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

AB-8030
File: 20-318875 Reg: 02052676

7-ELEVEN, INC., CRYSTAL K. TWOMEY, AND TIMOTHY J. TWOMEY,
dba 7-Eleven # 2133-18828
1017 North Broadway, Santa Maria, CA 93454,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Samuel D. Reyes

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

ISSUED OCTOBER 3, 2003

7-Eleven, Inc., Crystal K. Twomey, and Timothy J. Twomey, doing business as 7-Eleven # 2133-18828 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days 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., Crystal K. Twomey, and Timothy J. Twomey, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, 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 September 19, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 11, 1996. Thereafter, the Department instituted an accusation against appellants charging that, on January 16, 2002, appellants' clerk, Lolita Rasnake (the clerk), sold an alcoholic beverage to 18-year-old Matt Stromberg. Stromberg was working as a decoy for the Santa Maria Police Department at the time of the sale.

An administrative hearing was held on June 18, 2002, at which time documentary evidence was received and testimony concerning the violation charged was presented by Stromberg, by Santa Maria police officer Al Torres, and by Rudy Dominguez, manager of the premises.

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

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

DISCUSSION

I

Appellants contend the decoy did not display the appearance generally to be expected of a person under the age of 21 as required by Rule 141(b)(2), and the administrative law judge (ALJ) committed reversible error by not including in the decision a finding regarding compliance with Rule 141(b)(2).

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[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.

Appellants did not raise the issue of the decoy's appearance at the administrative hearing, and the Board may consider the issue waived. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §394, p. 444.) 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].)

In an attempt to show that they raised the issue at the hearing, appellants assert in their brief that "Evidence was . . . presented at the hearing as to this decoy's physical appearance, demeanor, and police training and a defense raised 'to each and every affirmative defense pursuant to Rule 141', including Rule 141(b)(2)." The evidence in the transcript as to the decoy's appearance is, at best, extremely limited. On page 62, counsel for appellants asked the decoy about his height, weight, and hair length. On page 67, Department counsel asked the decoy if the height and weight shown on his driver's license were the same as his height and weight at the time of the decoy operation, and whether he had done anything to make himself appear older than his true age. In closing argument, appellants' counsel argued that the decoy operation violated the fairness requirement of rule 141(a) because another customer caused the clerk to be distracted. At the close of his argument, counsel stated,

> I'll just submit the matter on that, Your Honor. I'll raise each and every affirmative defense pursuant to Rule 141, but I would request that the Court also take into account the training materials, the signs that this licensee has posted throughout his store to remind his clerks of their responsibility in selling alcoholic beverages.

The few questions asked about the decoy's appearance cannot be considered "raising the issue" such that the ALJ was fairly put on notice that appellants believed compliance with rule 141(b)(2) was in question. (See *Islam* (2000) AB-7442 [issue must be raised at hearing to give opposition and trier of fact fair notice and opportunity to address the issue].) The general reference to "each and every affirmative defense pursuant to Rule 141" does no more than invite the ALJ to perform counsel's job of making an argument for an affirmative defense. It is hardly surprising that the ALJ declined the invitation. It is not the ALJ's job to survey the evidence to find facts supporting an affirmative defense for appellants. Under the circumstances, appellants cannot be said to have raised the issue of the decoy's appearance, and the ALJ was under no duty to address this issue.

The ALJ addressed the only rule 141 issue that appellants raised: appellants' contentions that the fairness requirement of rule 141(a) was violated because another customer distracted the clerk. The failure to address the decoy's appearance was due to appellants' failure to apprise the ALJ of their belief that they had a defense under rule 141(b)(2). Having chosen not to raise Rule 141(b)(2) as a defense, appellants cannot now say they should be absolved of responsibility for selling to a minor because the ALJ failed to address an affirmative defense that appellants did not raise.

II

Rule 141(a) states that a law enforcement agency may only use a decoy under the age of 21 to attempt to purchase alcoholic beverages "in a fashion that promotes

fairness." Appellants contend that the fairness requirement of Rule 141(a) was violated because the decoy was allowed to continue with his attempt to purchase the beer even though the clerk "was still engaged and distracted by another customer" at the time.

In *KV Mart Company* (2000) AB-7476, the Board said, "It is conceivable that, where an unusual level of patron activity that truly interjects itself into a decoy operation to such an extent that a seller may be legitimately distracted or confused, and the law enforcement officials seek to take advantage of such distraction or confusion, relief might be appropriate." Appellants argue that the present case falls squarely within the language quoted: a customer buying a lottery ticket remained in front of the clerk during the transaction with the decoy, this created a distraction or a "confusing situation," and law enforcement "took advantage" of this by allowing the transaction to continue.

The ALJ considered, and rejected, appellants' "distraction argument" in Legal Conclusion 4:

> [Appellants] note that the cornerstone of Title 4, California Code of Regulations, section 141 (Rule 141), is to promote fairness in the conduct of minor decoy operations. They argue that the decoy took advantage of a clerk distracted by the female customer purchasing a lottery ticket. This defense is not supported by the facts. While another customer was indeed at the counter during the time Stromberg was purchasing the beer, Rasnake was not distracted by the other customer. Rasnake looked at Stromberg's driver's license for approximately fifteen seconds, or what seemed to be a long time to Torres. She kept her attention on Stromberg and the item he was purchasing during the entire transaction. The clerk was even able to assist four customers, including the minor, before she turned her attention to the lottery customer. Rasnake did not claim to have been distracted by the lottery customer. In these circumstances, the lottery customer did not interfere with Rasnake or prevent the clerk from discharging her duties. [Appellants] therefore have not established a defense under rule 141(a).

Implicit in appellants' argument is an attack on the ALJ's findings and determinations. The Appeals Board's review of these issues 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; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) 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. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (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]; *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].)

The ALJ resolved conflicts in the evidence and drew reasonable inferences. Substantial evidence supports the ALJ's findings and the findings support his determination that "the lottery customer did not interfere with Rasnake or prevent the

clerk from discharging her duties." We concur with his conclusion that appellants did not establish a defense under rule 141(a).

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
KAREN GETMAN, 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.