No. 1-876 / 11-0793
Filed January 19, 2012

MOTIF, LTD., d/b/a BO-JAMES,
Petitioner-Appellee,

vs.

**IOWA DEPARTMENT OF COMMERCE-
ALCOHOLIC BEVERAGES DIVISION,**
Respondent-Appellant.

Appeal from the Iowa District Court for Johnson County, Paul D. Miller,
Judge.

State agency appeals the district court's reversal on judicial review.

REVERSED AND REMANDED.

Thomas J. Miller, Attorney General, and John R. Lundquist, Assistant
Attorney General, for appellant.

Dennis J. Mitchell of Meardon, Sueppel & Downer, P.L.C., Iowa City, for
appellee.

Considered by Vogel, P.J., Eisenhauer, J., and Sackett, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206
(2011).

EISENHAUER, J.

The Iowa Alcoholic Beverages Division (IABD) administrator ruled licensee Motif, Ltd., d/b/a Bo-James, did not exercise reasonable care to ascertain the ages of underage patrons when it served them beer. Bo-James appealed. The district court reversed and remanded for dismissal of the agency's complaint. IABD now appeals arguing substantial evidence supports the administrator's ruling. We agree and reverse the district court.

I. Background Facts & Proceedings.

During an Iowa City police officer's October 24, 2008 compliance check, Bo-James served an alcoholic beverage to an underage customer. After hearing, IABD imposed a first-violation penalty on Bo-James. We upheld the administrative action in *Motif, Ltd. v. Iowa Department of Commerce*, No. 11-0328 (Iowa Ct. App. Sept. 21, 2011).

On January 30, 2009, Iowa City plainclothes police officers Batcheller and Faulkcon conducted compliance checks of thirteen establishments to determine whether liquor was being sold to anyone under the legal age. See Iowa Code § 123.3(19) (2009). B.R. and K.B. assisted the officers. During an instructional briefing at the police department, Officer Batcheller verified B.R. and K.B. were twenty years old from the information on their Iowa driver's licenses. B.R. and K.B. were told not to do anything deceptive, to tell the truth, and "if they ask for identification, you display the identification."

Around 11:30 p.m., B.R. and K.B. entered Bo-James. Bo-James posts a sign outside stating "21 ONLY BAR." At that time, doorman Gustaf Hawbaker was outside and doorman Brent Adams was inside next to the entrance door. It

is undisputed neither doorman asked to see the identification of B.R. or K.B. as they entered Bo-James, and they did not receive a stamp on their hands. When the officers entered Bo-James shortly thereafter, doorman Adams checked the officers' IDs and stamped their hands.

B.R. and K.B. ordered beers at the bar. The officers watched the bartender serve B.R. and K.B. without taking any action to verify their ages. After paying for their beers, B.R. and K.B. gave the beers to the officers, left the bar, and waited in the unmarked police car.

Officer Batcheller identified himself to the bartender, told her the bar had failed an alcohol compliance check, and asked her to get her manager. The officers then talked with Morgan Cohen, son of Bo-James's owner, Leah Cohen. Morgan demanded to see the identification of the underage patrons. When Leah subsequently arrived, she also demanded to see the identification. Officer Faulkcon went outside and retrieved the driver's licenses. Officer Batcheller went outside and asked B.R. and K.B. what happened and was told "the person at the door was not paying attention to them, that they just walked right by and that the person never asked for identification."

In September 2009, the IABD filed a complaint against Bo-James alleging a January 2009 violation of Iowa Code section 123.49(2)(h) by serving liquor to underage persons. The complaint noted Bo-James's October 24, 2008 violation, "making this the second violation within a period of two years."

In November 2009, an administrative law judge conducted a hearing. Officer Batcheller testified the birthdays B.R. and K.B. identified on their statements were consistent with their driver's license birthdays. B.R.'s statement

shows a 1988 birth date and states: “went in to the bar right away Bigger door guy was outside. Had another person inside but didn’t ask [K.B.] or I for an I.D. or for cover.” K.B.’s statement also shows a handwritten 1988 birth date and states: “[B.R.] and I entered Bo James and walked up to the bar. We passed the two door guys who failed to acknowledge us walking in.”

Doorman Adams’s February 2009 statement provides:

On the night of January 30, 2009, I was working my second night as doorman/security at Bo James Bar in downtown Iowa City. I was working with a current employee Gustaf Hawbaker who was training me that night At 11:30 this night I was working the door alone at the time because Gustaf was outside clearing the smokers away from the entrance of the bar; when I was approached by two older male customers with my boss and they were saying that we let in two minors and they were served because of it. I later found out these were the two undercover cops.

