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

AB-7812
File: 20-329466 Reg: 00049609

7-ELEVEN, INC., DAVID SWEDELSON, and DIANE SWEDELSON
dba 7-Eleven # 2232 18177E
130 Harder Road, Hayward, CA 94544,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: February 14, 2002
San Francisco, CA

ISSUED MAY 7, 2002

7-Eleven, Inc., David Swedelson, and Diane Swedelson, doing business as 7-Eleven #2232 18177E (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days, with 10 days thereof stayed for a probationary period of one year, for appellants' clerk selling an alcoholic beverage to a 19-year-old police decoy, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., David Swedelson, and Diane Swedelson, appearing through their counsel, Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

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[1]The decision of the Department, dated April 19, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 21, 1997. Thereafter, the Department instituted an accusation against appellants charging the sale-to-minor violation noted above.

An administrative hearing was held on February 23, 2001, at which time oral and documentary evidence was received. At that hearing, testimony concerning the transaction was presented by Jose Gonzalez ("the decoy"), by Hayward Police Officer Jeffery Snell, and by Steven Sessumes ("the clerk"). Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged in the accusation and that no defense had been established.

Appellants have filed a timely appeal in which they contend that Rule 141(b)(5) was violated.

DISCUSSION

Appellants contend that the face-to-face identification required by Rule 141(b)(5) did not take place. The rule states:

> "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 to make a face to face identification of the alleged seller of the alcoholic beverages."

The court in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126], a case which involved Rule 141(b)(5), held that the rule must be strictly applied. However, the court did not define the term "face to face" as used in the rule.

In the appeal of Chun (1999) AB-7287, this Board stated that:

"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."

The ALJ made the following findings regarding the decoy's identification of the seller:

"[VII] Snell approached the clerk and identified himself. According to the clerk's testimony, both the officer and the decoy were present when the officer informed Sessumes that the customer to whom he had sold the beer was 19 years old. Sessumes insisted he had seen Gonzalez' identification stating he was born in 1980. By this time, the decoy had left the premises. Sessumes asked that the decoy be brought back into the store to show his license.

"[VIII] The officer left briefly and returned with Gonzalez. At this point, the officer was standing to the right of the counter, about five feet from Sessumes. Gonzalez was standing to the right rear of Sessumes. The officer showed Sessumes the identification. Sessumes looked at it three times before he realized the card did not show that Gonzalez was 21 years old.

"[IX] There was a dispute whether the clerk heard or understood that Gonzalez identified him as the seller. Gonzalez testified he identified the seller, at the officer's request, as he reentered the store. He remembered he used words and a gesture with his arm. He was about ten feet from Sessumes and could clearly see his face. The officer testified he asked the decoy if Sessumes was the seller after he showed the clerk the decoy's identification. The clerk was behind the counter about four feet from the officer and Gonzalez. The officer stated that Gonzalez replied in the affirmative but could not recall if by words or gesture.

"Sessumes testified that when the officer brought him the identification, Snell was standing to his left forcing him to turn 90 degrees from the front of the counter. The decoy was standing behind the clerk. Sessumes avows he never heard the decoy say or indicate by gesture that he was the seller."

The ALJ's Determinations regarding the identification were as follows:

"[IV] In the case at bar, the evidence shows that after the transaction and before the decoy left the premises, the undercover officer identified himself to the seller and stated he had sold to a minor. The clerk, without hesitation, responded that he had not because he had requested and seen identification showing the decoy was born in 1980. He was the only clerk on duty.

"Thereafter, when the clerk insisted the officer obtain the identification, the decoy was brought back into the premises. Both the decoy and officer testified the decoy identified the clerk as the seller. The decoy was four to ten feet from the clerk who testified he was waiting on another customer at the time and neither heard nor saw the decoy identify him.[2]

"[V] Even if the seller did not observe the identification, the evidence clearly shows no question in the clerk's mind that he sold an alcoholic beverage to the decoy. He admitted the sale to the officer when first approached. He saw the decoy reenter the store with the officer when the identification was reexamined.

"[VI] The evidence is clear that the clerk was, or reasonably ought to have been, knowledgeable that he was being accused as the seller. Even if the clerk did not hear the decoy identify him, he was fully aware of the decoy's presence when the officer showed him the identification and could not have failed to understand and been aware that the decoy was identifying him as the seller (Southland Corporation and Marlene Anthony v. Department of Alcoholic Beverage Control (2001) AB-7292.).

"[VII] Given the facts established by the evidence, to sustain a defense based upon the purported failure of the clerk either to have heard or observed the decoy's identification of him as the seller would be contrary to law. The evidence shows that the decoy's identification of the clerk falls within the Appeals Board's determination of what constitutes satisfaction with the rule (Southland Corporation and Anthony, supra)."

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"[2] The officer conceded he was unaware of Rule 141."

