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

AB-9508
File: 20-519379 Reg: 14081471

7-ELEVEN, INC. & JANAM, INC.,
dba 7-Eleven Store #16769a
804 West Cook Street, Santa Maria, CA 93458,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 3, 2015
San Diego, CA

ISSUED DECEMBER 7, 2015

Appearances: *Appellants:* Melissa Gelbart of Solomon Saltsman & Jamieson as counsel for appellants 7-Eleven, Inc. and Janam, Inc., doing business as 7-Eleven Store #16769a.
Respondent: Heather Cline Hoganson as counsel for the Department of Alcoholic Beverage Control.

OPINION

This appeal is from a decision of the Department of Alcoholic Beverage Control[1] suspending appellants' license for 15 days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 25, 2012. On

[1]The decision of the Department, dated April 8, 2015, is set forth in the appendix.

October 27, 2014, the Department filed an accusation against appellants charging that, on June 11, 2014, appellants' clerk, Yohan Silva (the clerk), sold an alcoholic beverage to 18-year-old Cristian Barajas. Although not noted in the accusation, Barajas was working at the time as a minor decoy for the Santa Maria Police Department.

At the administrative hearing held on March 4, 2015, documentary evidence was received and testimony concerning the sale was presented by Barajas (the decoy) and by Ronald Murrillo, a Santa Maria Police Officer. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises and went to a cooler, where he selected a six-pack of Bud Light beer in twelve-ounce bottles. The decoy took the beer to the sales counter for purchase and placed it on the counter. The clerk rang up the beer on the cash register. The decoy paid for the beer, received his change, and exited the store with the beer. The clerk did not ask for identification, nor did he ask any age-related questions.

A second decoy, identified as Anthony O., was inside the store at the time but did not participate in the transaction. Officer Murrillo was also inside the store posing as a customer the entire time and witnessed these events.

The Department's decision determined that the violation charged was proved and no defense was established. A penalty of fifteen days' suspension was imposed.

Appellants then filed an appeal contending (1) the Department failed to show, through substantial evidence, that the operation took place at the licensed premises or that the clerk named in the decision was in fact the clerk who sold alcohol to the minor decoy, and (2) the ALJ failed to explain his reasons or cite substantial evidence for his conclusion that the second decoy, Anthony O., did not participate in the transaction.

DISCUSSION
I

Appellants contend that the Department failed to establish that the minor decoy purchased alcohol at the licensed premises named in the accusation. Appellants argue,

> It is common knowledge that 7-Eleven markets are populous in Southern California; without laying a foundation for and establishing that the specific store named in the Accusation was, in fact, the store about which the witness testified, it is entirely possible that the 7-Eleven in the testimony and the 7-Eleven named in the Accusation are not one and the same.

(App.Br. at p. 6.) Additionally, appellants contend that the Department failed to establish that the clerk described in the decoy's testimony was the clerk named in the accusation. Appellants note that "[t]he clerk's name is nowhere to be found in the record of the hearing." (App.Br. at p. 5.)

The Department argues that appellants did not raise this issue at the administrative hearing. It is settled law that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1126-1127 [116 Cal.Rptr.3d 315]; *Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Bd. of Med. Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

A review of the record, however, reveals that counsel for appellants did raise the issue of the alleged location of the premises during closing argument:

[MR. EVANS:]
Your Honor, I did not hear any testimony in this case as to the specific location of this license mentioned.

General testimony that the incident occurred at a 7-Eleven on Cook Street but not the specific address. So that's an issue that goes to the Department's burden.

(RT at p. 35.) The issue of the location of the premises is therefore properly raised on appeal.

On direct examination, the decoy testified regarding the location of the premises:

[BY MS. HOGANSON:]
Q. On — so we're going to talk about June 11th.

Do you remember visiting a 7-Eleven in Santa Maria?

A. Yes.

Q. And was that on Cook Street?

A. Yes.

Q. Why were you there?

A. To do an ABC decoy operation.

(RT at p. 8.) Officer Murrillo's testimony on direct was similar:

[BY MS. HOGANSON:]
Q. Were you involved in a decoy operation on June 11, 2014?

A. I was.

Q. Were you at the 7-Eleven on Cook Street in Santa Maria for that?

A. Yes, I was.

(RT at p. 22.) Counsel for appellants conducted no cross-examination of either witness, on this issue or any other.

Appellants are correct that neither the decoy nor Officer Murrillo specified the precise street address of the premises. Appellants attempt to rebut the undisputed testimony on this point by speculating that the decoy *might* have mistaken their premises for another 7-Eleven store. A search of Department's license query system, however, reveals that there is only one 7-Eleven licensed on any variation of "Cook Street" in Santa Maria, and that is appellants' storefront.[2] The decoy's testimony was sufficient to establish that the store he visited was in fact appellants' licensed premises. Appellants' speculative attempt at misdirection is insufficient to overcome that testimony.

