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

AB-7773
File: 20-214388 Reg: 00049387

7-ELEVEN, INC., BRENDA J. KLEE, and KENNETH W. KLEE
dba 7-Eleven Food Store #2142-19201
2005 Lomita Boulevard, Lomita, CA 90717,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: February 7, 2002
Los Angeles, CA

ISSUED MAY 7, 2002

7-Eleven, Inc., Brenda J. Klee, and Kenneth W. Klee, doing business as 7-Eleven Food Store #2142-19201 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for appellants' clerk selling an alcoholic beverage to a 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., Brenda J. Klee, and Kenneth W. Klee, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Stephen A. Jamieson, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

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[1]The decision of the Department, dated February 22, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. Thereafter, the Department instituted an accusation against appellants charging a sale-to-minor violation as noted above.

An administrative hearing was held on January 17, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented by the minor decoy, Louise Lumague ("the decoy"), by Los Angeles County Sheriff's deputies Robert Ferrell and Ronald Barri, and by co-appellant Brenda Klee. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged and no defense had been established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the evidence is insufficient to support the finding that the decoy's identification of the clerk after the sale was "face-to-face" as required by Rule 141(b)(5) (4 Cal. Code Regs. §141, subd. (b)(5)); (2) the Administrative Law Judge (ALJ) demonstrated a lack of impartiality, thereby violating due process and the Administrative Procedure Act; (3) the decision does not include proper findings; and (4) the appearance of the decoy violated Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)).

DISCUSSION

I

In Finding V-A, the ALJ found that the decoy's identification of the clerk was in compliance with Rule 141(b)(5):

> "Upon entering the store, Deputy Ferrell asked the decoy to identify the person who sold her the beer, and the decoy identified [the clerk] as that person. The

> decoy made the identification to Deputy Ferrell, the peace officer directing her. During a part of the identification, the clerk looked around the store. However, there were moments during the identification when the decoy and the clerk were face-to-face. In any event, the clerk knew that the decoy was identifying her as the seller of the beer. This identification was made prior to the issuance of a citation to the clerk and was in compliance with the Department's Rule 141(b)(5)."

Appellants contend the evidence was insufficient to support this finding because the testimony of the decoy and deputies did not show that the clerk was looking at the decoy when the decoy made the identification. They argue that the decoy testified that the clerk was facing away from her when she made the identification, Barri's testimony was "unclear, vague, and ambiguous," and Ferrell testified that the clerk was "just looking around" when the identification was made.

Rule 141(b)(5) 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."

In Chun (1999) AB-7287, this Board defined "face to face":

> "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 Appeals Board explained further in Greer (2000) AB-7403, that "[t]he minor decoy must identify the seller; there is no requirement that the seller identify the minor, nor is it necessary for the clerk to be actually aware that the identification is taking place."

The fact that there were conflicts in the testimony does not impugn the integrity of the ALJ's finding that a face-to-face identification complying with Rule 141(b)(5) was

made. Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; 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]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

All three of the Department's witnesses testified that the decoy identified the clerk while in close proximity to her. The decoy testified that she was about a foot away from the clerk when she made the identification; Barri testified that the two were standing across the counter from each other [RT 46], a distance that the decoy had testified was about three feet [RT 29]; and Ferrell testified that they were only "a few feet" from each other [RT 90].

All three testified that the decoy identified the clerk both verbally and by pointing at her [RT 18, 41, 59]. There was no testimony that the clerk was engaged with a customer or otherwise occupied while the identification took place. Both deputies testified that the decoy and the clerk were facing each other and that the clerk looked at the decoy at some point during the identification [RT 46-47, 58, 60, 91]. Appellants emphasize the decoy's testimony that the clerk was facing away from her when she identified her [RT 34]. The ALJ addressed this testimony in Finding V-B:

> "The decoy misspoke when she testified that the clerk was 'facing away from her' during the identification. It appears that the decoy was confusing the identification with the photographing which occurred later. It was during the photographing that the clerk looked away from the decoy."

The ALJ reached this finding by drawing a reasonable inference from the testimony of the two deputies which established that the clerk was actually facing away from the decoy when the photographs were taken after the actual identification had been done.

Ferrell was of the opinion that the clerk was aware she was being identified [RT 91]. Given the physical proximity of several deputies and Department investigators when the identification was made, it is highly unlikely that the clerk would have been unaware that she was being singled out as the person who made an illegal sale to a minor. Since the clerk did not testify, we do not know what she would have claimed.

The conflicts in the testimony are relatively minor, and the resolution of them was the ALJ's responsibility. We cannot say that he committed error in doing so. Taken all together, the evidence meets the standard set forth in Chun, supra. At the time of the identification, the decoy and the clerk were in reasonable proximity to each other and the clerk was aware, or reasonably should have been aware, that she was being identified as the seller of an alcoholic beverage to minor. Therefore, the identification complied with the requirement of Rule 141(b)(5) that the identification be face-to-face.

