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

AB-8490
File: 20-372055 Reg: 05059452

7-ELEVEN, INC., and HAROOTUNI, INC. dba 7-Eleven Store # 2174-22871
1212 East Orangethorpe, Placentia, CA 92870,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 2, 2006
Los Angeles, CA

Redeliberation: January 11, 2007; February 1, 2007

ISSUED MARCH 23, 2007

7-Eleven, Inc., and Harootuni, Inc., doing business as 7-Eleven Store #2174-22871 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, all of which were conditionally stayed, subject to one year of discipline-free operation, for their clerk, Harjinder Gill, having sold a six-pack of Bud Light beer and several 16-ounce cans of Sparks Malt Beverage to Nicole Silva, a non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Harootuni, Inc., appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated October 27, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 29, 2000. On April 25, 2005, the Department instituted an accusation against appellants charging, in two counts, the sale of alcoholic beverages to Nicole Silva (Count I) and Katrina Luna (Count II), both non-decoy minors.

An administrative hearing was held on September 2, 2005, at which time oral and documentary evidence was received. At that hearing, William Johnson, a Department investigator, Silva, and Luna testified in support of the Department's case, and Harjinder Gill testified on behalf of the licensees.

Subsequent to the hearing, the Department issued its decision which determined that the charge of Count I of the accusation, the sale or furnishing to Silva, had been established, and that the evidence did not support Count II, and that count was dismissed. The Department rejected appellants' claim that their clerk had reasonably relied on an out-of-state driver's license presented to him by Silva on several prior occasions.

Appellants have filed a timely appeal in which they contend that a defense was established under Business and Professions Code section 25660, and that the Department erred in accepting the testimony of the minor as credible over that of the clerk.

DISCUSSION

I

There is no dispute in this case that there was a sale of an alcoholic beverage to a minor. The only issue is whether the evidence establishes a defense to the charge based on the clerk's having reasonably relied on false identification. The burden in

such a case is on the party asserting the defense. To establish such a defense under section 25660, there must have been displayed an identification which reasonably purports to be issued by a government agency, and there must be a demonstrated reasonable reliance upon that identification. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429 [13 Cal.Rptr.3d 826].)

In this case, the clerk testified that, on three or four occasions, the minor had shown him an out-of-state driver's license that "looked real," and which purported to show that she was 21 years of age. He could not recall which state had issued the license. The minor denied ever having possessed false identification. The ALJ, reciting the factors set forth in Evidence Code section 780, decided to give greater weight to the minor's testimony that, although she had been in the store on prior occasions, she had never shown any identification to the clerk.

Appellants contend that the ALJ was obligated to make explicit findings as to why he chose to find the minor's testimony credible, citing Government Code section 11425.50, subdivision (a). That section provides, in pertinent part:

> 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 that 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.

Appellants argue that the decision lacks the factual findings required by section 11425.50.

It is firmly settled that the credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Lorimore v. State Personnel*

Board (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]*; Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) This Board has said that it will not interfere with credibility determinations "in the absence of a clear showing of an abuse of discretion*." (7-Eleven Inc. (Janizeh)* (2005) AB-8306.)

The Appeals Board has addressed the effect of the cited statute in earlier decisions. In *Chuenmeersi* (2002) AB-7856, the Board stated:

> Section 11425.50 is silent as to the consequences which flow from an ALJ's failure to articulate the factors mentioned. However, we do not think that any failure to comply with the statute means that the decision must be reversed. It is more reasonable to construe this portion 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 that the determination is entitled to no weight at all.

Nor can we ignore the ALJ's reference to specific factors set forth in Evidence Code section 780 - the ability to recollect and the existence or non-existence of a bias or motive. The clerk, who was still employed by appellants, had ample motive to claim he had seen identification on other store visits. His job depended on it. Even then, despite his confidence that he had seen the minor's identification three or four times, he could not recall which state supposedly issued the document he saw, and he recalled little else of its content. The minor, on the other hand, had nothing to gain, and risked perjury if she testified falsely.[2]

We have carefully reviewed the hearing record, and are unable to agree with

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[2] Appellants' burden is especially heavy in a case like this. How can anyone determine whether a clerk reasonably relied on false identification when there is no false identification to be examined? In this case the supposed false identification was a driver's license from some state other than California. How is one to know, that the out-of-state license even purported to show that the person displaying it was 21 years of age? We have seen innumerable cases where a clerk is presented with a driver's license clearly showing that its holder is a minor, and yet goes forward with a sale.

appellants that the Department abused its discretion in adopting the proposed decision and the disputed credibility determination the ALJ made. He saw and heard the witnesses as they testified. Our review of the cold record does not persuade us he was wrong.

Finally, we agree with the Department that the 9th Circuit decision in *Valderrama v. Immigration and Naturalization Service* (9th Cir. 2001) 260 F.3d 1083, cited by appellants, relates peculiarly to federal immigration law, and has no bearing on California administrative law.

II

Appellants have filed a motion to augment the administrative record with any form 104 (Report of Hearing) included in the Department's file, and have filed a supplemental brief regarding the recent decision of the California Supreme Court in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (November 13, 2006) 40 Cal.4th 1 [50 Cal.Rprtr. 3d. 585] (*Quintanar*).

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. (*Quintanar*, *supra*, 40 Cal.4th 1.) 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, appellant contends 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.[3]

ORDER

The decision of the Department is affirmed as to all issues raised other than that

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[3]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 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.

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.[4]

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

[4]This 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.