Notably, counsel for appellants did *not* raise the issue of the identity of the clerk. It was reasonable for both the ALJ and Department counsel to conclude, based on appellants' failure to raise the issue, that they conceded the identity of the clerk as named in the Accusation. We therefore consider the issue waived.

II

Appellants contend that the decision must be reversed because the ALJ failed to provide any reasoning for his finding that the second decoy, Anthony O., did not

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[2]The results of the Department license query system are a proper subject for judicial notice under section 452 of the Evidence Code:

> Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:
>
> [¶ . . .¶]
>
> (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

participate in the transaction. (App.Br. at p. 9.) Appellants argue that the omission precludes this Board from conducting any meaningful review. (*Ibid.*)

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]; see also *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged."].)

Rule 141, subdivision (b)(2), provides: "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 lies with the appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

There is nothing in rule 141 that requires a decoy to attempt the purchase of alcoholic beverages alone. The Board has explained that "the real question to be asked when more than a single decoy is used is whether the second decoy engaged in

some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law." (*7-Eleven, Inc./Janizeh Corp.* (200) AB-7790, at p. 4 [without clerk's testimony, no evidence clerk was in fact distracted].) Subsequent cases consistently follow this rule. (See, e.g., *Dave & Busters of Cal., Inc.* (2015) AB-9464, at pp. 8-9 [uncontroverted evidence supported finding that second decoy's presence was irrelevant].)

The ALJ made the following relevant finding of fact:

> 7. [The decoy] placed the beer on the counter. The clerk, subsequently identified as Yohan Silva, rang up the beer on the cash register. Barajas paid for the beer, received his change, and then exited the store with the beer. Clerk Silva did not ask for identification nor did he ask any age related questions. A second decoy, Anthony O., was inside the store at this time but did not participate in this transaction. Officer Ronald Murrillo was inside the store posing as a customer during this entire time and witnessed the events.

(Findings of Fact ¶ 7.) In light of this factual finding, it was unnecessary for the ALJ to reach any conclusion of law regarding Anthony's presence — and indeed, he did not. The only question, then, is whether the evidence supports the factual finding that Anthony did not participate in the transaction.

A review of the testimony shows nothing to suggest that Anthony played any role whatsoever in the transaction. On direct examination, for example, the decoy testified:

> [MS. HOGANSON:]
> Q. So you grabbed the beer out of the refrigerator. What did you do next?
>
> A. I went and lined up to buy it.
>
> Q. Was anyone with you?
>
> A. Yes.

Q. Who was with you?

A. Anthony.

[¶ . . . ¶]

[THE COURT:]
Okay.

See if I get this right. There was a second person with you when you went to the cooler and went to the counter?

THE WITNESS: He was doing his own thing, but he went in with me to the store.

THE COURT: Okay.

Ms. Hoganson.

BY MS. HOGANSON:
Q. So when you went to the counter, were you purchasing the beer by yourself?

A. Yes.

Q. And where was Anthony in relation to that?

A. He was somewhere else in the store, probably behind me.

(RT at pp. 9-10.) Later on direct, the decoy repeated that Anthony did not purchase alcohol with him:

[BY MS. HOGANSON:]
Q. Is that Anthony?

A. Yes.

Q. And he was with you in the store that day?

A. Yes.

Q. He wasn't purchasing alcohol, was he?

A. No.

(RT at p. 16.) Counsel for appellants conducted no cross-examination of the decoy regarding Anthony's presence or any other matter.

Later, the ALJ questioned Officer Murrillo regarding Anthony's presence:

> THE COURT: Okay. I got a question.
>
> Officer, I understand, and I'm trying to understand why there was a second minor brought to the store as part of this operation; am I correct?
>
> THE WITNESS: Correct.
>
> THE COURT: Been identified as Anthony O, I believe. Yes. Why — do you know why?
>
> THE WITNESS: Normally, when we have shoulder tap operations, we usually have two decoys out front of the stores, and I believe this night we were planning shoulder tap, we changed to minor decoys. So we had already two decoys held. So he accompanied in the store.
>
> THE COURT: Okay. Did Anthony O have anything to do, at least from your observations inside the store, with the purchase that was made by [decoy Barajas]?
>
> THE WITNESS: No. He was just following [decoy Barajas].

(RT at p. 28.) Counsel for appellants conducted no cross-examination of Officer Murrillo regarding Anthony's presence or any other matter. Appellants presented no witnesses, and offered no testimony or other evidence whatsoever to refute the testimony of the decoy and Officer Murrillo. The only reasonably inference is the one reached by the ALJ — that Anthony did *not* participate in the transaction.

Appellants nevertheless contend that the ALJ is required to explain his reasoning. While the reasons for a decision are important in evaluating its soundness on appeal, those reasons need not exhaustively discuss or include every conceivable ground for or against the decision. We have explained time and again that the failure

to construct an "analytical bridge" between the evidence and the findings of fact is not, in itself, grounds for reversal. We recently clarified that position:

> If this Board observes that the evidence appears to contradict the findings of fact, it will review the ALJ's analysis — assuming some reasoning is provided — to determine whether the ALJ's findings were nevertheless proper. Should this Board be faced with evidence clearly at odds with the findings and no explanation from the ALJ as to how he or she reached those findings, this Board will not hesitate to reverse. . . . . While an ALJ may better shield himself against reversal by thoroughly explaining his reasoning, he is not required to do so. The omission of analysis alone is not grounds for reversal, provided findings have been made.

