

IN THE COURT OF APPEALS OF IOWA

No. 6-834 / 06-0160
Filed November 30, 2006

YELDER ENTERPRISES, INC.
d/b/a THE QUE,
Plaintiff-Appellant,

**IOWA ALCOHOLIC BEVERAGES
DIVISION,**
Defendant-Appellee.

Appeal from the Iowa District Court for Johnson County, Douglas S. Russell, Judge.

Plaintiff appeals the district court ruling affirming an agency decision that it had violated Iowa Code section 123.49(2)(h) (2003), by selling or supplying an alcoholic beverage to a person under the legal age. **AFFIRMED.**

Jerald W. Kinnamon and J. Dean Keegan, Cedar Rapids, for appellant.

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

Considered by Huitink, P.J., and Vogel, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

ROBINSON, S.J.**I. Background Facts & Proceedings**

On September 6, 2003, at 7:30 p.m., three Iowa City police officers entered The Que, a licensed liquor establishment. They saw only three people sitting in the bar area—an older man in his fifties sitting alone, and two younger males sitting together. Each of the two younger men had a glass of beer in front of him.

The officers approached the two younger men. The first man, Tristan Miller, produced identification showing he was twenty-one years of age. The second person, Courtney, stated he did not have any identification with him, but admitted he was only twenty years old. Courtney was issued a citation for possession of alcohol under the legal age.

The officers approached the bartender, Alexander Buhlman, and asked how Courtney had obtained a beer if he did not have any valid identification with him. Officer David Schwindt testified Buhlman told him he sold two beers to Miller on three occasions, and each time Miller gave one of the beers to Courtney.¹ Officer Schwindt completed an incident report that was consistent with his testimony. Buhlman gave a written statement, as follows:

On 9-6-03 I was serving a gentleman who I knew to be twenty-one two beers at a time. He then distributed one of them to a friend. His ID confirmed that he was twenty-one years of age. The man that was taken out of the bar, who was of legal age, was the person that I was serving beer to.

¹ At the time of the incident, The Que was selling a ten ounce glass of beer for fifty cents. Buhlman stated most customers purchased two beers at a time for one dollar.

Miller was charged with giving a beer to a person under the legal age, and with public intoxication. Buhlman was also charged with permitting a person under the legal age to consume beer, but that charge was later dismissed.²

The Iowa Alcoholic Beverages Division filed a civil complaint against The Que, alleging it had violated Iowa Code section 123.49(2)(h) (2003). This section provides a person or club holding a liquor license 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, or permit any person, knowing or failing to exercise reasonable care to ascertain whether the person is under legal age, to consume any alcoholic beverage, wine, or beer.

Iowa Code § 123.49(2)(h). An establishment that violates section 123.49(2)(h) may be assessed a civil penalty of \$500. Iowa Code § 123.50(3)(a).

A hearing was held before an administrative law judge (ALJ) of the Iowa Department of Inspections and Appeals. At the hearing, Buhlman testified he sold two beers to Miller on only one occasion, and Miller was sitting by himself at that time. He stated he was doing bartending chores, and did not see Miller give the second beer to anyone. He testified his written statement to police officers merely reflected his understanding of events which he obtained after the fact. Officer Schwindt testified as outlined above, that Buhlman told him he sold two beers to Miller on three occasions, and each time Miller gave one to a friend. Officer Zachary Diersen was present during the interview with Buhlman, and testified, "he was aware that Mr. Miller was giving one of the drinks to the person

² A criminal conviction is not a prerequisite to the imposition of a civil penalty under Iowa Code section 123.49(2)(h) (2003). *Jim O., Inc. v. City of Cedar Rapids*, 587 N.W.2d 476, 479 (Iowa 1998).

that was sitting right next to him and that that had occurred on several different occasions.”

The ALJ concluded:

The preponderance of the evidence established that on September 6, 2003, Alexander Buhlman, the licensee’s employee, “otherwise supplied” beer to a person under the legal age, in violation of Iowa Code section 123.49(2)(h). The licensee’s employee sold two beers to a twenty-one year old customer, who gave one of the beers to the underage person sitting next to him at the bar. This happened more than once. The employee never asked that underage person for identification. The employee failed to exercise reasonable care to ascertain whether the consumer of the beer was a person who was under the legal age.

