

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

AB-7792

File: 20-330366 Reg: 00049561

7-ELEVEN, INC. and NAVDEEP SINGH dba 7-Eleven Store # 27265
902 West First Street, Santa Ana, CA 92703,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: February 7, 2002
Los Angeles, CA

ISSUED APRIL 18, 2002

7-Eleven, Inc. and Navdeep Singh, doing business as 7-Eleven Store # 27265 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days, with five days stayed for a probationary period of one year, for appellants' clerk selling an alcoholic beverage to a 19-year-old police decoy, Daniel Padron ("the decoy"), being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc. and Navdeep Singh, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Stephen A. Jamieson, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The decision of the Department, dated March 22, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 15, 1997.

Thereafter, the Department instituted an accusation against appellants charging the sale-to-minor violation noted above. An administrative hearing was held on January 11, 2001, at which time documentary evidence was received and testimony was presented by the decoy, by Santa Ana Police Department investigator Victor Allen McNatt, and by co-appellant Navdeep Singh. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged in the accusation and that no defense had been established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the Administrative Law Judge (ALJ) erred in not explaining why he found the decoy's testimony credible; (2) there was insufficient evidence to support findings that Rule 141(b)(3) and 141(b)(4) were complied with; and (3) the decoy's appearance violated Rule 141(b)(2). The first two issues are related and will be discussed together.

DISCUSSION

I

Appellants argue that, because the decoy was the only witness to testify to what occurred in the premises during the sale of the alcoholic beverage to him, and his testimony "suffers from striking credibility defects," the ALJ was required to "explain why [the decoy's] testimony was sufficient to support the Department's Accusation." (App. Br. at 6.) They assert that, because the decoy's "discredited" testimony is the only evidence that there was compliance with Rule 141(b)(3) and 141(b)(4), there is insufficient evidence to support a finding that Rule 141 was complied with.

Appellants base their contention that the ALJ committed reversible error in not making explicit findings regarding the credibility of the minor's testimony on Government Code §11425.50, provisions in other statutes, and case law requiring findings in administrative adjudicatory decisions.

Government Code §11425.50 provides, in pertinent part:

"(a) The decision shall be in writing and shall include a statement of the factual and legal basis for the decision.

"(b) The statement of the factual basis for the decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision. 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 the 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.

"(c) The statement of the factual basis for the decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. The presiding officer's experience, technical competence, and specialized knowledge may be used in evaluating evidence."

Section 11425.50 is silent as to the consequences which flow from an ALJ's failure to articulate the factors mentioned.² However, we do not think that any failure to comply with the statute means the decision must be reversed. It is more reasonable to construe this provision 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

² The Law Revision Comments which accompany this section state that it adopts the rule of Universal Camera Corp. v. National Labor Relations Board (1951) 340 U.S. 474 [71 S.Ct. 456], requiring that the reviewing court weigh more heavily findings by the trier of fact (here, the administrative law judge) based upon observation of witnesses than findings based on other evidence.

based the determination. We do not think it means the determination is entitled to no weight at all.

The ALJ in the present matter explained that the decoy's testimony was impeached on two points, but neither point was critical. Otherwise, the ALJ found that the decoy's testimony was credible. No testimony or other evidence was introduced by appellants that contradicted anything testified to by the decoy. Having reviewed the decoy's testimony, we cannot say that the ALJ's determination was in any way unreasonable or that, even if the decision fails to fully comply with Government Code §11425.50, any such failure would warrant reversal.

This Board has consistently rejected counsel's insistence, in other appeals, that the federal appeals court case of Holohan v. Massanari (9th Cir. 2001) 246 F.3d 1195 requires reversal of a decision that does not explicitly explain the basis of a credibility determination. (See, e.g., 7-Eleven and Huh (2001) AB-7680.) There is no reason to decide differently in the present appeal.

Appellants also rely on the case of McBail & Co. v. Solano County Local Agency Formation Com. (1998) 62 Cal.App.4th 1223, 1227 [72 Cal.Rptr.2d 923], in which the appellate court remanded to the Local Agency Formation Commission its decision denying the plaintiffs' annexation petition. The court stated that the agency must articulate the basis for its decision in order for a reviewing court to apply the substantial evidence rule in a meaningful way. This case, however, is inapposite because it deals with a legislative act of an agency, not a judicial one, and it has nothing to do with the credibility of a witness. We do not disagree with the general requirement expressed in the court's opinion that an agency should articulate its reason for a decision; however,

failure to do so is not a basis for reversal, as urged here by appellants, but, at most, simply a basis for remand.

This Board rejected, in 7-Eleven and Huh, *supra*, the argument that a deficiency in explanation regarding a credibility determination required reversal. What the Board said in that earlier case applies equally well here:

"While it may be true that a statement of the factors behind a credibility determination may be of considerable assistance to a reviewing court, and is welcomed by this Board, we are not prepared to say that a decision which does not set forth such considerations is fatally flawed."

Appellants argument that there was insufficient evidence to support the finding of compliance with Rule 141(b)(3) and 141(b)(4) because of alleged "credibility defects" in the decoy's testimony, is rejected. As noted above, the ALJ reasonably concluded that the decoy's testimony was, except for two non-critical points, credible. Therefore, the basis for appellants' contention on this issue is lacking. We also note that Rule 141 is an affirmative defense, and appellants cannot prevail without presenting some evidence that the rule was not complied with. Rank speculation is not the sort of evidence that fulfills appellants' burden.

II

Appellants contend, in a litany familiar to us from other appeals filed by counsel, that "The overwhelming weight of the evidence presented at the hearing indicates that [the decoy] had the looks and demeanor of an individual who appeared over 21 years of age at the time of the sale, in violation of Rule 141(b)(2)."

Appellants recite the same physical and non-physical features of the decoy that the ALJ did in Findings II-E and II-F, where he found that the decoy displayed an

appearance that complied with Rule 141(b)(2). Appellants have presented nothing indicating that we should reject the ALJ's finding in favor of that of appellants.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.