At this point in time the two cops [handed] me both the id’s that the minors used to “get in.” They were both [1]988, 20 id’s. I then stated that there was no way I checked them because I would have known they weren’t old enough.

Leah Cohen testified Officer Batcheller had Officer Faulkcon go outside to get the IDs. Leah did not take issue with the IDs after they were retrieved and displayed by the officers. Leah agreed Officer Batcheller went out to the car to talk to the minors, returned, and told her “they do not have a mark on their hand. So your employee did not mark them.”

Leah testified the January 30, 2009 security videotape showed “a large guy leaving the establishment that was asking Brent [Adams] some questions.”

This person

had the door kind of opened a little bit with his arm. It appeared as though the two [minors] walked past him there. They went a few feet further. They stopped, turned around, looked back. Appeared

to me they knew it was a doorman, assessed it was a doorman, and chose to continue to go on and not show their IDs.

Leah complained to the police department about the January incident and “made it very clear that I felt as soon as they knew a doorman was there and turned around and he was there and kept going on, that they misrepresented their age in coming into our establishment.”

Leah detailed the extensive training program utilized for Bo-James doormen, including the additional training she required after the October 2008 violation. Checking identification is strictly the doorman’s responsibility after he comes on duty and the wait staff and bartenders no longer check IDs. Further, it is not Bo-James’s policy to have the doorman mark all customers as having had their age checked, some are marked and some are not.

Morgan Cohen testified after the officers “brought the IDs back,” he demanded to see the marking on the minors’ hands. Morgan did not identify any issue with the date on the IDs after the officers produced them. Morgan discussed events on the videotape as it was played for the ALJ and pointed out the person who opens the door while talking to doorman Adams and “now all of a sudden these two [minors] just come right in and hands are in their pockets and they stop right here. And they’re talking.” Morgan concluded B.R. and K.B. got past doorman Adams “because they’re deceitful” and testified: “Q. Walking by the doorman, that’s deceitful? A. Yeah, they had their hands in their pocket and walking, so they indicated to him that they were of age by walking right by.”

The ALJ ruled:

The licensee argues . . . it did “virtually everything it could to prevent underage drinking.” It is undisputed, though, that Mr.

Adams was not paying attention when B.R. and K.B. entered Bo-James. While Mr. Adams may not have intended to let anyone in without checking identification that is precisely what happened. The downfall of using a door person to check IDs is that if the door person is not vigilant the whole system breaks down. This is especially true when, as at Bo-James, there is no uniform system for identifying individuals who are of legal drinking age. If the door person consistently marked or issued wristbands to persons whose age had been verified, the wait staff or bartenders could serve as a second line of defense. At Bo-James, however, the servers assume that everyone in the door is of legal drinking age and no further verification of wristband or marking is undertaken. Under Bo-James' system, the door person did not exercise reasonable care on January 30, 2009 and, as a direct result of the failure to exercise reasonable care, the licensee sold alcohol to underage persons.

The ALJ rejected Bo-James's entrapment argument. After finding Bo-James's first violation occurred on October 24, 2008, the ALJ imposed the second-violation penalty. See Iowa Code § 123.50(3).

Bo-James filed an intra-agency appeal. In July 2010, the IABD administrator adopted the ALJ's findings and conclusions. Bo-James sought judicial review and a stay of agency action. The district court issued a stay. In April 2011, the district court reversed the administrator, ruling:

[T]he Court concludes there is not substantial evidence in the record to support the agency's conclusion that [Bo-James] failed to exercise reasonable care to ascertain whether B.R. and K.B. were of legal drinking age when they entered Bo-James. Copies of the identification cards of B.R. and K.B. were not presented at the time of hearing, and neither B.R. nor K.B. testified at hearing. Because this information is lacking in the record, the agency's decision is not sufficiently detailed to establish that B.R. and K.B. actually were under the legal drinking age when they were served alcoholic beverages at Bo-James. . . .

