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

AB-8883
File: 20-442274 Reg: 07066835

7-ELEVEN, INC., and DAMANJIT SAHOTA dba 7-Eleven Store 2121 21453D
5650 Baltimore Drive, La Mesa, CA 91942,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 3, 2009
Los Angeles, CA

ISSUED: DECEMBER 1, 2009

7-Eleven, Inc., and Damanjit Sahota, doing business as 7-Eleven Store 2121 21453D (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their off-sale beer and wine license for 10 days for co-licensee, Damanjit Sahota, having sold a six-pack of Heineken beer, an alcoholic beverage, to Desirae Vargas, a 17-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellantS 7-Eleven, Inc., and Damanjit Sahota, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Alicia Ekland, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

---

[1]The decision of the Department, dated April 24, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 7, 2006. On September 18, 2007, the Department instituted an accusation against appellants charging the sale by co-licensee Sahota of an alcoholic beverage on December 16, 2006, to Desirae Vargas, a person under the age of 21. Although not stated in the accusation, Vargas was acting as a minor decoy for the La Mesa Police Department.

An administrative hearing was held on February 27, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented. The decoy testified that she was not asked for identification and believed she had not been asked her age before being sold the beer. Sahota testified that he thought she was 26 or 27 years of age.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and appellants had failed to establish any affirmative defense.

Appellants filed a timely notice of appeal in which they raise the following issues: (1) there was no compliance with Department Rule 141(b)(5) (4 Cal. Code Regs., §141 subd. (b)(5)); and (2) the decision lacks a credibility analysis.

DISCUSSION

I

Appellants challenge the Department's finding II-C as unsupported by substantial evidence. "Substantial evidence" is relevant evidence which reasonable minds would accept as a 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] and *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

The finding in question states:

> C. The preponderance of the evidence established that a face to face identification of the seller of the beer did in fact take place and that the identification complied with the Department's Rule 141.
>
> 1. After the sale had taken place, the police officers and the decoy reentered the premises. Officer Raybould contacted the clerk, identified himself and explained why he was there. When Raybould asked the decoy to identify the person who had sold her the beer, the decoy pointed to the clerk (Sahota) and stated, "He sold me the beer." When this identification took place, the clerk and the decoy were standing in close proximity and the clerk was facing the decoy. After the face to face identification had taken place, the photograph depicted in Exhibit 3 was taken. This photograph shows the decoy holding the six-pack of Heineken beer that she purchased at the premises and it also shows the decoy standing next to the clerk who had sold her the beer.
>
> 2. The last thing that the officers did before leaving the premises was to issue a citation to the clerk who had sold beer to the decoy.

Appellants argue that "[T]he Department failed to provide sufficient evidence to establish that a face to face occurred prior to the issuance of the citation," as Rule 141(b)(5) requires. Appellants cite *Azzam* (2001) AB-7631 to the effect that the Department must present affirmative testimony that a face to face identification occurred before a citation issued, and *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126], for the

proposition that Rule 141 must be strictly construed.

Appellants also cite the testimony of City of La Mesa police officer Jeff Raybould that a citation was issued to Sahota, but that he could not recall whether the citation issued before or after the decoy had identified Sahota as the seller. They contend that his additional testimony that the citation was issued at the "end of the contact," as explained by him, is too ambiguous to support the finding as to when the citation issued:

> Q. When you say "at the end of the contact," what do you mean by that?
>
> A. After speaking to him and asking him some questions and then returning the beer.
>
> Q. So was that after the decoy had pointed to him, as well?
>
> A. Most likely, yeah, because we left the store.

[RT 46-47].

There are a number of reasons why we must reject appellants' contentions.

