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

AB-9022
File: 20-223358 Reg: 07067536

7-ELEVEN, INC., ROBERT S. ELKINS, and JOANNE D. ELKINS,
dba 7-Eleven #2121 20245
10133 Maine Avenue, Lakeside, CA 92040,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 2, 2010
Los Angeles, CA

ISSUED FEBRUARY 9, 2011

7-Eleven, Inc., Robert S. Elkins, and Joanne D. Elkins, doing business as 7-Eleven #2121 20245 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, with all 10 days conditionally stayed for one year, for their clerk selling an alcoholic beverage to a law enforcement minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Robert S. Elkins, and Joanne D. Elkins, appearing through their counsel, Ralph Barat Saltsman, and the

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[1]The decision of the Department, dated March 26, 2009, is set forth in the appendix.

Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on September 27, 1988. On December 19, 2007, the Department filed an accusation against appellants charging that, on October 12, 2007, appellants' clerk, Jodie Reyes, sold an alcoholic beverage to 18-year-old Jonathan Simpson. Although not noted in the accusation, Simpson was working as a minor decoy for the San Diego County Sheriff's Department at the time.

At the administrative hearing held on February 11, 2009, documentary evidence was received and testimony concerning the sale was presented by Simpson (the decoy) and by Truc Vo, an investigator with the Department of Alcoholic Beverage Control.

The Department's decision determined that the violation charged was proved and no defense to the charge was established.

Appellants then filed an appeal contending: (1) the Department failed to meet its burden of proving the charges in the accusation, and (2) the Department failed to bridge the analytical gap between the raw data and ultimate conclusion that a violation occurred.

DISCUSSION

Appellants' two arguments will be considered together. In essence, appellants contend that the Department failed to prove that the alleged offense occurred on their premises, because the evidence is insufficient to support the charge.

> When findings are attacked as being unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,

> which will support the findings. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department. (See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 245, pp. 4236-4238.)

(*Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815].)

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

Appellants argue that the Department failed to prove that a sale of an alcoholic beverage to this decoy occurred on appellants' premises, because both witnesses simply answered "yes" when they were asked if the sale took place at a 7-Eleven located at 10133 Maine Avenue in Lakeside. Counsel for the appellants maintains that since neither the decoy nor the investigator could independently recall the street number of appellants' address, there is insufficient proof of personal knowledge that the alleged sale took place.

As the Department points out in their Reply Brief on page 4, counsel for the appellants failed to raise this issue at the administrative hearing, and failed to object to the witnesses simply answering "yes". Therefore, the Board is entitled to consider the issue waived. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §400, p. 458.) Further, the jurisdictional documents (exhibit 1) were admitted without objection at the administrative hearing, and these clearly establish that the violation occurred at the premises operated by the appellants. This is more than enough to constitute

substantial evidence that the violation occurred at appellants' premises.

Appellants further assert that the administrative law judge (ALJ) did not comply with the California Supreme Court's holding in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836] (*Topanga*), that the agency's decision must set forth findings to "bridge the analytic gap between the raw evidence and ultimate decision or order."

This Board has addressed a similar contention in prior appeals:

> Appellants misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made. This is made clear when one reads the entire sentence that includes the phrase on which appellants rely: "We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision *must set forth findings* to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga*, *supra*, 11 Cal.3d 506, 515, italics added.)
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> In *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760], the court quoted with approval, and added italics to, the comment regarding *Topanga* made in *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909]: " 'The holding in Topanga was, thus, that *in the total absence of findings in any form on the issues supporting the existence of conditions justifying a variance*, the granting of such variance could not be sustained.' " In the present appeal, there was no "total absence of findings" that would invoke the holding in *Topanga*.

(*7-Eleven, Inc. & Swanson* (2005) AB-8276, quoting from *7-Eleven, Inc. & Cheema* (2004) AB-8181.)

Appellants would have us believe that "[n]o competent evidence was produced supporting the contention that a violation occurred at Appellants' premises located at 10133 Maine Avenue in Lakeside" (App. Br., p. 6) and that "at best it was only established that a violation possibly occurred on *a* premises." (*Ibid*.)

Simply because the ALJ does not explain his analytical process does not invalidate his decision. Evidence was produced, and we believe there is sufficient evidence to find that the violation charged occurred at appellants' premises.

ORDER

The decision of the Department is affirmed.[2]

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

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[2]This 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.