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

AB-9324
File: 20-418474 Reg: 12076814

7-ELEVEN, INC. and SHMARIT, INC.,
dba 7-Eleven Store #2174-26073C
763 North Euclid Street, Anaheim, CA 92801,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 7, 2013
Los Angles, CA

ISSUED DECEMBER 19, 2013

7-Eleven, Inc. and Shmarit, Inc., doing business as 7-Eleven Store #2174-26073C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, with all 10 days stayed provided appellants complete one year of discipline-free operation, 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 Shmarit, Inc.,

[1]The decision of the Department, dated October 22, 2012, is set forth in the appendix.

appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J. Belvedere.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 15, 2004. On April 13, 2012, the Department filed an accusation against appellants charging that, on December 11, 2011, appellants' clerk, James Messina (the clerk), sold an alcoholic beverage to 19-year-old Josue Estevez. Although not noted in the accusation, Estevez was working as a minor decoy for the Department of Alcoholic Beverage Control (ABC) at the time.

At the administrative hearing held on August 30, 2012, documentary evidence was received and testimony concerning the sale was presented by Estevez (the decoy) and by Eric Burlingame, an ABC agent.

Testimony established that on December 11, 2011, the decoy entered the premises and selected a six-pack of Bud Light beer in bottles which he took to the sales counter. The clerk rang up the beer without asking for identification and without asking any age-related questions. Agent Burlingame witnessed the transaction from inside the premises. The decoy exited the premises with the beer and then returned with two Department agents. Agent Burlingame identified himself to the clerk and informed him he had sold an alcoholic beverage to a minor. The decoy was asked who sold him the beer and he pointed to the clerk and said “he did.” The decoy and clerk were standing in close proximity to one another and facing each other when the identification took place. A photograph of the decoy and clerk was taken and the clerk was cited.

The Department's decision determined that the violation charged had been

proven and that no defense to the charge had been established.

Appellants then filed an appeal contending: (1) The decoy's appearance violated rule 141(b)(2);[2] (2) the ALJ failed to consider arguments regarding the credibility of the decoy; (3) the face-to-face identification of the clerk violated rule 141(b)(5); and (4) the ALJ failed to proceed in the manner required by law by permitting the introduction of 15-year old disciplinary history.

DISCUSSION

I

Appellants contend that the ALJ failed to proceed in the manner required by law and abused his discretion when he disregarded evidence supporting appellants' argument that the Department failed to comply with rule 141(b)(2).[3] Appellants assert: "[b]ecause the Administrative Law Judge failed to properly consider the Appellant's [*sic*] evidence and arguments, this Appeals Board is precluded from properly evaluating the Administrative Law Judge's findings, or lack thereof." (App.Br. at p. 6.)

This Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our judgment on the evidence, and we must accept as conclusive the Department's findings of fact. *CMPB Friends,* [*Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.4th [1250,] 1254 [122Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.4th 364, 367 [3 Cal.Rptr.2d 770;. . . 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

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[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.

[3]Rule 141(b)(2) states: "The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense."

> judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. of 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*. (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826] (*Masani*).)

Appellants maintain that the decoy did not display the appearance which could generally be expected of a person under the age of 21, and therefore the decoy operation was unfair. Appellants contend that evidence that the decoy had participated in prior decoy operations,[4] was 5 feet 7 inches tall, weighed 185 pounds, and was not nervous, supports their assertion that he presented an appearance which was "mature." (App.Br. at p. 5.) Appellants never explain, however, how any of these factors might have made the decoy appear to be over the age of 21.

The ALJ made the following determinations about the decoy in Findings of Fact ¶¶ 8 through 11:

> FF 8. The decoy's overall appearance including his demeanor, his poise, his mannerisms, his maturity, his size and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation. The decoy is a youthful looking young man who was five feet seven inches in height and who weighed between one hundred eighty and one hundred eighty-five pounds on the day of the sale. On that day, the decoy was clean shaven and his clothing consisted of blue jeans, a gray sweatshirt and gray shoes. Exhibit 2 is a photograph of the decoy that was taken on the day of the sale before going out on the decoy operation and Exhibit 3 is a photograph of the decoy that was taken at the premises. Both of these photographs show how the decoy looked and what he was wearing on the day of the sale.

