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

AB-9062
File: 21-425690 Reg: 09070774

SHARMEENS ENTERPRISES, INC., dba Short Stop 22
9501 Van Nuys Boulevard 116, 117 & 118
Panorama City, CA 91402
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jonathon E. Logan

Appeals Board Hearing: February 3, 2011
Los Angeles, California

ISSUED MARCH 30, 2011

Sharmeens Enterprises, Inc., doing business as Short Stop 22 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 20 days, with 5 days stayed subject to a one-year probationary period, for appellant's clerk having sold or furnished an alcoholic beverage to a person under the age of 21 years, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Sharmeens Enterprises, Inc., appearing through its counsel, Ryan M. Kroll, and the Department of Alcoholic

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[1]The decision of the Department, dated July 29, 2009, is set forth in the appendix.

Beverage Control, appearing through its counsel, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on April 5, 2006. On March 30, 2009, the Department instituted an accusation against appellant charging that on October 31, 2008, appellant's clerk sold or furnished an alcoholic beverage to a person under the age of 21 years.

At the administrative hearing held on June 23, 2009, documentary evidence was received and testimony concerning the violation charged was presented by Juan Emerick, an officer with the Los Angeles Police Department, Ronnae George (the minor), and Sal Auddin Ahmed (the clerk).

The testimony established that on October 31, 2008, Kenisha Phillips,[2] an individual over the age of 21, purchased alcohol from appellant's clerk. [RT 10.] Initially, Kenisha requested vodka, which the clerk placed on the counter. (FF 23.) The minor then stuck her head in the door and directed that the vodka be exchanged for gin. (FF 24.) After purchasing the gin and exiting the premises, Kenisha passed the bottle to the minor. (FF 10.) Officer Emerick then detained the minor. (FF 11.)

Subsequent to the hearing, the Department issued its decision which determined that the charge was proven and no defense to the charge was established.

Appellant filed a timely appeal raising the following issues: (1) The Department's decision is not supported by sufficient evidence, (2) the administrative law judge (ALJ) failed to bridge the analytical gap between the evidence and the ultimate findings, (3) the Department's decision relies in error on a statement by appellant's clerk, (4) the

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[2]Kenisha Phillips is misidentified as Kenisha Williams in Finding of Fact (FF) 7 and Conclusion of Law (CL) 6.

Department failed to meet its burden of proof in establishing the charge, and (5) erroneous factors were applied to arrive at an aggravated penalty.

DISCUSSION

I

Appellant first contends that the Department's decision is not supported by sufficient evidence.

> In examining the sufficiency of the evidence, all conflicts must be resolved in favor of the department, and all legitimate and reasonable inferences indulged in to uphold its findings if possible. When findings are attacked as being unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department. (See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 245, pp. 4236-4238.)

(*Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 25Cal.App.3d 331, 335 [101 Cal.Rptr. 815].)

"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].)

In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*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]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

Appellant argues that there was insufficient evidence to establish that appellant's clerk knew that the alcoholic beverage would be furnished to a minor, so that the charge could be established. The ALJ, however, found in his Conclusions of Law 5 through 10 as follows:

> 5. Ronnae George credibly testified that she remained outside because the owner barred her from the store due to theft related offenses involving beer and candy.
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> 6. Kenisha Williams [*sic*] completed her personal transaction for candy and a cigar and it was only after communication from Ronnae that a separate transaction for alcohol occurred.
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> 7. When clerk Ahmed placed a bottle of vodka on the counter, Ronnae partially opened the door and Ahmed paused with his left hand resting on the counter next to the bottle. Both Ahmed and Kenisha looked in the direction of Ronnae for several seconds and Kenisha made a pointing motion towards the door.
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> 8. The bottle of vodka was taken off the counter and Ahmed moved to his right, closer to the doorway where the minor was standing. Ronnae testified she was at the doorway when she pointed to the Seagram's and stated, "Get the gin."
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> 9. The testimony that Ronnae communicated with the clerk and Kenisha verbally and by pointing is corroborated by the surveillance video. Neither Kenisha nor Ahmed had any reason to stop the vodka transaction except for the actions of Ronnae at the premises doorway.
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> 10. The testimony by Ahmed that he was unaware of Ronnae's presence at any time before her arrest, or that he did not select the Seagram's Gin

at Ronnae's request is contradicted by Ronnae's testimony, Officer Emerick's testimony and the surveillance video.

A reasonable person would accept the evidence presented here as substantial evidence, even though contradicted by the clerk, for the conclusion that appellant's clerk furnished an alcoholic beverage to this minor, as affirmed by the testimony of both the minor and the police officer, and as memorialized in the surveillance video (Ex. A). We disagree with appellant that insufficient evidence exists to support the ALJ's findings simply because some testimony is contradictory.

