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

AB-9447
File: 20-411027 Reg: 14079842

7-ELEVEN, INC. and BASSI & SONS, INC.,
dba 7-Eleven Store #27265C
902 West First Street, Santa Ana, CA 92703-5217,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: February 5, 2015
Los Angeles, CA

ISSUED FEBRUARY 24, 2015

7-Eleven, Inc. and Bassi & Sons, Inc., doing business as 7-Eleven Store #27265C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 5 days because their clerk sold an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellants 7-Eleven, Inc. and Bassi & Sons, Inc., through their counsel, Margaret Warner Rose of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, David W.

[1]The decision of the Department, dated May 21, 2014, is set forth in the appendix.

Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 8, 2004. On January 24, 2014, the Department filed an accusation against appellants charging that, on December 7, 2013, appellants' clerk, Angel Gonzalez (the clerk), sold an alcoholic beverage to 18-year-old Wendy Barragan. Although not noted in the accusation, Barragan was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on April 15, 2014, documentary evidence was received and testimony concerning the sale was presented by Barragan (the decoy); by Jennifer Gardea, a Department of Alcoholic Beverage Control agent; and by Navdeep Bassi, CFO and Secretary of co-licensee Bassi & Sons, Inc.

Testimony established that on the date of the operation, Agent Gardea entered the licensed premises. The decoy entered moments later and walked to the coolers, where she selected a three-pack of Bud Light beer in cans. She took the beer to the counter. Although there were other customers in the premises, the decoy did not have to wait in line.

The clerk scanned the beer and asked to see the decoy's identification. The decoy handed him her California Identification Card. The clerk looked at the card, entered the date "02/02/31" into the register, and handed the identification back to the decoy. The decoy paid for the beer and exited the premises.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed an appeal contending: (1) a violation of section 25658(a) does not establish good cause *per se* for license suspension, and the Department failed to show good cause under section 24200; (2) the ALJ failed to make sufficient findings on nonphysical aspects of the decoy's appearance; and (3) proper review requires that the decoy appear before the Appeals Board.

DISCUSSION

I

Appellants contend that the sale of alcohol to minors is not "per se contrary to public welfare and morals" and therefore cannot constitute good cause for suspension of a license under section 24200(a) absent sufficient evidence and relevant findings. (App.Br. at pp. 6-10.) Appellants quote *Boreta Enterprises* and contend that the Department must either "establish 'good cause' and make out its case" or "draw upon its expertise and the empirical data available to it and adopt regulations covering the situation." (*Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 106 [84 Cal.Rptr. 113].) Appellants point to their substantial preventative and remedial measures and insist that "[t]he Department, in its Proposed Decision, did not set forth one fact that the single Section 25658(a) violation can overcome the mountain of mitigating evidence." (App.Br. at p. 9.) Notably, appellants concede the fact of the sale-to-minor violation.

In *7-Eleven, Inc./Lucky & Co., Inc.* (2014) AB-9431, this Board conducted a complete analysis and ultimately disposed of this argument as a matter of law. We held:

In sum, state law — be it constitutional, statutory, or judicial — is

> unanimous in its conclusion that selling an alcoholic beverage to a minor is contrary to public welfare and morals. Where a sale-to-minor violation is admitted or proven, that alone is sufficient to show good cause for suspension under section 24200(a). The Department need not adopt a regulation that would merely parrot higher authorities, and it need not prove, on a case-by-case basis, a conclusion already so deeply ingrained in California law.

(*Id.* at p. 11.) Appellants do not challenge the fact of a sale-to-minor violation. Grounds for suspension therefore exist under both subdivisions (a) and (b) of section 24200.

Appellants offer detailed information on actions they have taken to prevent sales to minors both before and after the violation at issue. (App.Br. at pp. 9-10.) This evidence, though laudable, does nothing to counter the admitted violation itself, and therefore cannot negate a finding of good cause for suspension.

II

Appellants contend that the ALJ failed to make any specific factual findings regarding the decoy's nonphysical appearance, and instead relied on a boilerplate assessment of her "poise, demeanor, maturity, and mannerisms." (App.Br. at pp. 11-12.) Appellants, like so many before them, rely largely on *Topanga* and insist that the Department must "bridge the analytic gap between the raw evidence and the ultimate decision." (App.Br. at p. 11, quoting *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836].) Moreover, according to appellants, evidence that the decoy was not nervous at the time of the decoy operation "compelled" the conclusion that she appeared over the age of 21. (App.Br. at p. 13.)

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." The rule provides an affirmative defense, and the burden of proof rests with the appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

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 independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] 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. [Citations.]

