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

AB-8802

File: 20-387131 Reg: 07066521

7-ELEVEN, INC., and REHANA and SHARIF AHMAD, dba 7-Eleven #2171-20019
7020 Magnolia Avenue, Riverside, CA 92506,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: March 5, 2009

ISSUED JUNE 11, 2009

7-Eleven, Inc., and Rehana and Sharif Ahmad, doing business as 7-Eleven #2171-20019 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their off-sale beer and wine license for 15 days, 10 days of which were conditionally stayed for one year, for their clerk, Gurmakh Singh, having sold alcoholic beverages (Sparks malt liquor) to Thomas Johnson and Joshua Vides, non-decoy minors, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Rehana and Sharif Ahmad, appearing through their counsel, Ralph B. Saltsman, Stephen W.

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[1]The decision of the Department, dated January 18, 2008, is set forth in the appendix.

Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

FACTS AND PROCEDURAL HISTORY

Appellants' license was issued on July 1, 2002. In July 2007, the Department instituted an accusation against appellants charging the sale of alcoholic beverages to Thomas Johnson and Joshua Vides, both of whom were minors.

An administrative hearing was held on November 8, 2007, at which time documentary evidence was received and testimony concerning the violation charged was presented. The evidence established that neither minor was asked his age or for identification. The clerk testified that he had been shown identification on prior occasions indicating that the two were over 21 years of age. Johnson denied ever possessing false identification, and Vides admitted using another person's identification on one prior occasion, but denied that he resembled that person. The administrative law judge found the minors' testimony credible and rejected the clerk's testimony as not credible.

Subsequent to the hearing, the Department issued its decision which determined that the violations had been proved as alleged in the accusation, and no affirmative defense had ben proved.

Appellants filed a timely notice of appeal in which they raise the following issues: (1) the decision fails to explain its credibility determinations; (2) appellants established a defense under Business and Professions Code section 25660; (3) the Department lacked appropriate screening mechanisms to ensure the non-appearance of bias, and engaged in ex parte communications; and (5) the incomplete administrative record compels reversal of the decision.

DISCUSSION

I

The administrative law judge (ALJ) found credible the testimony of Johnson that he had previously purchased alcoholic beverages from appellants' store and had never used any identification to make the purchases, and the testimony of Vides that he had also purchased alcoholic beverages at appellants' store and only once been asked for identification. On that occasion Vides showed the clerk a borrowed identification, and said the photo on it did not resemble him. The ALJ rejected as not credible the testimony of the clerk that he had examined identification of the two five or six times previously which showed them to be 21.

Appellants contend that the decision fails to provide an analytical bridge between the evidence and the conclusions reached with that evidence, citing *Topanga Ass'n for a Scenic Community v. Los Angeles County* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] (*Topanga*); *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575 [128 Cal.Rptr.2d 514], and Government Code section 11425.50(b). Appellants contend the decision must be reversed because the ALJ did not explain the basis for his credibility determinations. Citing Government Code section 11425.50, subdivision (b),[2] and *California Youth Authority v. State Personnel Bd.*, *supra*, they argue that the

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[2] Section 11425.50, subdivision (b), a part of the APA's Administrative Adjudication Bill of Rights 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.

ALJ "cannot merely believe certain witnesses and disbelieved [*sic*] other [*sic*], without identifying any 'observed demeanor, manner, or attitude' of the witnesses." (App. Br., p. 14.)

Additionally, appellants assert that the ALJ violated the precept of the California Supreme Court in *Topanga, supra*, that an agency decision must include findings that "bridge the analytic gap" between the evidence and the conclusions reached.

Neither of appellants' arguments has merit.

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 issue raised by appellants in this case has been before the Board on a number of occasions, and the arguments made by appellants have been rejected without exception. The issue was discussed at length in *7-Eleven, Inc./Navdeep Singh* (2002) AB-7792, a case where the 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.[3] 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.

(See also *Chuenmeersi* (2002) AB-7856, and *7-Eleven, Inc./Janizeh* (2005) AB-8306.)

