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

AB-8891
File: 20-361574 Reg: 07067076

7-ELEVEN, INC., BALWINDER S. KAHLON, and PARMINDER K. KAHLON,
dba 7-Eleven Store # 2133-13890
6320 Bristol Road, Ventura, CA 93303,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED APRIL 21, 2010

7-Eleven, Inc., Balwinder S. Kahlon, and Parminder K. Kahlon, doing business as 7-Eleven Store # 2133-13890 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Balwinder S. Kahlon, and Parminder K. Kahlon, appearing through their counsel, Ralph B. Saltsman and Jonathan R. Ota, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

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[1]The decision of the Department, dated May 31, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 17, 2000. On October 17, 2007, the Department filed an accusation against appellants charging that, on August 30, 2007, their clerk, Ashrafbhai Maredia (the clerk), sold an alcoholic beverage to 19-year-old Stephanie Turner. Although not noted in the accusation, Turner was working as a minor decoy for the Ventura Police Department and the Department at the time.

At the administrative hearing held on April 10, 2008, documentary evidence was received and testimony concerning the sale was presented by Turner (the decoy) and by Patrick Lindsey, a Ventura police officer. Co-licensee Balwinder Kahlon testified for appellants.

The Department's decision determined that the violation charged was proved and no defense was established. Appellants then filed an appeal contending: (1) Rule 141(b)(5)[2] was violated, and (2) the penalty is excessive.

DISCUSSION

I

Rule 141(b)(5) requires, after a sale of an alcoholic beverage to a minor decoy, that the "officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy . . . make a face to face identification of the alleged seller of the alcoholic beverages." Failure of the law enforcement agency to comply with any of the provisions of rule 141 provides a complete defense to a sale-to-minor charge. (Cal. Code Regs., tit. 4, §141, subd. (c).)

[2]References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

Appellants contend that the decision must be reversed because the ALJ rejected their argument that the face-to-face identification was tainted without explaining why he did so. They assert that the ALJ is required to provide an explanation before rejecting an argument raised by a party. Their assertion is based on language in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] (*Topanga*), which states that an agency "must set forth findings to bridge the analytical gap between the raw evidence and ultimate decision or order." (11 Cal.3d at p. 515.)

Appellants' reliance on *Topanga* is misplaced. The Board has repeatedly rejected the argument that *Topanga*, *supra*, requires explanations of the reasoning behind the ALJ's determinations and conclusions. In *7-Eleven, Inc./Cheema* (2004) AB-8181, in response to a similar argument, the Board explained that *Topanga* "does not hold that findings must be explained, only that findings must be made." The Board went on to say:

> Appellants' demand that the ALJ "explain how [the conflict in testimony] was resolved" (App. Br. at p. 2) is little more than a demand for the reasoning process of the ALJ. The California Supreme Court made clear in *Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 778-779 [122 Cal.Rptr. 543], that, as long as findings are made, a party is not entitled to attempt to delve into the reasoning process of the administrative adjudicator:
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> > As we stated in *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836, 522 P.2d 12]: "implicit in [Code of Civil Procedure] 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."
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> > In short, in a quasi-judicial proceeding in California, the administrative board should state findings. If it does, the rule of *United States v. Morgan* [(1941)] 313 U.S. 409, 422 [85 L.Ed. 1429, 1435 [61 S.Ct. 999]] precludes inquiry outside the administrative record to determine what evidence was considered, and reasoning employed, by the administrators.

More recently, the Board restated the same idea: "The thrust of the decision is on the need for findings, and not at all with the agency's rationale in relating the findings to the ultimate decision." (*7-Eleven, Inc./ Parstabar* (2008) AB-8614.)

Appellants argue here, as they did before the ALJ, that the face-to-face identification was unduly suggestive because the officer singled out one of the two clerks before the decoy made the identification. They support their conclusion by what they purport to be a quote from *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2003) 109 Cal. App. 4th 1687, 1698 [1 Cal.Rptr.3d 339] *(Keller)*: "a suggestive line-up with only one person is impermissible under Rule 141(b)(5)."

The language appellants "quote" does not appear in *Keller*, *supra*, on page 1698 or anywhere else in the opinion. There is language on page 1698 that is somewhat similar, but its import is considerably different:

> We note that single-person show-ups are not inherently unfair. (*In re Carlos M*. (1990) 220 Cal.App.3d 372, 386 [269 Cal.Rptr. 447].) While an unduly suggestive one-person show-up is impermissible (*ibid*.), in the context of a decoy buy operations [*sic*], there is no greater danger of such suggestion in conducting the show-up off, rather than on, the premises where the sale occurred.

