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

AB-8839
File: 20-368611 Reg: 07065854

CHEVRON STATIONS, INC., dba Chevron
1131 Oak Street, Bakersfield, CA 93304,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: June 4, 2009
Los Angeles, CA

ISSUED AUGUST 19, 2009

Chevron Stations, Inc., doing business as Chevron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days for its clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Chevron Stations, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Julia H. Sullivan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated February 20, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on September 28, 2000. On May 29, 2007, the Department filed an accusation charging that appellant's clerk sold an alcoholic beverage to 18-year-old Skylar Holmes on April 17, 2007. Although not noted in the accusation, Holmes was working as a minor decoy for the Department at the time.

At the administrative hearing held on December 20, 2007, documentary evidence was received, and testimony concerning the sale was presented by Holmes (the decoy) and by Department investigator Mark McCullough. Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant filed an appeal contending: (1) The Department provided an incomplete and inaccurate administrative record; (2) the decoy violated rules 141(a) and 141(b)(3)[2] by retaining possession of her identification and obscuring a portion of it with her finger; and (3) the decoy did not display the appearance required by rule 141(b)(2).

DISCUSSION

I

Appellant asserts that the accusation must be dismissed because the certified record originally provided by the Department did not include certain documents required to be included. The missing documents were all prepared in connection with a motion to compel discovery: the motion; points and authorities in support of the motion; 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.

Department's opposition to the motion; and the order denying the motion. Appellant argues that omission of these documents from the certified record violates rule 188 of the Appeals Board (4 Cal. Code Regs., § 188) and makes it unclear whether and when the documents were considered by the decision maker. Appellant argues that the unreliability of the record was compounded when the Department filed a second certification covering the missing documents.

Rule 188 states what is to be included in the record on appeal:

> (1) The file transcript, which shall include all notices and orders issued by the administrative law judge and the department, including any proposed decision by an administrative law judge and the final decision issued by the department; pleadings and correspondence by a party; notices, orders, pleadings and correspondence pertaining to reconsideration;
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> (2) the hearing reporter's transcript of all proceedings;
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> (3) exhibits admitted or rejected.

There is no dispute that the documents noted were missing from the record originally certified by the Department; nor is there any dispute that the documents should have been included in the certified record. The only question is whether the Department's decision should be reversed because of this.

Appellant insists that reversal is required, but cites no authority to support this result. Nor does it present any meritorious argument in support of its contention. We conclude that the record on appeal presents no basis for reversing the Department's decision.

In the first place, the motion-to-compel documents were provided to appellant and this Board on or about March 17, 2009, with a certification clearly stating that the documents attached to it constituted a supplement to the record in this case. Therefore, any initial deficiency was cured.

Secondly, we cannot see that appellant has suffered any prejudice by this error. Appellant was not prevented from raising or arguing any issues on appeal, since it obviously had copies of the omitted documents in its possession when it first filed this appeal: two of the documents were of its own counsel's creation and the other two would have been received by appellant's counsel before the administrative hearing. Under these circumstances, appellant's contention borders on the frivolous.

Additionally, appellant has not even suggested that these documents would aid the determination of this appeal. It is not enough to say the documents "should" be included in the record on appeal. Without a showing that they are material to the issues raised here, there can be no prejudice to appellant in omitting them from the record.

A Motion to Augment is the appropriate way to deal with items that should have been included in the record. Appellant filed a Motion to Augment along with its opening brief, but did not ask to have the record augmented with the missing motion-to-compel documents. Having failed to pursue the proper avenue to have missing documents included in the record, appellant cannot now expect to be rewarded with a reversal of the Department's decision.

II

Rule 141(a) requires that law enforcement agencies conduct decoy operations "in a fashion that promotes fairness." Rule 141(b)(3) provides:

> A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages; . . .

Appellant contends that the decoy violated rules 141(a) and 141(b)(3) because when the clerk requested the decoy's identification, the decoy took out her California driver's license and held it out toward the clerk instead of giving it to the clerk. In

addition, she held the license with one of her fingers covering some portion of the license. This, according to appellant, raises questions about how much of the license was obscured and whether the clerk was given sufficient opportunity to inspect it.

Appellant also argues that the ALJ violated the directive of *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] (*Topanga*), that an administrative decision must contain an analytical bridge between the raw evidence and the conclusions drawn. Because he did not discuss the arguments made at the hearing on this issue, but merely found that "the evidence did not establish that the decoy operation was carried out in an unfair manner," appellant argues that the ALJ did not fulfill his "obligation to fairly, impartially, and accurately decide these matters."

Rule 141 does not require that the decoy hand over his or her identification to the clerk without being asked to. Here, the clerk did not ask to hold the license in his hand; rather, he leaned toward the license the decoy was holding in her outstretched hand to look at it. Then he waved his hand, which the decoy interpreted as meaning that he was done with the license and she could put it away, which she did. If the clerk's view of the license was inadequate, he did not say so.

If there was a question about what the clerk saw or how much of the license was covered up, appellant could have had the clerk testify, but it did not. It was the province of the ALJ to resolve any questions about the fairness of the way the decoy showed her license to the clerk. He did so, and concluded that there was no unfairness.

In reviewing this decision, the Appeals Board 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. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

Appellant is asking this Board to reweigh the evidence and reach a conclusion different from that reached by the ALJ and the Department. This we cannot do, both because it is beyond the scope of the Board's authority and because we did not see the decoy testify or demonstrate how she held the driver's license she showed the clerk. The ALJ did, and we defer to his findings.

The ALJ did not violate any of the principles of *Topanga*, *supra*. In *7-Eleven, Inc./Cheema* (2004) AB-8181 (fns. omitted), in response to a similar argument, 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.) [¶] . . . [¶]

> 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:
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> > 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."
> >
> > 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.

Appellant cites no authority, and we know of none, that requires an ALJ to make a finding, or even to discuss, every piece of evidence that was presented. As long as there is substantial evidence in light of the whole record to support the findings and the decision, that is sufficient. In the present case, the evidence that the decoy complied with rules 141(a) and 141(b)(3) was uncontradicted. This clearly provides substantial evidence supporting the finding. Appellant's speculation about what the clerk might or might not have seen is not evidence, and without facts that support it, appellant's legal argument does not merit consideration.

III

Appellant contends that because the decoy had participated in numerous decoy operations before the one under consideration in the present case, the decoy's

appearance did not comply with rule 141(b)(2) and the decoy operation violated the fairness requirement of rule 141(a).

The Board has considered, and rejected, arguments similar to this many times. An often-cited example is *7-Eleven, Inc./Azzam* (2001) AB-7631, in which the Board said:

> Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

Appellant has not presented any reason for the Board to reach a different conclusion in the present case.

ORDER

The decision of the Department is affirmed.[3]

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

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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.