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[4]This allegation, however, is contradicted by the decoy's testimony [RT 37] and the ALJ's findings. (FF 9.)

> FF 9. The decoy had not participated in any prior decoy operations, and he has not served as an Explorer. He volunteered to be a minor decoy after he learned about the decoy program through a criminal justice class. He did not receive any compensation and he did not receive any school credit for serving as a decoy.
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> FF 10. The decoy testified that he was not nervous when he was at the premises.
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> FF 11. There was nothing remarkable about the decoy's nonphysical appearance and there was nothing about his speech, his mannerisms or his demeanor that made him look older than his actual age. After considering the photographs depicted in Exhibits 2 and 3, the decoy's overall appearance when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that he did not. Appellants have given us no reason to depart from our general rule of deference to the ALJ's factual determination regarding the decoy's appearance. As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he testifies, and making the determination whether the decoy's appearance met the requirements of rule 141.

II

Appellants contend that the ALJ failed to consider their arguments regarding the credibility of the decoy. (App.Br. at pp. 6-7.)

It is a fundamental precept of appellate review that it is the province of the administrative law judge (ALJ), as trier of fact, to make determinations as to witness credibility and to resolve any conflicts in the testimony. (*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.

Appellants assert that the decoy's credibility is at issue simply because they made that assertion at the administrative hearing. [RT 49-50.] Citing *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 596 [128 Cal.Rptr.2d 514], appellants argue that the Appeals Board is precluded from evaluating any finding made by the ALJ because he failed to make a credibility finding about the decoy's testimony. (App.Br. at p. 7.)

The argument raised by appellants in this case has been before the Board on a number of occasions, and has been rejected without exception. The issue was discussed at length in *7-Eleven, Inc./Navdeep Singh* (2002) AB-7792, a case where appellants argued that, because the decoy was the only witness to testify about what occurred in the premises during the sale of the alcoholic beverage, and his testimony suffered from striking credibility defects, the ALJ was required to explain why the decoy's testimony was sufficient to support the Department's accusation. The Board rejected this argument, stating:

> . . . a reviewing court may give greater weight to a credibility determination in which the ALJ discussed the evidence upon which he or she based the determination. We do not think it means the determination is entitled to no weight at all.

This Board has consistently rejected the argument, in other appeals, that a reversal is required when a decision 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. (See also-*7-Eleven, Inc./Janizeh* (2005) AB-8306, and *Chuenmeersi* (2002) AB- 7856.)

Appellants' reliance on *California Youth Authority v. State Personnel Bd.*, *supra*, is misplaced for several reasons. First, the case declined to express any view on whether a failure of an ALJ to identify observations of witness demeanor, manner, or attitude rendered his or her decision defective. (*California Youth Authority*, *supra*, 104 Cal.App.4th at 596, fn. 11.) Second, there is nothing in that decision or in logic to indicate that a failure to make such observations deprives the credibility determination of any weight at all. Finally, we believe the issue of credibility is no more than a red herring — a false issue that does not reach the merits.

At the administrative hearing, the ALJ was confronted with conflicting testimony in that Agent Burlingame and the decoy each recalled certain details of the decoy operation differently. The ALJ had to decide whom to believe, and did so — as the trier of fact is entitled to do. At no point during the administrative hearing was the decoy's testimony impeached, and there was nothing in the record that would cast doubt on his testimony or to suggest that he displayed a lack of credibility.

Simply put, the ALJ's credibility determination is not an abuse of discretion because appellants disagree with it. The Board is not the finder of fact, and the question of whether the decoy's testimony was credible is a factual question to which we accord our usual deference to the ALJ.

III

Appellants contend that the face-to-face identification of the clerk failed to comply with rule 141(b)(5) because it was "unduly suggestive." (App.Br. at p. 7.)

Rule 141(b)(5) provides:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

Appellants maintain that the face-to-face identification was unduly suggestive because the ABC agent made the initial contact with the clerk, and informed him that he had sold an alcoholic beverage to a minor. According to appellants, "[t]he minor decoy had no other choice but to identify the clerk whom the officer had initiated contact with . . ." (App.Br. at p. 8.) Appellants also allege that the face-to-face identification failed to strictly comply with this Board's decision in *Chun* (1999) AB-7287, which defined face-to-face identification as:

> . . . the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

Appellants maintain that the identification was actually made by the ABC agent, rather than the decoy, and thus failed to comply with the requirement that the decoy make the identification.

