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

AB-9536
File: 20-510793; Reg: 14081438

7-ELEVEN, INC. and PAM & JAS, INC.,
dba 7-Eleven #33552B
40210 Murrieta Hot Springs Road, Murrieta, CA 92563-6435,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: March 3, 2016
Los Angeles, CA

ISSUED APRIL 19, 2016

Appearances: *Appellants:* Ralph Barat Saltsman and Melissa H. Gelbart, of Solomon Saltsman & Jamieson, counsel for 7-Eleven, Inc. and Pam & Jas, Inc.
Respondent: Kerry K. Winters, counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Pam & Jas, Inc., doing business as 7-Eleven #33552B (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 days because their clerk sold an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

[1]The decision of the Department, dated August 5, 2015, is set forth in the appendix.

Appellants' off-sale beer and wine license was issued on May 4, 2012. On October 23, 2014, the Department filed an accusation against appellants charging that, on August 12, 2014, appellants' clerk, Kuljit Toor (the clerk), sold an alcoholic beverage to 19-year-old Cassandra Oriana Torres. Although not noted in the accusation, Torres was working as a minor decoy for the Murrieta Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on June 10, 2015, documentary evidence was received and testimony concerning the sale was presented by Torres (the decoy) and by Susan Gardner, a Department agent. Appellants presented no witnesses.

Testimony established that on the day of the operation, August 12, 2014, the decoy entered the licensed premises alone and went to the coolers where she selected a tall can of Coors Light beer. She took the beer to the sales counter where the clerk scanned the beer. The clerk then asked the decoy for her identification. The decoy handed the clerk her California driver's license which had a vertical orientation and contained a red stripe indicating "AGE 21 IN 2016." (Exhibit 4.) The clerk asked the decoy "how old are you?" and the decoy replied, "19." The clerk responded by saying "wow, 19," then completing the sale. Department Agent Susan Gardener observed the transaction from inside the store. Later, the decoy was taken back inside the licensed premises where she made a face-to-face identification of the clerk and a photograph was taken of the clerk and decoy. (Exhibit 5.)

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

Appellants then filed a timely appeal contending: (1) the ALJ erred in denying

appellants' request for a videographer to videotape the adminstrative hearing, and (2) the ALJ's findings of fact are not supported by substantial evidence considering the record as a whole.

DISCUSSION

I

Appellants contend that the administrative law judge (ALJ) erred in denying their request to videotape the administrative hearing. They argue that the California Supreme Court's decision in *Emerson Electronics*, which addressed the use of videography in deposition, applies via analogy to Department administrative hearings. (App.Br. at p. 8, citing *Emerson Electronics Co. v. Superior Ct.* (1997) 16 Cal.4th 1101 [68 Cal.Rptr.2d 883].) They argue that a videotape of the hearing could prove critical to an affirmative defense under rule 141.[2] (App.Br. at p. 10.)

Appellants cite a footnote in which this Board noted the policy arguments in favor of videotaping administrative hearings: "Perhaps the time is now ripe for making digital recordings of all administrative hearings for review by the Board so that we can decide for ourselves whether the record of evidence presented is sufficient to support findings essential to the determination of legal issues." (App.Br. at p. 6, quoting *Garfield Beach CVS/Longs Drug Stores Cal., LLC* (2014) AB-9178a, at p. 7, fn. 2.)

Finally, appellants contend that the ALJ abused his discretion by failing to explain in his decision why he denied appellants' request. They claim that "where the ALJ improperly denied Appellants' request at the administrative hearing to videotape 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.

proceedings, this Board cannot adequately decide whether substantial evidence exists to support the ALJ's finding based on the minor decoy's appearance at the the hearing, and thus, the decision must be reversed." (App.Br. at p. 14.)

Section 11512(d) of the Government Code dictates reporting procedures for administrative hearings: "The proceedings at the hearing shall be reported by a stenographic reporter. However, upon the consent of all the parties, the proceedings may be reported electronically."

This Board has recently received a number of briefs premised on the same interpretation of section 11512(d) — specifically, that the word "electronically" was intended by the legislature to encompass only audio recordings, and that a videorecorded transcript may be allowed — even absent a party's consent — provided it does not *replace* the stenographic transcript.

In the earliest of these appeals, we articulated our support for the notion of videorecorded transcripts generally, but nevertheless rejected appellants' strained interpretation of the statute:

> According to the plain language of the statute, the consent of both parties is required before an administrative hearing may be reported by videorecording, and that videorecording — along with audiorecording and all other recording methods that invariably depend on electricity — fall under the definition of "electronically." Because consent could not be obtained, denial of appellants' request was proper as a matter of law.

