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

AB-9104
File: 20-419601 Reg: 09070500

CHEVRON STATIONS, INC., dba Chevron Station # 9 9206
1805 Ygnacio Valley Road, Walnut Creek, CA 94598,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: July 14, 2011
San Francisco, CA

ISSUED AUGUST 30, 2011

Chevron Stations, Inc., doing business as Chevron Station # 9 9206 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk selling an alcoholic beverage to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Chevron Stations, Inc., appearing through its counsel, Soheyl Tahsildoost, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

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[1]The decision of the Department, dated March 30, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 17, 2005. On February 17, 2009, the Department filed an accusation charging that appellant's clerk sold an alcoholic beverage to 18-year-old Nicholas Evans on December 29, 2008.

At the administrative hearing held on February 10, 2010, documentary evidence was received and testimony concerning the sale was presented by Evans (the minor) and by Casey Tinloy, a Department investigator.

On November 26, 2008, Tinloy participated in a "shoulder-tap" decoy operation in which a 20-year-old decoy, standing outside appellant's licensed premises, said to a young man about to enter the premises, "Hey dude, I'm only 20. Can you buy me a beer?" [RT 20.] The young man, later identified as Nicholas Evans, agreed and the decoy gave him a $5.00 bill. Evans entered the premises and came out shortly thereafter with a brown bag. He handed the bag to the decoy and began to leave, but was detained by investigators. The bag was found to contain a 32-ounce bottle of Natural Ice beer.

Evans was searched and officers found his own valid California driver's license, showing him to be 18 years old, and a false ID card bearing someone else's name and picture and a birthdate making that person over the age of 21. At the top of the ID it said, "Legal Non-Government Photo ID Card for Residents of Maine." Evans pointed out the clerk who sold the beer to him, and the investigator asked the clerk if he remembered a transaction involving a Maine ID card. The clerk said he remembered making the sale.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant filed an appeal contending: (1) The Department failed to prove a violation occurred at appellant's premises on the date alleged in the accusation; (2) the Department failed to prove that any violation occurred as alleged in the accusation; and (3) the Department improperly refused to mitigate the penalty.

DISCUSSION

I

Appellant contends that the Department did not prove a violation occurred at appellant's licensed premises on the date alleged in the accusation. The accusation charges a sale-to-minor violation "[o]n or about December 29, 2008."

At the hearing, the investigator testified to events that occurred on November 26, 2008. The investigator's report, exhibit 3, details facts and events occurring on November 26, 2008. The Finding of Fact in the Department's decision states that a clerk sold beer to 18-year-old Nicholas Evans "[o]n November 26, 2008. At the end of the paragraph, in parentheses, is the statement, "The Accusation incorrectly alleged the date as December 29, 2008."

Appellant argues that, since the Department's proof showed a violation on November 26, 2008, not on December 29, 2008, the Department did not prove the violation as charged in the accusation.

"No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." (Code Civ. Proc., § 469.) Appellant has not alleged that it was surprised by the evidence nor has it asserted that it was unprepared at the administrative hearing to defend against a violation that occurred on November 26, 2008. Since appellant was not misled by the date in the accusation, the variance is

immaterial and may be disregarded. (*Mitidiere v. Saito* (1966) 246 Cal.App.2d 535, 540-541 [54 Cal.Rptr. 665].)

In addition, an appellate body is prohibited from reversing for error unless, after considering the entire record, it is clear that the error has caused a miscarriage of justice. (Cal. Const., art. VI, § 13; Code Civ.Proc., § 475; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105-106 [87 Cal.Rptr.2d 754].) Appellant has the burden "of spelling out in his brief exactly how the error caused a miscarriage of justice." (74 Cal.App.4th at p. 106.) Appellant has done nothing to meet this burden.

In any case, appellant waived this issue by not raising it at the administrative hearing, and may not raise it now for the first time on appeal. (*Wishart v. Claudio* (1962) 207 Cal.App.2d 151, 154 [24 Cal.Rptr. 398]*; Darcy v. H. E. Murray Co*. (1955) 133 Cal.App.2d Supp 795, 796 [284 P.2d 583].)