Appellants fail to support either of these arguments, and as the ALJ found in Findings of Fact ¶¶ 4-6, the face-to-face identification complied with rule 141(b)(5):

> FF 4. Agent Burlingame was inside the premises when the clerk sold beer to the decoy and Burlingame witnessed the transaction.
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> FF 5. Shortly after the sale, the decoy and two agents returned to the premises. Agent Burlingame contacted Messina, identified himself and informed him that he had sold an alcoholic beverage to a minor.
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> FF 6. When the decoy was asked to identify the person who had sold him the beer, the decoy pointed to Messina and stated, "He did." At the time

> of this identification, the decoy and Messina were standing in close proximity and facing each other. Exhibit 3 is a photograph that shows the decoy holding the beer he purchased at the premises and the decoy is standing next to Messina, the clerk who sold him the beer.

The Board has addressed this issue before, rejecting the same argument appellants make here. In *7-Eleven, Inc./M&N Enterprises, Inc*. (2003) AB-7983, the Board said:

> The fact that the officer first contacts the clerk and informs him or her of the sale to a minor has been used to show that the clerk was aware of being identified by the decoy. (See, e.g., *Southland & Anthony* (2000) AB-7292; *Southland & Meng* (2000) AB-7158a.) ¶ . . . ¶ As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

Appellants' contentions are not supported by the evidence. While an "unduly suggestive" identification is impermissible, appellants have presented no evidence that the identification in this instance was unduly suggestive.

IV

Appellants contend that the ALJ erred by permitting the introduction of prior disciplinary matters, which occurred in 1992 and 1995, and failing to bridge the gap between this raw evidence and his ultimate decision.

As a preliminary matter it should be noted that although the present license has been in effect since December 15, 2004, the current president of Shmarit, Inc. (the co-licensee in this matter), Sharad Babubhai Patel, was the predecessor co-licensee at these premises along with 7-Eleven, Inc. The previous license held by Patel and 7-Eleven had been in effect since July 1, 1988, and it was the previous license which was the subject of the disciplinary history in 1992 and 1995.

Appellants maintain:

> . . . it can only be assumed that the Administrative Law Judge improperly considered the prior disciplinary action in rendering his decision because there are no facts to bridge the analytical gap and no findings for the Appeals Board to trace and examine the Administrative Law Judge's mode of analysis as it is related to the Appellant's [*sic*] prior disciplinary history and the Administrative Law Judge's ultimate conclusion.

(App.Br. at p. 10.) Appellants assert that the ALJ did not comply with the California Supreme Court's holding in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] (*Topanga*), that the agency's decision must set forth findings to "bridge the analytic gap between the raw evidence and ultimate decision or order."

As the Board has said many times before, there is no requirement that the ALJ explain his reasoning. Simply because the ALJ does not explain his analytical process does not invalidate his determination, or constitute an abuse of discretion. In any event, a 10-day, all-stayed suspension is less than the penalty contemplated by rule 144.[5]

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

[5]Cal. Code Regs., tit. 4, § 144.

acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

Unless some statute requires it, an administrative agency's decision need not include findings with regard to mitigation. (*Vienna v. California Horse Racing Bd*. (1982) 133 Cal.App.3d 387, 400 [184 Cal.Rptr. 64]; *Otash v. Bureau of Private Investigators* (1964) 230 Cal.App.2d 568, 574-575 [41 Cal.Rptr. 263].) Appellants have not pointed out a statute with such requirements. Findings regarding the penalty imposed are not necessary as long as specific findings are made that support the decision to impose disciplinary action. (*Williamson v. Board of Medical Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-1347 [266 Cal.Rptr. 520].)

This Board has rejected countless attempts to stretch *Topanga* beyond its limited usefulness. *Topanga* addressed the total absence of findings. It is of no relevance to a case such as this, where the ALJ did make findings — just none which explain his reasoning regarding the penalty. Appellants' disagreement with the penalty imposed does not mean the Department abused its discretion. This Board's review of a penalty looks only to see whether it can be considered reasonable, not what considerations or reasons led to it. If it is reasonable, our inquiry ends there.

ORDER

The decision of the Department is affirmed.[6]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[6]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.