Appellant's reliance on *California Youth Authority v. State Personnel Bd.*, *supra*, is also misplaced. In that case, the court determined that section 11425.50 did not "come into play" because the ALJ did not identify the witnesses' demeanor, manner, or attitude that supported his credibility determinations; therefore, the court said, it would not give special weight to those determinations when considering whether substantial evidence supported the administrative decision. Since neither party had argued that the decision was defective due to the ALJ's failure to identify the specified factors, the court declined to express a view on the matter. (*California Youth Authority*, *supra*, 104 Cal.App.4th at 596, n. 11.)

As for appellants' contention that conflicts in the testimony must be addressed, this has been rejected by the Appeals Board numerous times before. For example, in *7-Eleven, Inc./Cheema* (2004) AB-8181 (fns. omitted), the Board explained:

> Appellants misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made. This is made clear when one reads the entire sentence that includes the phrase on which appellants rely: "We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision *must set forth findings* to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga*, *supra*, 11 Cal.3d 506, 515, italics added.) [¶] . . . [¶]

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[3] The Law Revision Comments which accompany this section 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.

Appellants' demand that the ALJ "explain how [the conflict in testimony] was resolved" (App. Br. at p. 2) is little more than a demand for the reasoning process of the ALJ. The California Supreme Court made clear in *Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 778-779 [122 Cal.Rptr. 543], that, as long as findings are made, a party is not entitled to attempt to delve into the reasoning process of the administrative adjudicator:

> As we stated in *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836, 522 P.2d 12]: "implicit in [Code of Civil Procedure] section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order."
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> In short, in a quasi-judicial proceeding in California, the administrative board should state findings. If it does, the rule of *United States v. Morgan* [(1941)] 313 U.S. 409, 422 [85 L.Ed. 1429, 1435 [61 S.Ct. 999]] precludes inquiry outside the administrative record to determine what evidence was considered, and reasoning employed, by the administrators.

The language quoted above makes it clear that if findings are made, no further inquiry may be made into how those findings were reached. The Department decision contains findings, and the inquiry ends there.

II

Appellants contend they established a defense to the charge pursuant to Business and Professions Code section 25660. That section provides, in relevant part:

> (a) Bona fide evidence of majority and identity of the person is a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license or an identification card issued to a member of the Armed Forces, that contains the name, date of birth, description, and picture of the person. [¶] . . . [¶]
>
> (c) Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon bona fide evidence in any transaction, employment, use, or permission forbidden by Section 25658, 25663, or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

Section 25660, as an exception to the general prohibition against sales to

minors, must be narrowly construed. (*Lacabanne Properties, Inc. v. Alcoholic Beverage etc. Appeals Board* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734] (*Lacabanne*).) The statute provides an affirmative defense, and "[t]he licensee has the burden of proving . . . that evidence of majority and identity was demanded, shown and acted on as prescribed by . . . section 25660." (*Ibid*.)

The case law regarding section 25660 makes clear that to provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. (See, e.g., *Lacabanne*, *supra*; *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753 [318 P.2d 820] (*5501 Hollywood*).) A licensee, or a licensee's agent or employee, must exercise the caution that would be shown by a reasonable and prudent person in the same or similar circumstances. (*Lacabanne*, *supra*; *Farah v. Alcoholic Bev. Control Appeals Bd.* (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; *5501 Hollywood*, *supra*.) Reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered. *(5501 Hollywood, supra*, pp. 753-754.) Whether or not a licensee has made a reasonable inspection of an ID to determine that it is bona fide is a question of fact. ((*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2004) 118 Cal.App.4th 1429, 1445 [13 Cal.Rptr.3d 826] (*Masani*); *5501 Hollywood, supra,* at pp. 753-754.)

The court in *Masani*, *supra*, 118 Cal.App.4th at 1437, summarized the standard of review for questions of fact:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department’s findings of fact. (*CMPB*

> *Friends[, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002)] 100 Cal.App.4th [1250,] 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; §§ 23090.2, 23090.3.) 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. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) 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.

