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

AB-9481
File: 20-251681; Reg: 14080565

7-ELEVEN, INC., SERGE HAITAYAN, and VERA HAITAYAN,
dba 7-Eleven #2237-17096
469 North Clovis Avenue, Fresno, CA 93727,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: July 9, 2015
San Francisco, CA

Appearance by counsel:

Jennifer Oden, of Solomon Saltsman & Jamieson for appellants 7-Eleven, Inc., Serge Haitayan, and Vera Haitayan, dba as 7-Eleven #2237-17096.

Heather Cline Hoganson for respondent Department of Alcoholic Beverage Control.

Opinion:

This appeal is from a decision of the Department of Alcoholic Beverage Control[1] that suspended appellants' license for 10 days (with all 10 days stayed provided appellants complete one year of discipline-free operation) because their clerk sold an alcoholic beverage to a police minor decoy in violation of Business and Professions Code section 25658, subdivision (a).

[1]The decision of the Department, dated December 4, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on September 21, 1990. On May 29, 2014, the Department filed an accusation against appellants charging that, on April 10, 2014, appellants' clerk, Melissa Pool (the clerk), sold an alcoholic beverage to 18-year-old Zachary Lawley. Although not noted in the accusation, Lawley was working as a minor decoy for the Fresno Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on October 22, 2014, documentary evidence was received and testimony concerning the sale was presented by Lawley (the decoy) and by Janette Olson, a Fresno police officer.

Testimony established that on the day of the operation, the decoy entered the licensed premises and proceeded to the cooler where he selected a 12-pack of Bud Light beer. He took the beer to the counter, and the clerk asked for his identification. The decoy handed the clerk his California driver's license, and she swiped it through the register several times. She then touched something on the register and completed the sale without asking the decoy any questions about the license or his age. He then exited the store with the beer.

The decoy was escorted back into the premises by Fresno Police Officer Olson and ABC Agent Kohman — neither of whom had witnessed the sale. He pointed out the clerk to the officers as the person who had sold him the beer. They identified themselves to the clerk and escorted her to the rear office area where they advised her of the violation. Officer Olson then asked the decoy to identify the person who had sold him the beer. The decoy pointed at the clerk and said "she did." They were standing about three feet apart and facing each other at the time of the identification. At that

moment, the clerk made the statement “fuck my life,” indicating that she was aware that she had been identified as the person who sold beer to the decoy. A photo was then taken of the clerk and decoy and the clerk was cited.

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

Appellants contend: (1) the ALJ’s factual findings on the face-to-face identification of the clerk are not supported by substantial evidence, and (2) the face-to-face identification did not comply with rule 141(b)(5).[2]

DISCUSSION

Appellants contend the ALJ’s factual findings on the face-to-face identification of the clerk are not supported by substantial evidence. They maintain the ALJ arbitrarily accepted Officer Olson’s testimony over that given by the decoy, without setting forth evidence regarding the demeanor or attitude of the decoy that would justify discrediting him as required by Government Code section 11425.50.

This Board is bound by the factual findings in the Department's decision if 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.] 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

[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.

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

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].) When findings are attacked as unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasiveness can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; see also 6 Witkin, Cal. Procedure (2d ed. 1971) *Appeal*, § 245, pp. 4236-4238.)

The issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, 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].)

The ALJ made the following findings in regards to the face-to-face identification:

> 8. Decoy Lawley was escorted back into the store by Officer Olson and Agent Kohman. Officer Olson and Agent Kohman were not in the store during the sale and did not witness the sale to decoy Lawley. Lawley pointed out the white female clerk (Pool) to the officers as the person who sold him the beer. They then identified themselves to clerk Pool and escorted her to the rear office area. They advised clerk Pool of the violation. Officer Olson then asked decoy Lawley to identify the person who sold him the beer. Decoy Lawley pointed his finger at clerk Pool and said “She did”. They were standing about three feet apart and facing each other at the time of this identification. A photo of clerk Pool and decoy Lawley holding the beer he purchased was taken after the face to face identification. (See Exhibit 2A). Clerk Pool was aware that she was

> being identified as the person who sold decoy Lawley the beer. At the time of the identification she made the spontaneous statement "Fuck my life".

(Findings of Fact ¶ 8.) Based on these findings, he reached the following conclusion:

> 5. Respondents argue that Rule 141b5 [*sic*] was violated because the face to face identification was not properly done. This argument is rejected. Decoy Lawley testified that the face to face identification took place in front of the sales counter. Officer Olson testified that although decoy Lawley told them which clerk sold him the beer after they entered the store, clerk Pool was taken to the back office where the face to face identification took place. (Findings of Fact, ¶ 8.) Officer Olson was a credible witness. Decoy Lawley was admittedly a little nervous as this was his first experience testifying and perhaps mistaken as to [the] sequence of events. In any event, there was nothing improper about the face to face identification. There was compliance with Rule 141b5 [*sic*].

(Conclusions of Law ¶ 5.)

In his decision, the ALJ found Officer Olson's testimony about the face-to-face identification more credible than the decoy's testimony. In their brief, appellants seize upon a small contradiction in the decoy's testimony between his direct examination, in which he states that he identified the clerk from three feet away and was heard by the clerk (RT at pp. 28-30), and his cross examination, in which he is asked "Did you later at some point in that back room re-identify her?" and he replies "No." (RT at p. 41.) The ALJ disregarded this contradiction and accepted the police officer's version of the events, as corroborated by the decoy's direct examination.