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner

required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

Appellants have, at least obliquely, challenged the sufficiency of the evidence to support the findings, stating that the findings which were made were "not exactly supported by the evidence." Where an appellant contends that the evidence does not support the findings, the Appeals Board, taking into consideration the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

Appellants' assertion that the evidence does not support the findings is based primarily on differences in the testimony of the decoy, officer Snell, and the clerk. The conflicting testimony that appellants point out is almost exclusively regarding peripheral matters, not germane to a determination of whether a face-to-face identification occurred. To the extent any differences in testimony pertain directly to the question at hand, it was the job of the ALJ to resolve them. We cannot say that he abused his discretion in doing so. In any case, this Board is bound to resolve evidentiary conflicts in favor of the Department's decision, and must accept all reasonable inferences which

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[2]The California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Appellants contend that not all the requirements of a face-to-face identification as set forth in Chun, supra, were met. While acknowledging that the decoy made an affirmative identification of the seller while in reasonable proximity to him, they assert that the clerk was waiting on another customer and did not hear or see the decoy identify him.

In Prestige Stations, Inc. (2001) AB-7764, the appellant argued that the clerk could not have been aware of the decoy's identification of her because the clerk was talking to other deputies at the time of the identification. The Board rejected that argument, saying:

> "There is no question that the decoy actually made the identification while within reasonable proximity to the clerk. Her awareness, only minutes earlier, that she had made an unlawful sale, followed by the appearance of the decoy to within six feet of her, is probably sufficient, given her proximity to the decoy, to satisfy both the rule and the Board's interpretation of "face-to-face" in Chun. There is nothing in the evidence to indicate that, although she was engaged in conversation with other deputies, the clerk could not have been aware of the renewed presence of the decoy and his significance to what she was being told by the deputies, that she made a sale of alcohol to a minor."

The Board addressed this issue in another similar case, Southland and Anthony (2000) AB-7292, the case that the ALJ cited in his decision:

"The clerk's testimony that she did not recall being identified by the decoy does not negate the conclusion that a face-to-face identification occurred. Both the decoy and the officer were certain that an identification was made; they only differed as to the decoy's distance from the clerk at the time. The clerk testified that when the officer came up and identified himself and told her she had sold to a minor, she noticed the decoy had come back inside and was standing near the door [RT 66, 70]. She confirmed that she had no doubt to whom the officer was referring when he told her she had sold to a minor [RT 67].

"We conclude that the identification required by the rule was made. The decoy identified the seller to the police officer while the decoy was looking at the seller. The seller's face was visible to the decoy and the police officer, and the seller was within a reasonable distance from the decoy at the time of the identification. The seller was aware, or should reasonably have been aware, that an identification process was occurring, by reason of the officer's question to the decoy and the decoy's answer (see above). Even if, for whatever reason, the clerk did not hear the question and answer, she was fully aware of the decoy's presence when the officer told her she had sold to a minor and could not have failed to understand that the decoy was identifying her as the seller."

What the Board said in a similar situation in the appeal of North State Grocery, Inc. (2001) AB-7718, is instructive here as well:

"In the present case, there is no question that the decoy actually made the identification in a reasonable manner while within reasonable proximity to the clerk. It is also clear that the clerk realized, within seconds after the decoy made the identification, that she had made an unlawful sale to a minor and that she recognized the person standing at her checkout lane with the officer as the minor she sold to. Given these circumstances, the clerk reasonably should have known that the decoy identified her as the seller of alcoholic beverages. Although her realization was not exactly contemporaneous with the moment the decoy actually made the identification, this does not violate any of the requirements for a face-to-face identification under Rule 141(b)(5) and this Board's decisions."

In the present case, the clerk's testimony that he did not see or hear the decoy identify him is not controlling. There is no question that the decoy actually made the identification while within reasonable proximity to the clerk. The clerk had just been informed by the officer that he had sold an alcoholic beverage to a minor, and the presence of the decoy with the officer, within four to ten feet of the clerk when the

identification was made, is enough to satisfy both the rule and the standard in Chun. The clerk may not yet have accepted the fact that he had made an unlawful sale, but he clearly knew that he was accused, and by whom.

Appellants also contend that the decision is faulty because it does not include a specific, explicit finding that a face-to-face identification took place as required by Rule 141(b)(5). However, the findings, as discussed above, establish all the elements of a face-to-face identification. In the Determination of Issues, the ALJ then draws the conclusions that "The evidence is clear that the clerk was, or reasonably ought to have been, knowledgeable that he was being accused as the seller" (Det. VI), and that " The evidence shows that the decoy's identification of the clerk falls within the Appeals Board's determination of what constitutes satisfaction with the rule" (Det. VII). We believe that these are sufficiently specific findings and determinations on this issue.

In any case, appellants are wrong in asserting that such a specific finding is required. A reviewing court, or this Board, is not precluded from examining the record to determine the findings upon which the agency's determination was made. (City of Carmel-by-the Sea v. Board of Supervisors (1977) 71 Cal.App.3d 84, 91 [139 Cal.Rptr. 214].) We have done this in the discussion above and we find that substantial evidence supports the findings of the elements of a face-to-face identification, and the findings support the determination of the Department that there was compliance with the requirements of Rule 141(b)(5).

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.