While *Keller*, *supra*, did say that an *unduly suggestive* one-person line-up is impermissible, the court also noted that it is not "inherently unfair" to conduct an identification where there is only one person presented to identify. The court cited the decision in *In re Carlos M*. (1990) 220 Cal.App.3d 372 [269 Cal.Rptr. 447] (*Carlos M*.), where an alleged assailant was transported to a hospital to be identified by the victim. The court in that case rejected the contention that the identification was unduly suggestive, stating:

> A single-person show-up is not inherently unfair. (*People v. Floyd* (1970) 1 Cal.3d 694, 714 [83 Cal.Rptr. 608, 464 P.2d 64].) The burden is on the defendant to demonstrate unfairness in the manner the show-up was conducted, i.e., to demonstrate that the circumstances were unduly suggestive. (*People v. Hunt* (1977) 19 Cal.3d 888, 893-894 [140 Cal.Rptr. 651, 568 P.2d 376].) Appellant must show unfairness as a demonstrable reality, not just speculation. (*People v. Perkins* (1986) 184 Cal.App.3d 583, 589 [229 Cal.Rptr. 219].)

(Id., at p. 386.)

The person shown to the victim in *Carlos M*. was wearing handcuffs, but the court held that even that circumstance did not make the identification process unduly suggestive:

> While appellant claims the handcuffs influenced the victim to believe appellant was involved, the mere presence of handcuffs on a detained suspect is not so unduly suggestive as to taint the identification. (See *In re Richard W*. (1979) 91 Cal.App.3d 960, 969-971 [155 Cal.Rptr. 11].)

(*Carlos M*., *supra*.)

Similarly, *Keller*, *supra*, upheld a decoy identification even though the clerk was brought out from the store before the decoy was asked to identify him.

This case involves conduct far less suggestive than that in *Keller* or *Carlos M*. Appellants have not met their burden of showing that this identification was unduly suggestive nor have they provided any authority requiring the ALJ to explain why he rejected their argument.

II

Appellants contend that it was an abuse of discretion for the ALJ to propose as a penalty, and the Department to adopt, a suspension of 10 days, in light of the mitigation evidence they presented. They contend the ALJ considered only their 8 years of discipline-free operation, but negated even that by "unjustifiably dwell[ing] on" co-licensee Kahlon's lack of credibility.

The ALJ described Kahlon's testimony in Findings of Fact 13 and 14:

> 13. Respondent Balwinder Kahlon described the policy his store has in place concerning identification checking of customers purchasing alcoholic beverages. Expressing a bit of uncertainty, he finally concluded that they were to check identification if the patron appeared to be under 27 years of age. He testified that employees are trained using a video tape provided by Respondent 7-Eleven. It was unclear whether that video training program was 7-Eleven's "Come of Age" program or a different one, but Kahlon also testified that when a new employee is hired, "we go through all the questions and answers until the person understands it all." Then, he said, daily reminders are given. Kahlon also testified that they have a new secret shopper program, although it was not established when that program commenced. He indicated that the store has been shopped and responded appropriately five times since August 2007.
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> 14. Kahlon testified that clerk Maredia was not one of his employees, that he was a stranger to Respondents despite the fact he was wearing a red 7-Eleven smock and operating one of their cash registers. He asserted that Maredia was a friend of the other person on duty at the time of the transaction between Maredia and Turner and that other person had given Maredia a smock and a cash register and was permitting Maredia to work in the store to simply "to [*sic*] see how it was to work there." Kahlon denied that Maredia had received any training in sale of alcoholic beverages at all. Balwinder Kahlon was found not to be a credible witness in any respect.

In Conclusions of Law 6, the ALJ determined that Maredia was appellants' "on-duty clerk . . . in the Licensed Premises." The ALJ discussed the penalty determination in Conclusions of Law 7 and 8:

> 7. Complainant requested a 15-day suspension. In light of the less than forthright testimony provided by Respondent Balwinder Kahlon (mainly his denial that clerk Maredia was a newly trained employee), Complainant argued sufficient aggravation exists to counteract Respondents' history of licensure without discipline and merits treatment as a first-offense with neither aggravation nor mitigation. The violation occurred and no defenses were established. If believed, Kahlon's testimony suggested that anyone can walk in off the street, put on a smock, obtain access to a cash register, handle money, make change, and sell age-restricted products, all without challenge from a person in charge at the business. Respondents pointed to 8 years of discipline-free operation and Rule 144 and argued that a mitigated sanction is appropriate. The status of clerk Maredia, employee or not, and the truthfulness of Respondent Kahlon should not detract from such a long

period of successful operation they argued.

> 8. Kahlon's testmony certainly did not help Respondents' case. Little he said was either specific enough or believable enough to provide help. On the other hand, Respondent Kahlon's misguided attempt to ameliorate the situation is not deemed sufficient to detract from 7½ years of discipline-free operation. The Order that follows gives that credit.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*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].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

Contrary to appellants' assertions, it is clear that the ALJ gave reasonable consideration to the evidence presented and the credibility of the witnesses. He proposed a penalty less than that recommended by the Department, taking into consideration both the mitigating circumstances and the obvious fabrication of Kahlon.

It would be hard to imagine a more reasonable penalty than the one imposed here.

ORDER

The decision of the Department is affirmed.[3]

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

[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.