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

AB-8029
File: 20-270949 Reg: 02052225

7-ELEVEN, INC., CAROLINA DEJESUS, and DANILO DEJESUS,
dba 7-Eleven # 2131-13570
285 Broadway, Chula Vista, CA 91910,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: August 14, 2003
Los Angeles, CA

ISSUED OCTOBER 3, 2003

7-Eleven, Inc., Carolina DeJesus, and Danilo DeJesus, doing business as 7-Eleven 2131-13570 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days, with five days thereof stayed for a probationary period of one year for appellants' clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Carolina DeJesus, and Danilo DeJesus, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated September 19, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 20, 1992. Thereafter, the Department instituted an accusation against appellants charging that, on October 6, 2002, appellants' clerk, Gilden Azul, sold a four-pack of Bartles and Jaymes malt cooler to 18-year-old Victoria Majewski. Majewski was working as a minor decoy for the National City Police Department at the time.

An administrative hearing was held on July 31, 2002, at which time documentary evidence was received, and testimony concerning the violation charged was presented by Majewski and by National City police officer John Dougherty.

Subsequent to the hearing, the Department issued its decision which determined that the unlawful sale had occurred as charged and no affirmative defense had been established.

Appellants filed a timely appeal in which they raise the following issues: (1) The decoy's appearance violated rule 141(b)(2),[2] and (2) the administrative law judge failed to make a finding regarding compliance with rule 141(a).

DISCUSSION

I

Appellants contend the decoy, Majewski, did not display the appearance that could generally be expected of a person under 21 years of age and, therefore, violated rule 141(b)(2). They base their contention on Majewski's experience, her acquaintance with one of the police officers involved in the decoy operation, and her manner of dress.

[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.

The ALJ discussed Majewski's appearance in Findings of Fact VII through XIII[3]:

> VII. The decoy was 5' 6" tall and weighed 125 pounds on October 6, 2001. She did not wear any jewelry or make-up. While in Respondents' store, the decoy wore tennis shoes, blue jeans, a gray tank top and a gray sweatshirt. A photograph (Exhibit 4) taken of the decoy with Azul shows that the decoy displayed the physical appearance which could generally be expected of a person under twenty-one years old.
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> IX. In the photograph, a part of the decoy's midriff is exposed. According to the decoy, this exposure occurred due to the way she was holding the malt coolers. No evidence was presented regarding whether the decoy's midriff was exposed when she purchased the malt coolers. Respondents argued that the exposure of the midriff is a "mature" style of dress, thereby making the decoy appear older. The argument is rejected, as it is not supported by any evidence.
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> X. The decoy was 5' 6" tall and weighed 135 pounds on the day of the hearing. Other than a slight increase in weight, the decoy on the day of the hearing looked very similar to the decoy in Exhibit 4.
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> XI. The decoy had been a decoy on several prior occasions. Nevertheless, she was nervous while in Respondents' store, partly because of the location of the store, and partly because of the time of night.
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> XII. The decoy appeared a little nervous while testifying, although she stated that she was not. She spoke in a soft voice, occasionally smiling and giggling.
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> XIII. The Administrative Law Judge observed the decoy's mannerism, demeanor, poise, and maturity while she testified. Based on this observation, the testimony about the decoy's appearance, and Exhibit 4, the Administrative Law Judge finds that the decoy displayed the appearance which could generally be expected of a person under twenty-one years old when she purchased the malt coolers from the Respondents' clerk

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, 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

[3]In the original decision, paragraph VIII was non-existent.

decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[4]

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 Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *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 [40 Cal.Rptr. 666].)

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as she testifies and making the determination whether the decoy's appearance met the requirement of Rule 141, that she possessed 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.

We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy did not have the appearance required by the rule, and an equally partisan response that she did.