(*Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2015) AB-9514, at pp. 6-7 [rejecting the argument that *Topanga Ass'n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] requires an ALJ to "bridge the analytic gap" between the evidence and the factual findings.)

Appellants' case, however, is somewhat novel in that they do not rely, as their predecessors have, on *Topanga*, but rather on two recent Ninth Circuit decisions, *Brown-Hunter v. Colvin*, No. 13-15213 (9th Cir. Aug. 4, 2015) and *Triechler v. Commissioner of Social Security Administration* (9th Cir. 2014) 775 F.3d 1090, 1103. Both cases do nothing to aid appellants' position.

First, both *Brown-Hunter* and *Treichler* decided appeals from federal administrative Social Security decisions — specifically, the denial of Social Security disability benefits. They are not binding on California state alcoholic beverage licensing proceedings. Moreover, appellants fail to explain why this Board should accept either of these cases as persuasive authority.

Second, a thorough read of both cases reveals that they are not pertinent to this case. In *Treichler*, for instance, the court's decision derived directly from language in

federal statutes and the Code of Federal Regulations specific to Social Security determinations:

> In Title II of the Social Security Act, Congress entrusted the Commissioner with the power and authority to enact rules and regulations that govern the disability determination. *See*, *e.g.*, 42 U.S.C. §§ 405, 421, 423. In particular, Congress authorized the Commissioner to "make findings of fact, and decisions as to the rights of any individual applying for a payment" under the Act. *Id.* § 405(b)(1). By law, the disability determination is made by the Commissioner or authorized state agencies under the Commissioner's supervision. *See id.* §§ 405, 421; 20 C.F.R. § 404.1503. *If the Commissioner's decision is unfavorable, it must "contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based."* 42 U.S.C. § 404(a). The statute allows a claimant receiving an adverse decision to obtain administrative review. *Id.* § 405(b)(1).

(*Treichler*, *supra*, at pp. 16-17, emphasis added.)

The *Brown-Hunter* court, on the other hand, did not refer to specific federal statutory or regulatory law in its decision. Not surprisingly, appellants place more emphasis on *Brown-Hunter* than on *Treichler*, perhaps because the former contains passages such as this:

> A finding that a claimant's testimony is not credible must be sufficiently specific to allow a reviewing court to conclude the adjudicator rejected the claimant's testimony on permissible grounds and did not arbitrarily discredit a claimant's testimony regarding pain.

(*Brown-Hunter*, *supra*, at p. 13, citing *Bunnell v. Sullivan* (9th Cir. 1991) 947 F.2d 341.) In making pronouncements such as this, the *Brown-Hunter* court relied on previous cases interpreting federal Social Security statutes and regulations. The quote above draws its reasoning from a passage in *Bunnell*, *supra*, which appeared only after the *Bunnell* court had spent no less than six lengthy paragraphs parsing Congress' intent in amending specific federal Social Security statutes delineating what is required in

disability determinations. (*Brunnell*, *supra*, at pp. 343-345.) Even if *Brown-Hunter* contained no *direct* reference to the governing statute, its holding is narrowly confined to federal Social Security disability determination cases.

Put shortly, *Treichler* and *Hunter-Brown* are beside the point.

We do find it instructive, however, that both cases articulate a rule that bears some similarities to this Board's holding in *Garfield Beach CVS*, as quoted above:

> Even where the ALJ commits legal error, we uphold the decision where that error is harmless. "We have long recognized that harmless error principles apply in the Social Security Act context" [Citation.] An error is harmless if it is "inconsequential to the ultimate nondisability determination," [citation], or "if the agency's path may reasonably be discerned," even if the agency "explains its decision with less than ideal clarity" [citation].

(*Treichler*, *supra*, at p. 1099; see also *Brown-Hunter*, *supra*, at p. 12.) We have, in this case, no trouble deducing the ALJ's reasoning, for the simple reason that appellants provided absolutely nothing to contradict the testimony indicating that Anthony took no part in the transaction. The absence of detailed analysis in the decision below in no way hinders this Board's ability to conduct a meaningful review.

Appellants' argument is therefore rejected. It was sufficient for the ALJ to conclude that Anthony did not participate in the transaction; nothing more was required. We repeat our recent statement regarding the mythic and much-storied "analytical bridge": where, as here, findings have indeed been made and the inferences reached therein are clearly reasonable in light of the evidence, no analysis is required. (See *Garfield Beach CVS, LLV/Longs Drug Stores Cal., LLC*, *supra*, at pp. 6-7.)

ORDER

The decision of the Department is affirmed.[3]

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

[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.