Appellants maintain that it was an abuse of discretion for the ALJ to issue factual findings which relied on his belief in the greater credibility of one witness over another, without setting forth evidence of the witness' demeanor or attitude. (See App.Br. at p. 8.) They cite the following provision of the Government Code as their authority for this assertion. It provides, in pertinent part:

> If the factual basis for the decision includes a determination based

> substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

(Gov. Code § 11425.50(b).)

The Law Revision Comments which accompany section 11425.50 state that it adopts the rule of *Universal Camera Corp. v. National Labor Relations Board* (1951) 340 U.S.474 [71 S.Ct. 456], requiring that the reviewing court weigh more heavily findings by the trier of fact (here, the administrative law judge) based upon observation of witnesses than findings based on other evidence.

We begin by stating the general principle that it is the province of the ALJ, as the trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (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 abuse of discretion.

The arguments and theory raised by appellants in this case have been before the Board on a number of occasions and consistently rejected. The issue was, for example, 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:

> Section 11425.50 is silent as to the consequences which flow from an ALJ's failure to articulate the factors mentioned.[fn.] However, we do not think that any failure to comply with the statute means the decision must be reversed. It is more reasonable to construe this provision as saying simply that 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.

(*Id.* at pp. 3-4.)

This Board has rejected the argument that the federal appeals court case of *Holohan v. Massanari* (9th Cir. 2001) 246 F.3d 1195 requires reversal of a decision that does not explicitly explain the basis of a credibility determination. (See, e.g., *7-Eleven Inc./Huh* (2001) AB-7680.) There is no reason to decide differently in the present appeal. (See also *Chuenmeersi* (2002) AB-7856, and *7-Eleven, Inc./Janizeh* (2005) AB-8306.)

Appellants' reliance on *California Youth Authority v. State Personnel Board* (2002) 104 Cal.App.4th 575, 596 [128 Cal.Rptr.2d 514 ("CYA")] is misplaced. First, *CYA* 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. 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.

This Board rejected, in *7-Eleven/Huh*, *supra*, the argument that a deficiency in explanation regarding a credibility determination required reversal. What the Board said in that case applies equally well here:

> While it may be true that a statement of the factors behind a credibility determination may be of considerable assistance to a reviewing court, and is welcomed by this Board, we are not prepared to say that a decision which does not set forth such considerations is fatally flawed.

(*7-Eleven Inc./Huh* (2001) AB-7680, at p. 5.)

We have carefully reviewed the entire record, and are firmly satisfied that the decision and its findings on the face-to-face identification are supported by substantial evidence.

II

Appellants contend that the face-to-face identification of the clerk did not comply with rule 141(b)(5) because the only identification of the clerk took place when the decoy re-entered the premises with the officers, at a time when she was assisting another customer. (App.Br. at p. 9.)

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.

The rule provides an affirmative defense. The burden is therefore on the appellants to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

In *Chun* (1999) AB-7287, this Board observed:

> The phrase "face to face" means that the two, 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.

(*Id.* at p. 5.) In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board clarified application of the rule in cases where an officer initiates contact with the clerk following the sale:

> 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.

(*Id.* at pp. 7-8; see also *7-Eleven, Inc./Paintal Corp.* (2013) AB-9310; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *BP West Coast Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

In the instant case, appellants argue that the only identification of the clerk was made from too great a distance to constitute a valid face-to-face identification — that is, when the decoy initially told the officers which of the two clerks had sold him the beer. Had this been the only identification we might agree, but the record reflects a second identification of the clerk by the decoy, made from three feet away in the back of the store (see RT at pp. 10, 20, and 30), so this argument must fail. It is irrelevant that the clerk was assisting a customer when the decoy and officers first re-entered the premises because the actual face-to-face identification took place later.

Finally, appellants contend that the clerk was not aware that she was being identified as the seller of the alcohol to the decoy. (App.Br. at p. 11.) This contention is not supported by the evidence. The clerk did not testify, so there was no direct testimony to establish whether the clerk knew or should have known she was being identified. However, the testimony given by both Officer Olson and the decoy make it very clear that the clerk knew she had been identified as having sold alcohol to a minor when she said "fuck my life." (RT at pp. 12 and 28.) We do not have to guess whether she knew or not — her response confirms that she did.

The core objective of rule 141 is fairness to licensees when decoys are used to test their compliance with the law. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev.*

Control Appeals Bd. (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339].) Rule 141(b)(5) is concerned with both identifying the seller and providing an opportunity for the seller to look at the decoy again, soon after the sale. (*Ibid*.) It does not require a direct "face off" to accomplish these purposes. Regardless of whether the clerk heard what the decoy said to the officer, she had the opportunity to look at the decoy again, and her response shows that she knew that she had been identified as having sold alcohol to a minor.

We believe the record contains sufficient evidence to support a finding that a proper face-to-face identification took place, in compliance with rule 141(b)(5).

ORDER

The decision of the Department is affirmed.[3]

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

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[3]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.