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[4]The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

With regard to the decoy's experience, this Board said in *Azzam* (2001) 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 have not explained to this Board how the decoy's acquaintance with one of the officers made her appear to be over 21. At the hearing appellant asked Majewski questions about her acquaintance with the officer, stating that the answers would be relevant to show Majewski's "bias, interest, or motive." [RT 20.] The ALJ sustained the Department's objection to the questions, and we see no reason to disagree with his ruling.

Appellants' reference to Majewski's manner of dress is also not explained, although from their argument on the fairness issue, we assume they are asserting that it "enhance[d] the age and appearance of the decoy." The ALJ rejected this contention as not supported by any evidence, and we agree with his conclusion.

II

Appellants contend that the issue of fairness under rule 141(a) was raised at the hearing, but the ALJ failed to make a finding on that issue. They also argue that the ALJ's analysis was incorrect and unfair, because he used the photograph of the decoy taken with the clerk after the sale as support for his conclusion that the decoy's

appearance met the requirement of rule 141(b)(2), but found "that the same photograph is insufficient to show what she actually looked like while in front of the clerk during the transaction." (App. Br. at 5.)

We do not believe the ALJ erred in not making a specific finding regarding fairness under rule 141(a). Appellants can only be said to have raised this issue in the broadest sense. The only references to this issue are two statements made by counsel during closing argument: "I'd raise each and every affirmative defense to 141, but particularly I would like to highlight for the court the minor's dress on this particular night," [RT 51] and "I think it was unfair in this case for the Department to proceed with the decoy operation when Ms. Majewski was dressed as such" [RT 52].

Numerous cases have held that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*E.g., Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

The general reference to "each and every affirmative defense pursuant to Rule 141" does no more than invite the ALJ to find a basis for asserting the affirmative defense. It is hardly surprising that the ALJ apparently declined the invitation. It is not the ALJ's job to survey the evidence to find facts supporting an affirmative defense for appellants.

Immediately preceding counsel's statement in closing argument that, "I think it was unfair in this case for the Department to proceed with the decoy operation when Ms. Majewski was dressed as such," he said:

> Department's Exhibit 4 clearly shows that the minor is wearing a tank top, as she said, but her midriff, her belly, is clearly exposed. She has an open sweatshirt. All of this would have been visible to the court – to the clerk. Excuse me, would have been visible to the clerk. And I would submit that that form of dress, low-cut blue jeans, as the photo shows, a belly exposed, a shirt riding up, and an open sweatshirt is a very mature style of dress. It is not an adolescent style of dress characteristic of somebody 20 years of age or younger.

The import of this argument is that what the decoy wore made her appear old enough to purchase alcoholic beverages, thereby violating rule 141(b)(2). Adding a single sentence alleging that it was "unfair" for the decoy operation to continue, was not sufficient to put the ALJ on notice that appellants were raising the issue of fairness under rule 141(a) in addition to rule 141(b)(2). The ALJ addressed the argument appellants made, that the decoy was wearing a "mature" style of clothing that made her appear older, and rejected it. In doing so, he adequately addressed the issue as raised by appellants.

Appellants contend the ALJ's use of the photograph in his analysis of was unfair, but their analysis is based on a mistatement of the evidence. They say the ALJ found the photograph insufficient evidence of the way the decoy looked "while in front of the clerk during the transaction." Appellants take the testimony of the decoy that the photograph of her with the clerk, taken after the sale, "accurately depicts her dress," to justify their statement that her midriff was showing when she was in front of the clerk during the transaction. When asked if the top she was wearing was a "belly shirt," Majewski said it was not, and that if she had been "standing up straight and not holding

the heavy Fuzzy Navels [the alcoholic beverages she purchased]," her midriff would not have shown. The clear implication of her response was that her midriff was not showing during the transaction although it was when the picture was taken. Appellants' counsel was the only person at the hearing who said that "all of this . . . would have been visible to the clerk." We can find no error in the ALJ's use of the photograph.

ORDER

The decision of the Department is affirmed.[5]

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5]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.