(*7-Eleven, Inc./Arman Corp.* (2016) AB-9535, at p. 8.) The law has not changed, and the facts in this case are, for purposes of this issue, indistinguishable. We therefore

repeat our conclusion that "we cannot find error in the ALJ's refusal to allow the production of a video transcript, particularly where the videographer is paid by one party, and the other party has unequivocally exercised its statutory right to decline." (*Id.* at p. 21.)

Unless the legislature modifies section 11512(d) or a higher court shines a brighter light on its meaning, we consider this legal issue duly resolved.

II

Appellants contend that the ALJ's findings of fact are not supported by substantial evidence considering the record as a whole. (App.Br. at p. 10.) Appellants maintain that the ALJ failed to acknowledge that the decoy's appearance at the hearing differed from her appearance during the decoy operation, and also failed to explain how he determined that her appearance was substantially the same on both occasions. (*Id.* at p. 12.) Therefore, they allege, no substantial evidence exists to support the ALJ's findings that the decoy appeared under the age of 21. (*Id*. at pp. 12-13.)

This Board is bound by the factual findings in the Department's decision so long as those findings 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

> 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 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, § 23804; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) "Substantial evidence" is relevant evidence which reasonable minds would accept as 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].)

Rule 141(a) provides:

> A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

To that end, rule 141(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.

Rule 141 provides an affirmative defense, and the burden of proof lies with the party asserting it — here, appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven,*

Inc./Lo (2006) AB-8384.)

The ALJ made the following factual findings concerning the decoy's appearance:

> 5. Decoy Torres appeared and testified at the hearing. She stood about 5 feet, 2 inches tall and weighed approximately 135 pounds. Her hair was pulled back and in a "bun". When she visited Respondents' store on August 12, 2014, decoy Torres wore a tan tank top, a tribal shawl, blue jeans and denim wedge shoes. (See Exhibits 3 and 5). Her hair was just straight, below her shoulders, during the decoy operation, not pulled back into a bun. Decoy Torres' height and weight have remained the same since last August. At Respondents' Licensed Premises on the date of the decoy operation, decoy Torres looked substantially the same as she did at the hearing.
>
> [¶ . . . ¶]
>
> 9. Decoy Torres appears her age, 19 years of 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/conduct in front of clerk Toor at the Licensed Premises on August 12, 2014, decoy Torres displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to clerk Toor. Decoy Torres appeared her true age.
>
> 10. This was the first time that Torres operated as a decoy. Decoy Torres attempted to purchase alcoholic beverages at seventeen different off-sale licensed businesses on August 12, 2014. This was the only business where Decoy Torres was able [to] purchase beer.

(Findings of Fact, ¶¶ 5, 9-10.) These findings prompted the ALJ to reach the following conclusion regarding appellants' rule 141(b)(2) defense:

> 5. Respondents argue that the decoy Torres appeared older than 21 thereby violating Rule 141(b)(2). That argument is rejected. Decoy Torres appeared and acted her true age. (Findings of Fact, ¶¶ 4 through 10)

(Conclusions of Law, ¶ 5.)

Appellants maintain that the decoy's appearance was so markedly different at the hearing than on the day of the operation that it rendered the operation unfair. (App.Br.

at p. 11.) They contend that "distinctly different apparel" and the styling of her hair in a bun, rather than down, made the operation unfair. (*Ibid*.) Finally, they complain,

> Clearly, the ALJ conveniently left out any mention of how the decoy was dressed completely different at the hearing, only including the fact that Ms. Torres' hair was down during the operation while it was pulled back during the hearing. Further, the ALJ provided no indication of how or why he found that the appearances were substantially the same or what about either appearance indicated youthfulness.

(*Ibid.)*

As we explained in an opinion addressing a similar attack on an ALJ's findings:

> [T]his Board is entitled to review whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. (Cal. Const. art. XX, § 22; Bus. & Prof. Code. § 23084, subd. (c) and (d).) 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. This should not be read to require an explanation or analysis to bridge any sort of "gap"; typically, the evidence an appellant insists is essential and dispositive is either irrelevant or has no bearing whatsoever on the findings of fact. 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-9501, at pp. 5-6.)

In the instant case, appellants have offered no *evidence* that the decoy displayed the appearance of a person 21 years old or older during the decoy operation. Indeed, evidence of how the decoy appeared from the clerk's perspective would be nearly impossible to ascertain; the clerk did not testify at the administrative hearing. In the end, all the Board is left with is a difference of opinion — appellants' versus that of the ALJ — as to the conclusion that the evidence supports. Without more, this is simply an

insufficient basis upon which to overturn the determination by the ALJ.

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

[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.