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

AB-8917
File: 20-419879 Reg: 06064530

7-ELEVEN, INC., and FATIMA STORES, INC., dba 7-Eleven 2173 27062E
1100 South La Brea Avenue, Inglewood, CA 90301,
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 MARCH 3, 2010

7-Eleven, Inc., and Fatima Stores, Inc., doing business as 7-Eleven 2173 27062E (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 Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Fatima Stores, Inc., appearing through their counsel, Ralph B. Saltsman and Alicia R. Ekland, 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 August 6, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 4, 2004. The Department filed an accusation charging that appellants' clerk sold an alcoholic beverage to 19-year-old Jacqueline Cordova on October 21, 2006. Cordova was working as a minor decoy for the Department at the time.

At the administrative hearing held on June 12, 2008, documentary evidence was received and testimony concerning the sale was presented by Cordova (the decoy) and by Department investigators Eduardo Madrid and Wendi Casteel. Israr Siddiqui, a director of co-licensee Fatima Stores, Inc., testified about the store's policies and employee training regarding alcoholic beverage sales.

The Department's decision determined that the violation charged was proved and no affirmative defense was established. Appellants filed an appeal contending that the Department did not provide a complete record on appeal nor did it file the accusation within one year of the violation. They also moved to augment the record with any report of hearing and documents related to General Order No. 2007-09.[2]

DISCUSSION

I

Appellants contend that the Department provided an incomplete certified record on appeal, failing to include the proposed decision of the administrative law judge (ALJ) and the Department's certification that it adopted the proposed decision as its own. Appellants assert that the Department's decision must be reversed because an incomplete record was provided.

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[2]As the documents requested do not appear to have any relevence to the determination of the issues in this appeal, the motion to augment is denied.

The Department does not dispute that the documents should have been included in the certified record. It contends, however, that this error was cured when a supplemental record containing the missing documents was served on the parties on June 18, 2009, three months before appellants filed their opening brief. Additionally, the Department argues, the appropriate remedy is not to reverse the decision, but for appellants to file a motion to augment the record with the missing documents.[3] In any case, the Department asserts, appellants have not shown that they suffered any prejudice from omission of the documents.

Appellants insist that reversal is required, but cite no authority to support this result. Nor do they present any meritorious argument in support of their contention. We conclude that the record on appeal presents no basis for reversing the Department's decision.

In numerous prior appeals, this Board has rejected arguments identical to those made by appellants, for the same reasons asserted here by the Department: The defect was cured in a timely fashion (see, *e.g., Garfield Beach CVS LLC* (2009) AB-8767); appellants did not request the missing documents in their motion to augment (see, *e.g., 7-Eleven, Inc./Thind* (2009) AB-8736); and appellants have not shown that they were prejudiced in any way by omission of the documents, which they had in their possession at all pertinent times,[4] even before the supplemental record was served.

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[3]Although appellants did file a motion to augment, it requested documents not relevant to any of the issues on appeal. See *ante*, footnote 2.

[4]As parties, appellants received a certified copy of the Department's decision, including the proposed decision and the Department's certification, when it was issued on or about August 6, 2008. If they did not have these documents, it seems very unlikely that they would have filed their notice of appeal, as they did, without mentioning the lack of documents. The inevitable inference is that they did have them at that time.

Appellants attempt to present this as a serious issue by asserting that, given the irregularities of the certified record, neither they nor the Appeals Board know what administrative record the director reviewed.[5] However, even though the record on appeal was not distributed to the parties all at one time, that does not mean that the entire record was unavailable to the director. Unless appellants have some evidence that the initially incomplete certified record was the result of something other than clerical error, this does not even raise an inference, much less constitute evidence, of what the director did or did not review before adopting the ALJ's proposed decision.

II

Appellants contend that the Department has no jurisdiction in this matter because the only accusation produced at the hearing did not bear a stamped "file date" and, therefore, no evidence was presented that the accusation was filed within one year from the date of the violation, as required by Business and Professions Code section 24206.[6]

Appellants argued this issue at the hearing and the ALJ addressed their argument in paragraphs 6 and 7 of the introductory part of the proposed decision. He reasoned that, the violation having occurred on October 21, 2006, the accusation

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[5]Appellants state that "[t]he Director is mandated to review the following documents: the pleadings and correspondence of the parties, notices, orders, pleadings and correspondence pertaining to reconsideration, and exhibits admitted or rejected before adopting the ALJ's proposed decision. See Rule 188." (App. Opening Br. at p. 11.) Appellants are in error. Rule 188 is a regulation of the Appeals Board, not the Department; it cannot mandate that the director do anything. Even if it were a Department regulation, however, it says nothing at all about what the director must review before adopting the ALJ's proposed decision.

[6]That section provides, in pertinent part: "All accusations against licensees for violating or permitting the violation of [Section] . . . 25658 . . . shall be filed within one year."

needed to be filed on or before October 20, 2007. The accusation bears the registration number 06064530; since the first two numbers of the registration number are the last two numbers of the year in which the accusation was registered, the accusation must have been registered in 2006, some time between October 21 and the end of the year. In addition, the accusation was stamped as received by the Department's Hearing & Legal unit on November 28, 2006. The ALJ concluded that the accusation was filed within the required period.

The Department, in its appeal brief, also points out that appellants filed their notice of defense in response to the accusation on February 13, 2007. This would have been impossible if, as appellants contend, the accusation was not filed until more than a year after the violation.

Appellants are alleging that there is not substantial evidence to support the finding of timely filing. "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].) When a decision of the Department is challenged on this basis, the Appeals Board's review is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the challenged finding. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In determining whether the finding is supported by substantial evidence, the Board may not exercise independent judgment on the effect or weight of the evidence; instead, it must resolve any evidentiary conflicts in favor of the Department's decision and accept

all reasonable inferences that support the finding. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].)

Appellants assert the finding is "based on conjecture, rather than actual evidence." (App. Br. at p. 11.) While it is true there was no direct evidence presented that the accusation was filed within one year of the violation, substantial indirect, or circumstantial, evidence exists to support the determination of timely filing. It is axiomatic that a finding may be supported by inference, as long as the inference is a reasonable conclusion from the evidence. (*Krause v. Apodaca* (1960) 186 Cal.App.2d 413, 418 [9 Cal.Rptr. 10].) An inference made by the trier of fact will be overturned by an appellate tribunal only "when that inference is 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." (*Hicks v. Reis* (1943) 21 Cal.2d 654, 660 [134 P.2d 788]; see also *Gaffney v. Downey Savings & Loan Assn.* (1988) 200 Cal.App.3d 1154, 1168 [246 Cal.Rptr. 421].)

The inferences that arise from the circumstantial evidence in this case are clearly reasonable and overcome the lack of a file stamp, shifting the burden of proof back to appellants. They produced nothing further to contradict those inferences or to support their contention, so we can only conclude that the accusation was timely filed.

ORDER

The decision of the Department is affirmed.[7]

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

[7]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.