II

Appellant contends that the Department failed to prove that any violation occurred at this licensed premises. The decision states, in its Findings of Fact, that

> [t]he finding regarding the sale is based on a Department investigator's observation of Evans entering Respondent store empty-handed and leaving with a bag containing the beer, and on the clerk's admission to the investigator that he, the clerk, had sold the beer to Evans.

Appellant argues that the investigator's observation does not support the finding of a violation because "[w]hat happened inside the store is purely speculation." (App. Opening Br. at p. 7.) What the clerk told the investigator, appellant asserts, cannot provide a basis for finding a violation because the statement is inadmissible hearsay.

We review an appeal using the substantial evidence rule and are bound by the Department's factual findings absent an abuse of discretion:

> The burden is upon the appellant to show there is no substantial evidence whatsoever to support the findings. (*Division of Labor Law Enforcement v. Transpacific Transportation Co*. (1979) 88 Cal.App.3d 823 [152 Cal.Rptr. 98].) The trier of fact (the [Department] in this instance) is the sole arbiter of all conflicts in the evidence, conflicting interpretations thereof, and conflicting inferences which reasonably may be drawn therefrom; it is the sole judge of the credibility of the witnesses; may disbelieve them even though they are uncontradicted if there is any rational ground for doing so, one such reason for disbelief being the interest of the witnesses in the case; and, in the exercise of sound legal discretion, may draw or may refuse to draw inferences reasonably deducible from the evidence. (*Johnson v. Pacific Indem. Co*. (1966) 242 Cal.App.2d 878, 880 [52 Cal.Rptr. 76].)

(*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970-971 [191 Cal.Rptr. 415].)

A decision may be supported by an inference, as long as the inference is a reasonable conclusion deduced from the evidence and not based on mere suspicion, conjecture or guesswork. (*Beck Development Co., Inc. v. Southern Pacific Transportation Company* (1996) 44 Cal.App.4th 1160, 1204 [52 Cal.Rptr.2d 518]; *Krause v. Apodaca* (1960) 186 Cal.App.2d 413, 418 [9 Cal.Rptr. 10].) When the evidence raises an inference that a fact exists, the inference may be "rebutted by clear, positive and uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable men. The trier of the facts may not believe impossibilities." (*Krause v. Apodaca*, *supra*, at p. 419.)

We do not agree that the Department's conclusion was based on mere speculation. Rather, the ALJ drew reasonable inferences based on the evidence in the record of what Evans was asked to do and the sequence of events that followed his agreement to do what was asked. These inferences were not rebutted at all, much less by "clear, positive and uncontradicted evidence." Nothing indicates to us that the ALJ believed "impossibilities." While opinions might differ as to the inferences that could be drawn from the evidence, this Board is bound by those reasonable inferences that support the Department's decision.

III

Appellant contends that the decision must be reversed because the Department failed to mitigate the penalty for appellant's three and a half years of discipline-free licensure before this violation. The Department imposed the standard 15-day suspension for a first sale-to-minor violation, as indicated in the Department's Penalty Schedule.[2]

"The propriety of a penalty imposed by an administrative agency is a matter vested in the discretion of the agency, and its decision may not be disturbed unless there has been a manifest abuse of discretion. [Citations.]" (*Lake v. Civil Service Commission* (1975) 47 Cal.App.3d 224, 228 [120 Cal.Rptr. 452].)

Appellant's belief that a different, less onerous penalty would be more appropriate does not indicate that the penalty imposed by the Department is an abuse of discretion. There is nothing unreasonable about the standard 15-day suspension imposed here. That being the case, the Board must affirm the Department's imposition of penalty.

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[2]The Penalty Schedule may be found in the Penalty Guidelines Appendix to Department rule 144 (Cal. Code Regs., tit. 4, § 144.)

[3]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.