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

AB-7678
File: 20-343973 Reg: 00048486

7-ELEVEN, INC., SHASHI KANT KAMBOJ, and VEENA KAMBOJ
dba 7-Eleven Store #2237-32376A
9600 Brimhall Road, Bakersfield, CA 93312,
Appellants/Licensees
v.
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: August 17, 2001
Los Angeles, CA

ISSUED OCTOBER 18, 2001

7-Eleven, Inc., Shashi Kant Kamboj, and Veena Kamboj, doing business as 7-Eleven Store #2237-32376A (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Gurjant Singh ("Singh"), having sold an alcoholic beverage (a 12-pack of Miller Genuine Draft beer) to Heather Hutton ("Hutton"), an 18-year-old minor 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., Shashi Kant Kamboj, and Veena Kamboj, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control,

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[1]The decision of the Department, dated July 27, 2000, is set forth in the appendix.

appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 28, 1998. Thereafter, on March 16, 2000, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor.

An administrative hearing was held on June 29, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Scott Carvel ("Carvel"), a Bakersfield police detective, and Hutton, the minor decoy, in support of the charge of the accusation, and by Veena Kamboj, on behalf of the licensees.

Subsequent to the hearing, the Department issued its decision which determined that the transaction had occurred as alleged, and ordered a 15-day suspension.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the Department failed to prove that the citation was issued after the face to face identification; and (2) the Department improperly ignored evidence tending to show mitigation.

DISCUSSION

I

Appellants contend that there is no proof that the issuance of the citation was preceded by the face to face identification. They question the finding by the Administrative Law Judge that Department investigator Montgomery issued the citation to appellants' clerk, asserting that the citation itself recites that it was issued by Reserve Officer M. Nord.

Department counsel placed in evidence the court minutes that were generated in the criminal proceeding against the clerk. Included within those minutes was a copy of the citation which was issued to the clerk. It shows as the issuing officer one "M. Nord R161." However, there is no reference anywhere in the record to any officer, reserve officer, or investigator by that name.

Appellants have seized upon this discrepancy as the basis for their contention that there is no evidence the face to face identification preceded the issuance of the citation. They did not raise this issue at the administrative hearing. Had they, it is doubtful it would have been pursued on this appeal.

Detective Carvel testified that he was accompanied on the investigation by Department investigators Jason Montgomery and Bob Freed. On cross-examination, Carvel testified that investigator Montgomery conducted the face to face identification after the decoy had reentered the store.

Carvel had previously testified on direct examination that "at the conclusion of the decoy operation" investigator Montgomery contacted the clerk and wrote the citation in his (Carvel's) presence. He was not asked to explain why the name M. Nord was shown on the citation as the issuing officer.

Given Carvel's testimony, it would seem that investigator Montgomery simply entered Nord's name rather than his own as the issuing officer. Despite whatever confusion this may generate, it is not enough to overcome the direct testimony of detective Carvel regarding the face to face identification process, elicited by appellants' counsel, and his testimony regarding when the citation was issued.

II

Appellants challenge the 15-day suspension which was ordered, contending that the Department not only ignored mitigation evidence, but also ignored the recommendation of the Department for a lesser penalty.

This Board has said more than once that when an administrative law judge departs upward from the recommendation made by Department counsel at the administrative hearing, he or she is obligated to set forth reasons for doing so. This is because the Board assumes that counsel's penalty recommendation represents the Department's best thinking at the time, and, in the absence of an explanation, any penalty greater than that which was recommended is arbitrary.

At the close of the administrative hearing, Department counsel recommended a 10-day suspension [RT 102].

The only finding relevant to mitigation was that the clerk had been supplied documents pertaining to the sale of alcoholic beverages, and had passed an oral test on the laws relating to such sales.

Ordinarily, we would presume that a recommendation by the Department of a penalty more lenient than the standard 15-day penalty for first-time offenders assumes the existence in the Department's thinking that mitigation was present. However, the Department argues that the evidence sought to be presented by appellants on the issue of mitigation might even have been fabricated, and, further, that there is evidence of aggravating factors.

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. Here, the ALJ made a

finding consistent with mitigation. The Department's position would require that the Board make findings on the issues of mitigation and aggravation that it did not request from the ALJ. For the Board to accede to the Department request would not be in accord with acceptable appellate procedure.

The Department also asserts that the transcript is in error in reporting the Department's recommendation. In the absence of a sworn statement to that effect, accompanied by a motion to correct the transcript, such an assertion must be rejected.

What all this means is that the Department must be required to reexamine the penalty, and explain to the satisfaction of this Board its reasons for its upward departure from its own recommendation at the administrative hearing.

ORDER

The decision of the Department is affirmed except as to penalty, and the case is remanded to the Department for reconsideration in light of the comments herein.[2]

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

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[2] 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.