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

AB-7720
File: 21-227726 Reg: 00048962

DONALD R. and SHARON E. PITTMAN dba Pittman's Liquors
1758 Fillmore Street, San Francisco, CA 94115,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

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

ISSUED APRIL 18, 2002

Donald R. and Sharon E. Pittman, doing business as Pittman's Liquors (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for ten days for their clerk having sold an alcoholic beverage to a minor, 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 Donald R. and Sharon E. Pittman, appearing through their counsel, Dawn S. Pittman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on August 15, 1989. Thereafter,

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[1]The decision of the Department, dated October 19, 2000, is set forth in the appendix.

the Department instituted an accusation against appellants charging that, on March 23, 2000, their clerk, Carl Johnson, sold an alcoholic beverage (beer) to Matthew J. Mammone, a 17-year-old minor. Although not disclosed in the accusation, Mammone (hereinafter "the decoy") was working with the San Francisco Police Department as a police decoy.

An administrative hearing was held on August 25, 2000, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) appellants were denied a full and fair opportunity to present their defense; (2) the determination that the decoy presented the appearance of a person under the age of 21 is not supported by the evidence; (3) the Department failed to consider the potential for bias from the fact that the decoy's mother and father were police officers, one of whom was participating in the decoy operation; (4) appellants were prejudiced by misrepresentations of Department counsel during the discovery phase; and (5) the penalty is excessive.

DISCUSSION

I

Appellants contend they were denied their right to present a full defense to the charge of the accusation. Specifically, they say they were not permitted to examine witnesses regarding the transaction at issue with respect to the nature, scope and training of the officers in charge of and participating in the decoy program, and the

officers' knowledge or lack thereof of the guidelines governing decoy operations.

The Appeals Board is not required to make an independent search of the record for error not pointed out by appellants. It is the duty of appellants to show to the Appeals Board that the claimed error existed. Without such assistance by appellants, the Appeals Board may deem the general contentions waived or abandoned. (Horowitz v. Noble (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710] and Sutter v. Gamel (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].)

We say this because, despite the sweeping nature of appellants' complaint, the only transcript reference they have provided us - RT 139-144 - deals with discovery issues, and appellants' attorney's representation that she was not informed that she could file a motion to compel further discovery. [2]

Appellants' complaint that they were prevented in their attempts to establish that no consistent guidelines were provided or known by the individuals in charge of and participating in the decoy operation, even if true, affords them no relief. Rule 141 has its own set of rules, and these rules control over any internal police guidelines that may have been in existence. It was incumbent upon appellants to establish a violation of Rule 141. Where there has been no violation of Rule 141 shown, the knowledge, or lack thereof, of the requirements of Rule 141 on the part of the police would seem to be irrelevant. The issue is whether the decoy operation was conducted fairly. There has been no showing here that it was not.

Thus, where the Administrative Law Judge (ALJ) observed the decoy as he testified, and, taking into account both his physical and non-physical appearance, was

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[2] This will be addressed in part IV, infra.

satisfied that he presented an appearance which could generally be considered that of a person under the age of 21 - the decoy was only seventeen years old at the time of the decoy operation, and eighteen when he testified - any limitation on appellants' examination in the areas cited was not prejudicial.

II

As noted above, the ALJ found that the decoy presented the appearance required by Rule 141(b)(2) after considering his physical and non-physical appearance, and observing his poise, demeanor, maturity and mannerisms. Appellants suggest only that reasonable people might disagree about the decoy's appearance, and are critical of the fact the decoy's hair was cut differently at the time of the hearing.

Even assuming that reasonable people might disagree whether the decoy appeared to be under the age of 21, appellants' argument must fail. Rule 141 only requires that the appearance of the decoy be one which "could" generally be considered that of a person under the age of 21 years.

III

Appellants contend the decoy operation was conducted unfairly because the decoy was the son of two police officers, one of whom was participating in the decoy operation.

San Francisco police officer Rose Meyer was one of three police officers participating in the decoy operation. She is the decoy's mother.

Officer Meyer testified that she witnessed the sale of the beer to her son while about three or four feet away. She followed the decoy out of the store, and the two then returned and the decoy, in response to her direction, identified the clerk who made the sale. Appellants have never denied that the sale was made, nor have they

challenged the identification process.

We can appreciate the possibility that, in some circumstances, a familial relationship between police officer and son or daughter might raise questions of credibility. Here, however, appellants have pointed only to the bare existence of the relationship between police officer and decoy, as if that alone gives rise to prejudice. We do not think it does. Such a relationship may invite closer scrutiny in a given case, and make a difference in a very close case, but in this case we see no prejudice at all.

IV

Appellants contend that they were prejudiced in obtaining full discovery by a misrepresentation by Department counsel, made to their attorney, to the effect that appellants had no remedy where the Department's response to a discovery request was incomplete. Department counsel denied having made any such representation.

The Administrative Procedure Act permits the filing of a motion to compel the production of materials sought in discovery. An experienced practitioner would have been well aware of the availability of such a procedure. Appellant's counsel, admittedly inexperienced in this area of the law, apparently was not. Department counsel contends that he answered a question he was asked by appellants' counsel, which did not directly concern a motion to compel, and was not obligated to volunteer advice to opposing counsel.

In any event, without a record of what was sought but allegedly not produced, this Board is not in a position to determine if any relief would be appropriate. Appellants have not told us what records they sought, or how they would have altered the course of their defense.

V

Appellants contend that the penalty is disproportionate to the offense, especially in light of their ten-year operation free of discipline.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Department counsel recommended a 15-day suspension. This is the usual penalty recommended in a minor decoy case, and one the Board has said is a reasonable penalty for a first-time sale-to-minor violation. However, the ALJ imposed only a 10-day suspension, taking into account the fact that appellants had no previous violations.[3]

We cannot say that a 10-day suspension in this case is unreasonable or in any way an abuse of the Department's discretion.

ORDER

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[3] Appellants are involved in two other disciplinary proceedings where no final order has yet been entered, and which were not considered by the ALJ in determining the penalty. Nor have they been given any weight by this Board.

The decision of the Department is affirmed.[4]

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

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[4] 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.