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

AB-9140
File: 20-214473 Reg: 10073039

7-ELEVEN, INC. and CLARA L. and GREGORY G. GONSER,
dba 7-Eleven Store No. 2237-23947
7314 North Blackstone Avenue, Fresno, CA 93650,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: October 6, 2011
San Francisco, CA

ISSUED DECEMBER 2, 2011

7-Eleven, Inc. and Clara L. and Gregory G. Gonser, doing business as 7-Eleven Store No. 2237-23947 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days, all of which were stayed on the condition that appellants complete one year of discipline-free operation, for their clerk selling an alcoholic beverage to a law enforcement minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc. and Clara L. and Gregory G. Gonser, appearing through their counsel, Ralph B. Saltsman and Soheyl Tahsildoost, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

---

[1]The decision of the Department, dated October 25, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. On March 4, 2010, the Department filed an accusation against appellants charging that, on February 11, 2010, their clerk sold an alcoholic beverage to 18-year-old Zachary Buie. Although not noted in the accusation, Buie was working as a minor decoy for the Fresno Sheriff's Department at the time.

At the administrative hearing held on September 29, 2010, documentary evidence was received and testimony concerning the sale was presented by Buie (the decoy).

The Department's decision determined that the violation charged was proved and no defense to the charge was established. Appellants then filed an appeal contending: (1) The Department did not meet its burden of proving the charges against appellants; (2) the decoy's appearance violated rules 141(a) and 141(b)(2)[2]; and (3) the penalty was not adequately mitigated.

DISCUSSION

I

Appellants contend that the Department did not meet its burden of proving the charge of the accusation because the decoy, who was the only witness at the hearing, testified that he had no independent recollection of the specific incident charged. Appellants argue that the decoy's testimony was "sparse and devoid of useful facts and information" and he could only testify to an "outline of facts that would be the same in any of his . . . decoy operations where a sale took place." (App. Br. at p. 4.) The

[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.

findings, they insist, are not supported by substantial evidence, but are based on "minimal, shaky evidence." (*Id*., at p. 5.) Appellants ask the Board to reverse the Department's decision, asserting that the decision violates the rules of due process and the Department's own rules.

The decoy was the only witness and his memory of details of the decoy operation was sketchy at best. He did not remember if there were other customers in the store, how far the entrance was from the beer cooler, whether the clerk asked for his identification, or whether more than one officer was involved. And he testified on cross-examination that he had no independent recollection of this specific incident. [RT 10.]

However, immediately after that, when asked, "How are you testifying today about it?" he responded, "I know I bought it from him. I do remember that I went in there and bought it from him." [RT 10.] He also recalled going back to the car where the officer was waiting, giving the beer to the officer, returning to the store, and identifying the clerk who sold to him. [RT 11-12.]

Subsequently, the ALJ questioned the decoy:

> Q. Now, is your testimony today based on that photograph,[3] or do you have some recollection of –
> A. I have somewhat. Not fully. But I do have somewhat a memory of that.
> Q. You do?
> A. Yes.

When the Appeals Board considers a challenge to the evidentiary basis of the Department's decision, it is limited to determining "[w]hether the findings are supported by substantial evidence in the light of the whole record," and "[w]hether the decision is

[3]Exhibit 2, taken at appellants' premises, showing the decoy holding the can of beer and standing next to the clerk.

supported by the findings." (Bus. & Prof. Code, § 23084.) "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 its 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].)

We agree that the evidence presented by the Department was minimal, but that does not mean it was not substantial evidence. The Department was only required to make a prima facie case showing that appellants' clerk sold an alcoholic beverage to a person under the age of 21. The testimony of the decoy established the facts necessary to prove the violation. Appellants presented no evidence, so the decoy's testimony was uncontradicted. The ALJ believed the decoy's testimony that the sale had occurred. There was minimal, but clearly sufficient, substantial evidence to support the decision.

II

Appellants contend that this decoy violated rule 141(b)(2) because he "towered over the clerk and a vast majority of adults" (App. Br. at p.6) and he was confident and experienced.

Height does not correspond with age. The clerk did not testify, so there is nothing to show that the clerk thought the decoy was over 21 because he was over 6' tall. He was taller than the clerk, but appellants have not alleged that this somehow intimidated the clerk into selling to the decoy; in any case, that would be an entirely different issue.

Appellants did not argue at the administrative hearing that the decoy appeared to be over 21 because he was an experienced decoy and was confident, so the Board could consider that argument waived. However, even if the argument is considered, it has no merit. The decoy was experienced and may well have appeared confident. This does not mean that he appeared to be over the age of 21.

III

Appellants contend that the penalty imposed was not adequately mitigated to reflect their "outstanding record of discipline-free licensure." (App. Br. at p. 7.)

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.

Appellants refer several times to being discipline free for 21 years. However, at the hearing, appellants stipulated to the disciplinary history as shown in the accusation, consisting of two sale-to-minor violations, one in 1995 and one in 1999. The ALJ disregarded the stipulation, saying that, since there was "no evidence of any disciplinary action or problem involving Respondent during its twenty-one years of licensure," mitigation was appropriate. He mitigated the penalty by staying all 15 days of the suspension, subject to one year of discipline-free operation.

The ALJ mitigated the penalty based on 21 years without discipline, but appellants say it was an abuse of discretion not to reduce the penalty more. Appellants' disagreement with the penalty imposed does not make the penalty an abuse of discretion. The penalty imposed is reasonable and the Board must uphold it.

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[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.