Although section 25660 was designed "to relieve vendors of alcoholic beverages from having in all events to determine at their peril the age of the purchaser" by allowing them to rely on certain documentary evidence of majority and identity, "the bona fides of such documents must be ascertained if the lack of it would be disclosed by reasonable inspection, the circumstances considered." (*Dethlefsen v. State Bd. of Equalization* (1956) 145 Cal.App.2d 561, 567 [303 P.2d 7].) The licensee or the licensee's agent must act in good faith and with due diligence in relying on an apparently valid but actually fraudulent ID:

> [T]he defense must be asserted in good faith, that is, the licensee or the agent of the licensee must act as a reasonable and prudent [person] would have acted under the circumstances. Obviously, the appearance of one producing the card, or the description on the card, or its nature, may well indicate that the person in possession of it is not the person described on such card.

(Keane v. Reilly (1955) 130 Cal.App.2d 407, 409-410 [279 P.2d 152].)

Appellants assert that their clerk's reliance on the identifications displayed on prior occasions is sufficient to establish a defense under the statute. Simple reliance, however, is not sufficient. The case law noted above clearly recognizes the implicit requirement of *reasonableness* in the explicit requirement of *reliance*. Appellants' clerk

claims he was shown identification purporting to show each of the minors to beover the age of 21. Even assuming this to be true, it would necessarily follow that he was shown false identification in both cases. That being so, more than a general recollection that the photos and physical descriptions sufficiently resembled the two minors is essential to meet appellants' burden under section 25660. Otherwise, the requirement that reliance be reasonable would not exist, and the defense would be foolproof.

The Board addressed a contention similar to appellants' in *Aramark Sports and Entertainment Services, Inc.* (2000) AB-7586, saying:

> The reason the reliance must be reasonable is obvious. Otherwise, a seller need only go through the motions of requesting identification, accept any driver's license handed to him, and sell the alcoholic beverage with impunity.

Appellants assert that the "reliance" required by section 25660 depends only on "whether the appearance of the person presenting the identification resembles the photograph and description." (App. Cl. Br. at p. 3.) However, as the case law makes clear, reasonable reliance requires more than just a cursory comparison of the photograph on the identification with the person presenting the identification. The apparent age of the presenter must also be considered, that is, as noted above, the person presenting identification must appear as if he or she *could* be 21 years old.

The appearance and nature of the document presented also determines whether the reliance was reasonable. If the document gives some indication, after reasonable inspection, that it may not be the identification of the person presenting it, reliance on the document may not be considered reasonable. Without knowing something about what the clerk saw, too much is left to the testimony of a witness having a natural bias. The rejection of his testimony was not an abuse of discretion.

III

The administrative hearing in this matter took place on November 8, 2007, well after the adoption by the Department of General Order No. 2007-09 (the Order) on August 10, 2007.

The Order sets forth changes in the Department's internal operating procedures which, it states, the Director of the Department has determined are "the most effective approach to addressing the concerns of the courts and to avoid even the appearance of improper communications," changes which consist of "a reassignment of functions and responsibilities with respect to the review of proposed decisions." The Order, directed to all offices and units of the Department, provides:

> **Background**:
> In 2006 the California Supreme Court found that the Department's practice of attorneys preparing a report following an administrative hearing, and the Director and his advisors having access to or reviewing that report, violated the Administrative Procedures [*sic*] Act's prohibition against *ex parte* communications. Subsequent cases in the courts of appeal extended the reasoning of the Supreme Court in holding that such a statutory violation continues to exist even if the Department adopted the administrative law judge's proposed decision without change. In addition, the courts of appeal placed the burden on the Department to establish that no improper *ex parte* communication occurred in any given case.
>
> **Procedures**:
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> Although the Supreme Court held that a physical separation of functions within the Department is not necessary, in light of subsequent appellate decisions the Director has determined that the most effective approach to addressing the concerns of the courts and to avoid even the appearance of improper communications, a reassignment of functions and responsibilities with respect to the review of proposed decisions is necessary and appropriate.
>
> Effective immediately, the following protocols shall be followed with respect to litigated matters:
>
> 1. The Department's Legal Unit shall be responsible for litigating administrative cases and shall not be involved in the review of proposed

decisions, nor shall the Chief Counsel or Staff Counsel within the Legal Unit advise the Director or any other person in the decision-making chain of command with regard to proposed decisions.

