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

AB-9442
File: 20-506512 Reg: 13079237

7-ELEVEN, INC., HINA NILESH PATEL, and NILESH PATEL,
dba 7-Eleven Store 2368-17488D
320 Reservation Road, Marina, CA 93933,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: January 8, 2015
Sacramento, CA

ISSUED JANUARY 30, 2015

7-Eleven, Inc., Hina Nilesh Patel, and Nilesh Patel, doing business as 7-Eleven Store 2368-17488D (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 25 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellants 7-Eleven, Inc., Hina Nilesh Patel, and Nilesh Patel, through their counsel, Ralph Barat Saltsman of the law firm of Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control (Department), through its counsel, Dean Lueders.

[1]The decision of the Department, dated May 9, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 14, 2011. On September 19, 2013, the Department filed an accusation against appellants charging that, on August 24, 2013, appellants' clerk, Sari Nabieh Salim Al Nimri (the clerk), sold an alcoholic beverage to 19-year-old Andrew McIntire. Although not noted in the accusation, McIntire was working as a minor decoy for the Department at the time.

At the administrative hearing held on February 11, 2014, documentary evidence was received and testimony was presented by McIntire (the decoy), and by co-licensee Hina Nilesh Patel.

Testimony established that on the date of the operation, the decoy entered the licensed premises and retrieved a six-pack of beer[2] from the coolers. He proceeded to the cash register and placed the beer on the counter. The clerk requested the decoy's identification, and the decoy gave the clerk his California driver's license which contained his true date of birth, October 13, 1993, and a red stripe stating "AGE 21 IN 2014." (Exhibit 3.) The clerk took possession of the license, looked at it, and input something into the register. The clerk said "You're too young" to the decoy, and the decoy turned to exit the store. As the decoy walked out, the clerk told the decoy to stop. The clerk then said to the decoy that he (the clerk) remembered drinking when he was underage. The clerk completed the sale and told the decoy not to tell anyone. The decoy exited the premises.

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[2]As noted in the Proposed Decision, the decoy did not testify as to which brand of beer he selected for purchase. However, Exhibit 4 is a photograph of the decoy taken after he purchased the beer at the licensed premises. In it, the decoy is holding a six-pack of Budweiser beer. Appellants did not contest that the decoy bought beer at their store. (See Findings of Fact II.)

The Department's decision determined that the violation charged was proved and no defense was established. In assessing the penalty, the Proposed Decision, which was adopted by the Department, cited both mitigating factors[3] and aggravating factors,[4] and found that they negated one another. As a result, the Department imposed a penalty of twenty-five days' suspension.

Appellants then filed an appeal contending: (1) the findings and determinations in the Department's decision evidence that the Department improperly considered hearsay evidence; (2) the Department impermissibly used the hearsay evidence as a basis for a finding; and (3) because the hearsay statements should not have been admitted, the ALJ impermissibly used them to find the sale was intentional and thus that an aggravated penalty was warranted. These issues will be discussed together.

DISCUSSION

Appellants contend the ALJ improperly used the clerk's statement to prove the truth of the matter stated. Appellants claim the clerk's remarks could have been made as a comment on the decoy's youthful and underage appearance, and yet the ALJ must have relied on them to draw the conclusion that the clerk knew the decoy was under 21. (App.Br. at pp. 7-8.) Because the statements relied upon by the ALJ were inadmissible, appellants claim, there was not substantial evidence in the record to support either the ALJ's finding that the sale was intentional or his conclusion that

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[3]Those mitigating factors considered include: appellants have removed the feature on their cash registers that allowed clerks to override prompts and the clerk's employment was terminated immediately following the instant violation. (Penalty Considerations.)

[4]Aggravating factors considered include: the sale to the minor decoy in this case was intentional and appellants had previously violated section 25658 on April 30, 2011. (Penalty Considerations.)

aggravating factors exist in this case.

When an appellant contends that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) 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 Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr. 826]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.3d 181, 185 [67 Cal.Rptr. 734].) "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 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Ct.* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

“Hearsay evidence” is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (Evid. Code § 1200(a).) In administrative proceedings, “[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient to support a finding unless it would be admissible over objection in civil actions.” (Gov. Code § 11513(d).)