. . . .
While there is no reason to believe that the testimony offered by Detective Batcheller and Officer Faulkcon was anything other than truthful, the Court finds that there was better evidence available as to the question of the ages of B.R. and K.B. The [agency] could have submitted copies of B.R.'s and K.B.'s

identification cards/driver's licenses or called B.R. and K.B. as witnesses at the agency hearing

Even if the identification cards/driver's licenses of B.R. and K.B. had been submitted as evidence, or if B.R. and K.B. had testified at the agency hearing, the Court further finds there is not substantial evidence in the record to support [the agency's] allegation that [Bo-James] failed to exercise reasonable care due to the doorman failing to check the identification of B.R. and K.B. The testimony regarding the surveillance video footage is not persuasive . . . as to the actions taken by B.R. and K.B. in entering the bar while the doorman allegedly was distracted by a "large gentleman." Testimony from B.R. and K.B. as to their actions could have provided substantial evidence on this issue and could have provided a basis for finding [Bo-James] failed to exercise reasonable care; however, without such testimony, the Court concludes the record lacks substantial evidence to support a finding that [Bo-James] did not exercise reasonable care.

The district court rejected Bo-James's entrapment argument. The district court also rejected Bo-James's argument the "civil penalty imposed should be for a first violation" and ruled if substantial evidence had supported the administrator's ruling, the January incident constituted a second violation. The court remanded for dismissal of the complaint. The IABD now appeals.

II. Standard of Review.

We review for the correction of errors at law. *Jim O. Inc. v. City of Cedar Rapids*, 587 N.W.2d 476, 478 (Iowa 1998). In judicial review of agency action we apply the standards found in the Iowa Administrative Procedure Act. Iowa Code ch. 17A. We apply the standards found in section 17A.19(10) to determine whether our application of those standards produces the same result as that reached by the district court. *Auen v. Alcoholic Bev. Div.*, 679 N.W.2d 586, 589 (Iowa 2004).

III. Merits.

IABD contends there is substantial evidence in the record to support the agency's finding the Bo-James employees did not exercise reasonable care. Additionally, IABD argues the mandatory penalty for a second underage-sales violation was appropriately imposed.¹

Iowa Code section 123.49(2)(h) provides a person or club holding a liquor license and the person or club's employees shall not: "Sell, give, or otherwise supply any alcoholic beverage, wine, or beer to any person, knowing or failing to exercise reasonable care to ascertain whether the person is under legal age"

Agency action may be reversed when it "is not supported by substantial evidence in the record before the court when that record is viewed as a whole."

Iowa Code § 17A.19(10)(f). The term substantial evidence means:

the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

Id. § 17A.19(10)(f)(1). "Generally, a licensee exercises reasonable care to ascertain a patron's age by 'simply requiring patrons to furnish proof of age before the licensee serves them.'" *Walnut Brewery, Inc. v. Iowa Dep't of Commerce*, 775 N.W.2d 724, 730 (Iowa Ct. App. 2009) (quoting *Jim O. Inc.*, 587 N.W.2d at 478). In our review, we do not consider whether the evidence might support a different finding, but whether there is substantial evidence to support

¹ We have considered all issues raised and those not addressed are deemed to be without merit.

the findings actually made. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). Additionally, “hearsay evidence is admissible at administrative hearings and may constitute ‘substantial evidence.’” *Gaskey v. Iowa Dep’t of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995).

The district court’s ruling the driver’s licenses and/or testimony of B.R. and K.B. were required in order to prove the violation is a misapplication of the substantial evidence test. In addition to the officers’ testimony at the administrative hearing, B.R., K.B., and Adams’s statements establish B.R. and K.B. were under the legal age and had licenses with 1988 birthdates. Further, both Leah and Morgan testified they demanded and saw the identification. Neither challenged the 1988 birth year at the time or at the administrative hearing.

While there is evidence in the record Bo-James trained its employees to recognize underage patrons, in the specific instance when B.R. and K.B. entered Bo-James there is substantial evidence to support the agency’s finding Bo-James did not exercise reasonable care to ascertain whether either one was under the legal age. See Iowa Code § 123.49(2)(h). Adams’s own statement shows Adams did nothing to determine how old B.R. and K.B. were before the bartender served them alcohol on January 30, 2009. Accordingly, we reverse the district court on this issue and remand for further proceedings consistent with this opinion.

Regarding the appropriate statutory penalty on remand, we agree with the agency and the district court—a second-violation penalty is appropriate under the circumstances of this case. Iowa Code § 123.50(3); see *Walnut Brewery, Inc.*,

775 N.W.2d at 732 (holding a second violation within two years subjects the licensee to a thirty-day suspension and a civil penalty of \$1500).

REVERSED AND REMANDED.

Vogel, P.J., concurs; Sackett, S.J., dissents.

SACKETT, S.J. (dissenting)

I respectfully dissent. I would affirm.