II

Appellants contend the ALJ demonstrated a lack of impartiality by explaining to Department counsel what evidence was lacking regarding the face-to-face identification. Even though the Department was unable to elicit the supposedly necessary testimony, appellants argue, the ALJ's actions were improper and violated provisions of the Administrative Procedure Act and appellants' right to due process.

Appellants misstate what actually occurred. In the course of direct examination of Barri, Department counsel asked a question about what happened "After the face-to-

face identification took place . . . ." The ALJ interrupted, objecting "for the record" to counsel's use of "face-to-face" to describe the identification, which, he said, assumed a fact that was not in evidence. Appellants' counsel "join[ed] in the objection." [RT 43.]

Department counsel took the position that the decoy and the clerk did not need to be literally face-to-face, and that the testimony already elicited was sufficient to establish a face-to-face identification in accordance with decisions of the Appeals Board. Appellants' counsel mentioned "strict compliance with the rule," and the ALJ agreed that the court of appeal had held "it's strict compliance."[2] The ALJ reiterated that he did not believe the term "face-to-face" was properly used because the evidence had not shown that the identification was, in fact, face-to-face. Department counsel responded, "All right, Your Honor. If you want a literal face-to-face contact, I will solicit it from the witness." [RT 43-44.]

The ALJ did express why he thought it improper for Department counsel to refer to the identification as "face-to-face," but we do not see that as amounting to unfairly "advising" the Department's counsel on how to proceed. In any case, appellants' counsel, far from objecting to the ALJ's objection, *joined him in it*. Appellants' acquiescence in this advice at the hearing precludes their complaint about it on appeal.

In any case, appellants have not shown that their due process rights were violated in any way, since the ALJ was wrong in suggesting that Rule 141(b)(5) is not

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[2]Apparently referring to Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126], in which the court stated: "The Department's increasing reliance on decoys demands strict adherence to the rules adopted for the protection of the licensees, the public and the decoys themselves."

complied with unless the decoy is literally face-to-face with the clerk when making an identification. (See Chun, supra.)

III

Appellants contend the ALJ made no findings explaining why he found that a face-to-face identification occurred. They appear to argue that the ALJ made a credibility determination, believing Ferrell and rejecting the testimony of the decoy, and cite the federal Social Security Disability Insurance case of Holohan v. Massanari (9th Cir. 2001) 246 F.3d 1195, which requires that an ALJ make specific findings explaining the basis for his or her credibility finding.

The Board considered this question recently in 7-Eleven, Inc. and Huh (8/16/01) AB-7680, and rejected it, saying:

> "We have reviewed the decision in [Holohan], and the court decisions cited in support of that portion of the court's holding, and are satisfied that the view expressed by the court is peculiarly related to federal Social Security disability claims, and does not reflect the law of the State of California. While it may be true that a statement of the factors behind a credibility determination may be of considerable assistance to a reviewing court, and is welcomed by this Board, we are not prepared to say that a decision which does not set forth such considerations is fatally flawed."

Additionally, appellants' assertion that the ALJ made a credibility determination, accepting the testimony of Ferrell and rejecting that of the decoy, misstates what the ALJ did here. The discrepancies in the testimony of the officer and the decoy are not of such significance that they required any credibility determination to be made. The ALJ needed only to determine which recollections appeared to be most accurate or definite, not who told the truth and who did not.

IV

Appellants contend that "The overwhelming weight of the evidence presented at the hearing indicates that [the decoy] had the looks and demeanor of an individual who

appeared over 21 years of age at the time of the sale, in violation of Rule 141(b)(2)."[3] Appellants argue that the decoy's participation in the Sheriff's Explorer program "clearly indicated" that she had the appearance of a person over the age of 21. They also state that the decision does not describe the decoy's appearance, other than to refer to the photographs taken that night and to say that the decoy was nervous at the hearing. They argue this is insufficient to support a finding that the decoy complied with the Rule.

"The overwhelming weight of the evidence" referred to by appellants is apparently the testimony of the decoy that she was involved in the Explorer program with the Sheriff's Department. The Board addressed, and rejected, this type of contention in Azzam (4/26/01) AB-7631:

> "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."

Appellants offer no other reason for asking this Board to substitute its judgment for that of the ALJ. Under the circumstances, it is ironic, if not ludicrous, for appellants to complain that the ALJ did not describe the decoy. In fact, he did give at least a basic description of her, certainly more than appellant has presented to this Board.

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[3]Rule 141(b)(2) provides that "The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense . . . ."

ORDER

The decision of the Department is affirmed.[4]

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

[4]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.