In this case, the ALJ made the following findings of fact pertinent to the issues raised by appellants in this case:

> B. The decoy entered the 7 Eleven [*sic*] store and retrieved a six-pack of beer[fn.] from the coolers. He took the beer to the cash register area and placed it on the counter. The male clerk behind the counter waited on him. The clerk was subsequently identified as Sari Al Nimri (hereinafter "the clerk" or "Al Nimri"). Al Nimri requested the decoy's identification and McIntire gave him his California Driver License (CDL). The clerk took the CDL and entered something into the cash register. Al Nimri then said to the decoy, "You're too young." McIntire turned to exit the store.
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> C. As the decoy turned to leave, Al Nimri said to McIntire that he remembered drinking when he was underage. Al Nimri told the decoy, "Don't tell anyone" and he sold McIntire the beer. The decoy did not say anything in response to Al Nimri's comments or the ultimate sale of beer. The decoy exited the store after Al Nimri sold him the six-pack of Budweiser beer.
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> [¶ . . .¶]
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> [E.]3. There was no evidence presented that McIntire's prior experience as a decoy caused or contributed to the clerk selling an alcoholic beverage to him. Instead, the evidence establishes the clerk knew McIntire was under 21 years of age and sold beer to him despite his knowledge. The selling clerk (Al Nimri) did not testify at the hearing.

(Findings of Fact, ¶¶ II.B-C, E.3.)

Appellants' contentions are without merit. First, the statements at issue are not hearsay as they were not used to prove the truth of the matter stated. With regard to the clerk's statement, "You're too young," the ALJ had absolutely no reason to use this statement to deduce that the decoy was too young to purchase alcohol on August 24, 2013 because there was ample direct evidence in the record, including the decoy's testimony (RT at p. 7) and the copy of his California driver's license (Exhibit 3), which proved the decoy was 19 years old on the date of the operation. Similarly, regarding the statement that the clerk too purchased alcohol when he was underage, the matter stated was of no relevance at the hearing and there is no evidence that the ALJ considered the

clerk's alleged purchase of alcoholic beverages whilst underage in rendering the Proposed Decision. Rather, the record reflects — and appellants argue — that the ALJ considered the clerk's statements in finding that the clerk knowingly and intentionally made the sale to the decoy. Even so, the statements are not hearsay.

A statement is not hearsay, though made extrajudicially, to the extent that it is offered as circumstantial evidence of some fact in issue other than the truth or falsity of the statement itself. (*People v. Jackson* (1989) 49 Cal.3d 1170, 1187 [264 Cal.Rptr. 852]; 31 Cal.Jur.3d (2010) Evidence, § 247.) Use of such circumstantial evidence to prove a state of mind, such as belief, intent, or knowledge, is not opposed by the hearsay rule "because the utterance is not used for the sake of inducing belief in any assertion it may contain. The assertion, if in form there is one, is to be disregarded, and the indirect inference alone regarded." (*Skelly v. Richman* (1970) 10 Cal.App.3d 844, 858 [89 Cal.Rptr. 556], citing 6 Wigmore on Evid. (3d ed. 1940), § 1790, p. 239]; *Estate of Truckenmiller* (1979) 97 Cal.App.3d 326 [158 Cal.Rptr. 699]; *Sandoval v. Southern Cal. Enterprises* (1950) 98 Cal.App.2d 240 [219 P.2d 928]; *Hickman v. Arons* (1960) 187 Cal.App.2d 167 [9 Cal.Rptr.379].)

Here, the clerk's statements – even disregarding the assertions within them – support the inference that he knowingly and intentionally sold the beer to the decoy. These statements were used by the ALJ as circumstantial evidence of the clerk's mental state, not to prove the truth of the matters stated. The circumstantial evidence corroborates the direct evidence in the record that the clerk knowingly sold to a person who was underage. That direct evidence includes: that the decoy handed the clerk his California driver's license showing he was 19 (RT at pp. 8, 19); the clerk took possession

of the license, looked at it, and input something into the register (RT at pp. 8-9); and the clerk stopped the decoy and completed the sale after the decoy attempted to exit the store once he believed the purchase would not be completed. (RT at p. 19.) All in all, there is substantial evidence in the record for the ALJ to have concluded that the clerk knew the decoy was a minor and intentionally completed the sale. Nothing in the ALJ's use of the clerk's statements to support this conclusion is improper under, or even subject to, the rule against hearsay.