The ALJ specifically found officers Schwindt and Diersen were credible witnesses, and their testimony was more credible than that of Buhlman. The Que was assessed a civil penalty of \$500. The ALJ’s decision was affirmed by the Iowa Alcoholic Beverages Division.

The Que filed a petition for judicial review. The district court concluded there was substantial evidence in the record to show Buhlman violated section 124.49(2)(h). The court noted it was within the agency’s domain to assess Buhlman’s credibility. The court affirmed the decision of the Division. The Que appeals.

II. Standard of Review

Our review is governed by the Iowa Administrative Procedure Act. Iowa Code § 17A.20; *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 216 (Iowa 2004). We review the district court’s decision by applying the standard of chapter 17A to the agency to determine if our calculations are the same as those reached by the district court. *University of Iowa Hosp. & Clinics v. Waters*, 674 N.W.2d 92, 95

(Iowa 2004). We may reverse, modify, or grant other relief if a party shows the agency's action is "[b]ased upon a determination of fact clearly vested by a provision of law in the discretion of the agency that 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).

III. Substantial Evidence

The Que claims there is not substantial evidence in the record to show its employee was knowingly complicit in the transfer of an alcoholic beverage to an underage person. The Que asserts that Buhlman's statement on the date of the event, and his later testimony at the administrative hearing, show he did not know Miller had given one of his two beers to Courtney. The Que contends the testimony of officers Schwindt and Diersen was based on an improper understanding of Buhlman's written statement, and not on an independent memory of their conversation with him.

The agency specifically found officers Schwindt and Diersen were credible witnesses, and their testimony was more credible than that of Buhlman. We give deference to an agency's credibility determinations. *Lange v. Iowa Dep't of Revenue*, 710 N.W.2d 242, 247 (Iowa 2006). Furthermore, on September 6, 2003, before his shift ended at 11:00 p.m., officer Schwindt typed up a narrative of the events at The Que that evening. The narrative states Buhlman said he had sold two beers to Miller on three occasions, and Miller "would then give one of the beers to his friend" Officer Schwindt's written narrative, made shortly after the event, supports his testimony at trial.

We conclude there is substantial evidence in the record to support the agency's finding that The Que's employee knew some of the beer he was selling Miller was being consumed by another person, and the employee failed to exercise reasonable care to ascertain whether that person was under the legal age. See *Jim O., Inc. v. City of Cedar Rapids*, 587 N.W.2d 476, 479 (Iowa 1998) (noting a civil penalty may be imposed upon a finding that an employee of an establishment sold alcohol to a person under legal age "without exercising reasonable care to ascertain whether she was under legal age"); *State v. Hy-Vee, Inc.* 616 N.W.2d 669, 673 (Iowa Ct. App. 2000) (finding that under section 123.49(2)(h), there must be evidence an establishment knew or failed to exercise reasonable care to ascertain whether the person is under legal age).

IV. Evidentiary Rulings

The Que claims the ALJ abused her discretion by permitting police officers to testify to whether Buhlman's conduct met a legal standard. Officer Becki Sammons was asked whether Buhlman acted reasonably in ascertaining whether Courtney was of legal age. The Que's attorney objected, and the ALJ permitted the question. Additionally, The Que claims the ALJ abused her discretion by permitting Officer Schwindt to testify to his impression of the meaning of Buhlman's written statement.

In administrative hearings,

A finding shall be based upon the kind of evidence on which reasonable prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial.

Iowa Code § 17A.14(1). An ALJ may consider evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). An administrative agency is not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 620 (Iowa 2000). We conclude the ALJ did not abuse her discretion in her evidentiary rulings in this case. The evidence was relevant, and therefore was admissible under section 17A.14(1).

The decision of the agency was supported by substantial evidence. We affirm the decision of the agency and the district court.

AFFIRMED.