First, appellants materially overstate the holding in *Azzam*, *supra*. In *Azzam*, the appellants argued that Rule 141(b)(5) was violated because the record was silent as to whether the citation was issued before or after the decoy identified the clerk. What the Board said then is still true:

> In the many appeals that have been heard by the Board since the advent of Rule 141, it is the normal course in decoy operations for the face-to-face identification to occur prior to issuance of a citation.[2] While there is not specific testimony in the present case regarding when the citation was issued relative to the time the clerk was identified, logic, common sense, and usual practice dictate that the identification occurred first and then the citation was issued. The ALJ so found (Finding III-C), and that finding is based on a reasonable inference from the testimony.
>
> 2 In the early days of Rule 141, this was not necessarily the case. Once the requirements of the rule became better known and understood, the absence of a face-to-face identification became uncommon. More often, now, the issue concerns the mechanics of the identification process.

Appellant relies on *The Southland Corporation/R.A.N.* (1998) AB-6967 for its assertion that the Department has failed to satisfy its burden of presenting a prima facie case of compliance with Rule 141. They contend that, despite straightforward testimony by the officer and the decoy that a face-to-face identification occurred, more is required.

We disagree. Once there is affirmative testimony that the face-to-face identification occurred, the burden shifts to appellants to demonstrate non-compliance, i.e., that the normal procedure of issuing a citation after identification of the clerk was not followed. We are unwilling to read our decision in *The Southland Corporation/R.A.N.* as expanding the affirmative defense created by Rule 141 to the point where appellants need produce no evidence whatsoever to support a contention that there was a violation of that rule.

Appellants acknowledge, as they must, that there was testimony from both the police officer and the decoy that a face to face identification was conducted. That being the case, under the reasoning of *Azzam*, *supra*, it became appellant's burden to demonstrate that the citation issued before the face to face identification. Any ambiguity in the testimony of the police officer as to what "end of contact" meant does not in any way suggest that the citation was issued prematurely.

The decision in *Acapulco Restaurants, Inc.*, *supra*, affords no support to appellants' position. That case involved a decoy operation where the evidence showed there had been no face to face identification by the decoy. The issue whether it was the appellants' burden to show affirmatively that the issuance of the citation preceded the face to face identification was not addressed.

In any event, we think the officer's testimony was not ambiguous. It was reasonable for the ALJ to construe what the officer said to mean that the last thing the police did before leaving the premises was to issue a citation to the clerk.

II

Appellants contend that the decision is flawed because the ALJ failed to explain his reasons for accepting the testimony of the police officer and the decoy over that of

the clerk/co-licensee as to when the face to face identification was conducted. They cite a federal court of appeals decision requiring an ALJ to provide "clear and convincing" reasons for rejecting a Social Security claimant's testimony (*Holohan v. Massanari* (9th Cir. 2001) 246 F.3d 1195), and a California appellate court decision dealing with what a court requires in order to determine whether a decision is supported by substantial evidence (*McBail & Co.* v. *Solano County Local Agency Formation Commission* (1998) 62 Cal.App.4th 1223 [72 Cal.Rptr. 2d 922]).

Appellants point to supposed contradictions in the testimony of Officer Raybould and the decoy with respect to how close the decoy was to the clerk when she identified him as the seller. Raybould estimated two feet, the decoy said from three to six feet. Given that both were testifying months after the event, we find it difficult to treat a discrepancy of as small as one foot a contradiction. Similarly, the decoy's inability to remember whether the clerk was wearing a uniform or a name tag strikes us not as a contradiction, but simply an inability to recall a trivial detail months after the fact. Indeed, as Exhibit 3 demonstrates, he was wearing neither.

It is an exaggeration to say, as appellants do say, that these were "obvious discrepancies in testimony and lapses in memory on these critical issues." Nor do we think a credibility analysis is essential where an ALJ equates "two feet" and "three to six feet" with "standing in close proximity," or where the ALJ bases a finding on the testimony of two witnesses and a photograph (Exhibit 3) that a face to face identification took place despite testimony of the clerk that he was unaware he was being identified as the seller.

Appellants' contentions are without merit.

ORDER

The decision of the Department is affirmed.[2]

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

---

[2] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.