II

Appellant contends secondly that the administrative law judge failed to bridge the analytical gap between the evidence and the ultimate findings in his decision. Appellant seems to assert that the ALJ is required to provide an explanation for his conclusion. This assertion is based on language in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836] (*Topanga*), which states that an agency "must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order."

Appellant's 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:

> 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.)

Simply because the ALJ does not explain his analytical process does not invalidate his determination. There is sufficient evidence to find that the violation occurred as charged, even though appellant disagrees with the ALJ's conclusion.[3]

III

Appellant contends the Department's decision relies in error on a statement by appellant's clerk. On this point, appellant would have us believe that the Department's case relies *entirely* on the testimony of Officer Emerick that when clerk Ahmed was

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[3]As a side note: appellant opines (AOB at page 11) that the Department disregarded certain testimony in order to justify a desired outcome. Unfortunately, this assertion is made about the supposed testimony of Kenisha Phillips (who did not appear as a witness at the administrative hearing) so we must disregard this argument.

confronted about whether he knew Kenisha was buying alcohol for Ronnae, Ahmed replied, “well, yeah.” (AOB 11-13.)

The only reference to this statement in the Proposed Decision is in Finding of Fact 22: “While issuing the citation, Officer Emerick asked if Ahmed knew that Kenisha was buying the alcohol for Ronnae. According to the officer, Ahmed shrugged his shoulders and stated, “Well, yeah.”

Contrary to appellant’s assertion, the ALJ does not rely solely on this statement to reach his conclusion that the clerk knew the alcohol was being purchased for a minor. In addition to the clerk’s statement, the ALJ refers to the testimony of the minor and to that of Officer Emerick, as well as to the surveillance video which was introduced into evidence and viewed at the administrative hearing.

Appellants are essentially asking this Board to reweigh the factual evidence in this case, and reach a conclusion different from that of the ALJ and the Department. This the Board is not entitled to do.

The Court of Appeal addressed the standard of review that it, and this Board, must use when considering a decision of the Department:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department’s findings of fact. (*CMPB Friends* [(2002)] 100 Cal.App.4th [1250] at p. 1254 [[122 Cal.Rptr.2d 914]]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) We must indulge in all legitimate inferences in support of the Department’s determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department’s factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of

> witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Where, as here, there is conflicting testimony, the Appeals Board is powerless to substitute its own conclusions for those of the trier of fact when there is substantial evidence, even if contradicted, to support the findings.

IV

Appellant contends the Department failed to meet its burden of proof in establishing the charge in the accusation.

This issue was addressed as part of Issue I, where we quoted the standard of review in *Kirby, supra*: "When findings are attacked as being unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether there is <u>*any*</u> substantial evidence, contradicted or uncontradicted, which will support the findings." [Emphasis added.]

Having found that substantial evidence exists to support the findings, the Board is powerless to reweigh the facts and come to a different factual conclusion than that of the ALJ and the Department.

V

Appellant's final contention is that erroneous factors were applied to arrive at an aggravated penalty.

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] (*Martin).*) 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].)

Department Rule 144 (tit. 4, Cal. Code Regs, §144), a duly promulgated regulation, directs that, in reaching a decision, the Department "shall consider the disciplinary guidelines entitled 'Penalty Guidelines' (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation -- such as where facts in aggravation or mitigation exist."

The Penalty Guidelines Appendix declares: "It is the policy of this Department to impose administrative, non-punitive penalties in a consistent and uniform manner with the goal of encouraging and reinforcing voluntary compliance with the law." The Appendix further states, in a paragraph entitled "Penalty Policy Guidelines":

> The California Constitution authorizes the Department, in its discretion to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may

> be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.
>
> Higher or lower penalties from this schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances.

The Penalty guidelines go on to list possible aggravating factors:

1. Prior disciplinary history
2. Prior warning letters
3. Licensee involvement
4. Premises located in high crime area
5. Lack of cooperation by licensee in investigation
6. Appearance and actual age of minor
7. Continuing course or pattern of conduct

In the instant case, the ALJ cites three aggravating factors in his Decision (at page 7): the youthful appearance of the minor, actual knowledge of the clerk that Ronnae was a minor and had been banned from the store, and indifference displayed by the clerk. As noted in the Penalty guidelines themselves, the factors listed "may include, but are not limited to" the factors listed here.

When an appeal is made because of an allegedly excessive penalty, the standard of review is not whether substantial evidence supports the findings, but only whether the penalty imposed is an abuse of the Department's discretion. *(Martin, supra.)* We do not believe there was an abuse of discretion in this case.

Appellant is asking the Board to reweigh the evidence and disregard the ALJ's findings. The Board is not permitted to do this. Second, it asks the Board to substitute its opinion of an appropriate penalty for that of the Department. The Appeals Board may not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion *(Martin, supra)*, and none has been demonstrated here.

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
MICHAEL A. PROSIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]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.