2. The Administrative Hearing Office shall forward proposed decisions, together with any exhibits, pleadings and other documents or evidence considered by the administrative law judge, to the Hearing and Legal Unit which shall forward them to the Director's Office without legal review or comment.

3. The proposed decision and included documents as identified above shall be maintained at all times in a file separate from any other documents or files maintained by the Department regarding the licensee or applicant. This file shall constitute the official administrative record.

4. The administrative record shall be circulated to the Director via the Headquarters Deputy Division Chief, the Assistant Director for Administration and/or the Chief Deputy Director.

5. The Director and his designees shall act in accordance with Government Code Section 11517, and shall so notify the Hearing and Legal Unit of all decisions made relating to the proposed decision. The Hearing and Legal Unit shall thereafter notify all parties.

6. This General Order supersedes and hereby invalidates any and all policies and/or procedures inconsistent to [*sic*] the foregoing.

The obvious purpose of the Order is to amend the internal operating procedures of the Department that have resulted in more than 100 cases having been remanded to the Department by the Appeals Board for an evidentiary hearing regarding claims of ex parte communications between litigating counsel and the Department's decision makers.[4] Although not identified in the Order, the "appellate decisions" to which it refers undoubtedly include in their numbers the decision by the California Supreme Court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [50 Cal.Rptr.3d 585] *(Quintanar)*, and Court of

[4]We understand that these cases were ultimately dismissed by the Department.

Appeal decisions in *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th116 [57 Cal.Rptr.3d 6] (*Chevron*), and *Rondon v. Alcoholic Beverage Control Appeals Board* (2007) 151 Cal.App.4th 1274 [60 Cal.Rptr.3d 295] (*Rondon*), case authorities routinely cited in appellate briefs asserting that the Department engaged in improper ex parte communications.

The Order effectively answers the question raised in earlier appeals, i.e., whether the Department's long standing practice of having its staff attorneys submit ex parte recommendations in the form of reports of hearing, has been officially changed to comply with the requirements of *Quintanar* and the cases following it. It replaces an earlier, less formal procedure used by the Department to address the problems of ex parte communications, one which the Appeals Board found was not an effective cure for the problem endemic within the Department, with one intended to isolate the Department decision maker from any potential advice or comment from the attorney who litigated the administrative matter, as well as the Department's entire Legal Unit.

Appellants have not affirmatively shown that any ex parte communication took place in this case. Instead, they have relied on the authorities cited above *(Quintanar, supra; Chevron, supra; Rondon, supra*), for their argument that the burden is on the Department to disprove the existence on any ex parte communication.

We are now satisfied, by the Department's adoption of General Order No. 2007-09, that it has met its burden of demonstrating that it operated in accordance with law. Without evidence that the procedure outlined in the Order was disregarded, we believe it would be unreasonable to assume that any ex parte communication occurred.

While the Order does not specifically address the question whether there was an

adequate screening procedure to prevent Department attorneys who acted as litigators from advising the Department decision maker in other matters, by its terms it appears to resolve that issue by effectively removing the litigating attorneys from the review process entirely.

Appellants' request that this Board withhold its decision until the California Supreme Court issues its decision in *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (S155589) has been rendered moot by the Court's issuance of that decision on February 9, 2009, reversing the decision of the appellate court and holding that the separation of prosecutorial and advisory functions may be made on a case-by-case basis.

IV

Although appellants purport to raise an issue concerning the certification of an incomplete administrative record, there is nothing in their brief explaining how they might have been prejudiced by that. Indeed, appellants do not even identify what the record supposedly lacks.

The Board has addressed the issue of an incomplete administrative record a number of times. All those cases involved the omission of documents relating to a discovery motion seeking the production of Department records in decoy cases.

This case does not involve decoys; therefore, there was no discovery motion, so there were no missing documents. Appellants' contention is without merit.

ORDER

The decision of the Department is affirmed.[5]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[5] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.