Appellants also take issue with the role the alleged hearsay statements played in the ALJ's penalty determination. They cite *Prestige Stations, Inc.* (2000) AB-7484, where the Board reversed a Department decision imposing an aggravated penalty based on a finding that was predicated upon hearsay statements. (App.Br. at pp. 9-10.) In that case, the Department agent testified the clerk told her "he knew he wasn't supposed to be selling [alcoholic beverages past a certain hour] and that he told his manager." (*Prestige Stations, supra*, at p. 4.) The agent's testimony formed a basis for the ALJ's determination that a supervisor had been alerted by the clerk in advance of the sale in question that employing the clerk at that time to sell alcoholic beverages was a violation, that the violation was intentional, and that a penalty greater than the recommended penalty was warranted. (*Id*.)

The Department argued that the clerk's statements were within the course and scope of his employment, authorized by the licensee, and thus binding on the licensee as an exception to the hearsay rule. (*Prestige Stations*, *supra*, at pp. 5-8; Evid. Code § 1222.) The Board rejected the Department's argument, observing:

> But the statement attributed to [the clerk] was not one relating to the sale of gasoline or alcoholic beverages, but instead was an expression of

> his agreement with the legal opinion posited by the Department investigator that he was engaged in an illegal transaction and his further, self-serving contention that he had told his managers so.
>
> It is most unlikely that appellant would have authorized its retail clerk to bind it by an expression of his opinion on such a relatively esoteric point of law — the concurrent sale of alcohol and gasoline by a minor after 10:00 p.m.

(*Id*. at p. 6.) On the point of whether the licensee ever vested in the clerk the authority to provide legal opinions, the Board concluded as follows:

> We seriously doubt that appellant ever vested [the clerk] with the authority to provide legal opinions to its management. Thus, his hearsay statement that he had informed his manager that what he was doing was illegal must be seen for what it was, a self-exculpatory statement made in an attempt to avoid or minimize personal blame. [The clerk's] statement should not have been ruled admissible, and provided no valid basis for the admission of additional hearsay evidence.

(*Id*. at p. 8.)

Prestige Stations is unavailing to appellants' case. To the extent the clerk's statements in *Prestige Stations* were used to show that the supervisor had prior notice of the violation, they were used to prove the truth of the matter stated — that the clerk had told the supervisor — and, as such, they were hearsay. Here, by contrast, the clerk's statements were not used to prove the truth of the matter stated and thus there is no need to assess whether they fall within an exception to the hearsay rule.

Next, even if the clerk's statements in this case had to fall within an exception to the hearsay rule — which they do not — *Prestige Stations* does not support appellants' argument. Unlike that case, the statements at issue here did not constitute an opinion on a relatively esoteric point of law offered by the clerk to a Department investigator and the store manager. They were statements made to a minor purchasing alcoholic beverages by the clerk making the sale and at the time of the transaction; there is

therefore no question that they related to the sale of alcohol.

Furthermore, as the Board observed in *Prestige Stations*, "The determination [of whether an employee is authorized to make a given statement] requires an examination of the employee's usual customary authority, the nature of that statement in relation to that authority, and the particular relevance or purpose of the statement." (*Id*. at p. 7.) Even under this complicated framework, statements made by a clerk who has been given the authority by her or his employer to engage in the sale of alcoholic beverages, at the time of the sale, and reflecting the clerk's impressions of the age of the purchaser, must undoubtedly be authorized by and attributed to the employer. Therefore, even if the clerk's statements were hearsay in this case, they would fall within the exception of the hearsay rule provided by Evidence Code section 1222.

In sum, there is substantial evidence in the record to support the ALJ's determination, and because the clerk's statements were properly admitted, the ALJ did not err in considering them as aggravating factors when assigning the penalty. Also, the penalty imposed is a 25-day suspension, which is the default penalty recommended by rule 144 for a second violation of section 25658 within 36 months. This reflects that the ALJ considered both aggravating factors and mitigating factors in determining the penalty, and found that they negated one another. Contrary to appellants' contention, nothing about the ALJ's assessment appears erroneous.

ORDER

The decision of the Department is affirmed.[5]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[5]This final decision 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 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.