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

In *Circle K Stores, Inc.* (1999) AB-7122, this Board reversed a Department decision for failure to make findings regarding nonphysical aspects of the decoy's appearance. In that case, the ALJ did make detailed findings regarding the decoy's *physical* traits, but gave no indication that he had evaluated the decoy's *nonphysical* traits as well. (*Id.* at p. 4.) This Board wrote:

> [W]hile an argument might be made that when the ALJ uses the term "physical appearance," he is reflecting the sum total of present sense impressions he experience when he viewed the decoy during his or her testimony, it is not at all clear that is what the ALJ did in thius [*sic*] case. We see the distinct possibility that the ALJ may well have placed too much emphasis on the physical aspects of the decoy's appearance, and have given insufficient consideration to other facets of appearance — such as, but not limited to, poise, demeanor, maturity, mannerisms. Since he did not discuss any of these criteria, we do not know whether he gave them any consideration.

(*Ibid*.) Though the Board made no reference to *Topanga*, the grounds for reversal was ultimately the *total absence of findings* regarding the decoy's nonphysical appearance. (See *ibid.*) The Board observed, however, that assuming findings are made, they need not meet any minimum threshold of detail:

> It is not the Appeal's Board's expectation that the Department, and the ALJ's, be required to recite in their written decision an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ's are capable of delineating enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.

(*Ibid.*)

Here, the ALJ made clear, albeit brief, findings regarding the decoy's nonphysical appearance:

> 12. Barragan appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, *poise, demeanor, maturity, and mannerisms* shown at the hearing, and her appearance *and conduct* in front of Gonzalez at the Licensed Premises on December 7, 2013, Barragan displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Gonzalez.

(Findings of Fact ¶ 12, emphasis added.)

Appellants protest, however, that *Topanga* requires that these findings "bridge the gap between the raw evidence and the ultimate decision or order." Like so many of their predecessors, appellants fundamentally misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made. This is made clear when one reads the entire sentence that includes the phrase on which appellants rely: "We further conclude that implicit in section 1094.5 is a requirement that the agency

which renders the challenged decisions *must set forth findings* to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga*, *supra*, 11 Cal.3d 506, 515, emphasis added.) In *No Slo Transit*, the court of appeals quoted with approval — and emphasized with italics — a comment regarding *Topanga* made in an earlier case: "'The holding in Topanga was, thus, that *in the total absence of findings in any form on the issues supporting the existence of conditions justifying a variance*, the granting of such variance could not be sustained.'" (*No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760], quoting *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909].)

There is no question here that the ALJ made findings on nonphysical aspects of the decoy's appearance. That is all that is required. The fact that appellants wish to see *more* findings — or rather, wish to see findings construing the evidence in the manner most favorable to their case — does not render the decision flawed.

III

Appellants contend that in order for this Board to conduct an adequate review of the Department's decision, the decoy himself must appear before the Board (App.Br. at pp. 13-16.).

Appellants' argument is merely a more succinct version of the decoy-as-evidence argument we addressed at length — and firmly rejected — in *Chevron Stations* (2015) AB-9415. (See also *7-Eleven, Inc./Niaz* (2015) AB-9427; *7-Eleven, Inc./Jamreonvit* (2015) AB-9424; *7-Eleven, Inc./Assefa* (2015) AB-9416.) We offer only a summary of our reasoning here, and refer appellants to *Chevron Stations*, *supra*, for a more comprehensive analysis.

Section 23083 limits our review to evidence included in the administrative record. (Bus. & Prof. Code § 23083; see also *7-Eleven, Inc./Grover* (2007) AB-8558, at p. 3.) Section 1038(a) of the California Code of Regulations defines the items to be included in the administrative record — none of which conceivably allows for an actual human being. (See Cal. Code Regs., tit. 1, § 1038(a).) The properly compiled record — including testimony, arguments, photographs of the decoy, and the Department's decision containing the ALJ's firsthand impressions — is both legally and practically sufficient for the Board to determine whether the conclusions reached regarding the decoy's appearance are supported by the evidence.

As we noted in *Chevron Stations*, *supra*, this argument has no merit and wholly lacks support in law either law or logic. In our previous decisions addressing this issue, we strongly encouraged appellants to seek a writ of appeal if they disagree. During oral argument for this matter, counsel for appellants informed the Board that they are proceeding on a writ at this time. That established, until such time as a higher authority definitively resolves this issue, we do not wish to see this argument again.

ORDER

The decision of the Department is affirmed.[2]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER

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[2]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.