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

AB-8042
File: 20-287939 Reg: 02052399

7-ELEVEN, INC., IQBAL S. GILL, and JOGINDER K. GILL
dba 7-Eleven Store #2235-14075
506 East 19th Street, Marysville, CA 95901,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ann E. Sarli

Appeals Board Hearing: June 12, 2003
San Francisco, CA

ISSUED AUGUST 28, 2003

7-Eleven, Inc., Iqbal S. Gill, and Joginder K. Gill, doing business as 7-Eleven Store #2235-14075 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk having sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Iqbal S. Gill, and Joginder K. Gill, appearing through their counsel, Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 27, 1993. Thereafter, the Department instituted an accusation against appellants charging that

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[1]The decision of the Department, dated October 10, 2002, is set forth in the appendix.

appellants' agent, employee, or servant, Jasbir S. Uppal, sold an alcoholic beverage (malt liquor) to Todd A. Benson, a person then approximately 19 years of age.

An administrative hearing was held on August 23, 2002, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Marysville police officer Brad Minton; Todd Benson, the decoy; Jasbir Uppal, the clerk; and Iqbal Gill, the store owner.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been proven, and appellants had failed to establish any affirmative defense.

Appellants thereafter filed a timely appeal in which they raise the following general issues: (1) the accusation should have been dismissed because the Department failed to produce the minor at the hearing; (2) the decoy operation was unfair; (3) the decoy did not display the appearance required by Rule 141(b)(2); and (4) the penalty is improper.

DISCUSSION

I

Appellant contends that the decoy operation was unfair because the decoy presented the clerk an identification with a picture that did not match the decoy; the decoy should have left the store after the clerk refused to make the sale because he believed the identification did not belong to the decoy; and the involvement of other customers into the transaction created an unfair distraction for the clerk. We are inclined to agree with appellants that the combination of circumstances resulted in a

flawed decoy operation and a violation of the fairness requirement of Rule 141.[2]

When shown the decoy's Minnesota driver's license, the clerk said that he did not think it was the decoy's identification, because the photograph did not look like him. The decoy replied that he was the person in the photo. The clerk looked at the photo a second time, and again expressed his disbelief. The decoy then gestured toward his hair and told the clerk he had changed his hair style, in an apparent effort to show the clerk it really was his identification. Next, the clerk asked the decoy for his date of birth. He was given the date, but continued to question the identification. At this point another patron, one of several young men who were watching the transaction, looked at the identification, and told the clerk that he thought the identification was that of the decoy. Shortly thereafter the clerk went forward with the sale.

The ALJ concluded that the clerk "got sidetracked over the photograph: "When he was satisfied that the photograph was Benson's, he either forgot about the subsequent steps in the process [of his system for checking identification] or assumed Benson was over 21 years of age." (Finding of Fact 13.)

The Department argues that appellants are simply asking the Appeals Board to act as the trier of fact. We disagree. This case turns on the issue of whether the clerk was so distracted by the decoy's appearance, the license photograph, or the involvement of other patrons, that he failed to realize that the identification he was being shown was that of a minor.

In *Circle K Stores, Inc.* (2001) AB-7626, the Board stated:

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[2] Rule 141(a) provides that "a law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages ... in a fashion that promotes fairness."

> 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.

We think this is such a case. Our review of the record persuades us that the combination of the decoy's persistence and the intervention of other patrons was enough distraction to overcome those doubts on the part of the clerk that might have led to a refusal to sell.

Resolution of the remaining issues raised by appellants is unnecessary in light of our determination that the decision of the Department must be reversed, but we include our views on those issues for the guidance of the parties.

II

This matter was originally set to be heard on June 25, 2002. At the commencement of the hearing, Department counsel informed the Administrative Law Judge (ALJ) that the Department's witnesses, the decoy and the police officer, would not be present. According to Department counsel, subpoenas had been placed with the Marysville Police Department for service, but neither the decoy nor the officer was served.

The ALJ granted the Department's request for a continuance over appellants' objection, stating:

> I find there is good cause for the continuance and that all steps routinely taken in all these cases as far as I know have been taken by the Department.
>
> The fault in this case is with the local police department. It's unfortunate, and a lot of people were put to unnecessary expense, and it won't happen a second time because the proviso for the continuance is that there won't be any further continuance for the department with these problems with the next hearing.
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> But I find that the subpoenas were properly served on subpoena control at

Marysville PD, and whatever failure occurred thereafter out of the Department's control.

Appellant argues that the accusation should have been dismissed because of the Department's failure to produce the minor, citing Business and Professions Code section 25666;[3] that the Department was not entitled to a continuance because Government Code section 11450.20 requires that the subpoena be served upon the witness personally; and that good cause was not established to justify a continuance under Government Code section 11524.

An appellant has no absolute right to a continuance; they are granted or denied at the discretion of the ALJ and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446].) By the same token, an order granting a continuance should not be disturbed in the absence of an abuse of discretion.

We think the ALJ acted reasonably. The Department had followed the procedure normally utilized when subpoenaing law enforcement officers, undoubtedly one intended to protect the officers' rights to privacy.

We find nothing in section 25666 that deprives a hearing officer of the discretion he or she possesses with respect to whether a continuance may or should be granted.

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[3] Business and Professions Code section 25666 provides:

In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless the licensee has waived, in writing, the appearance of the minor.

The purpose of that section is to ensure the presence of a minor at a hearing in which the alleged violation relates in some direct way to the conduct of the minor. We do not see it as intended to preclude the Department from continuing to pursue a violation where the Department followed the normal procedure for placing a subpoena with a police officer and a decoy.

Appellants cite *Equilon Enterprises, LLC* (2001) AB-7622, as holding that a continuance is not proper where the Department has failed to subpoena the minor. This reads too much into that decision. In that case, the minor who did not appear had been subpoenaed. By its language in that case, the Board was saying only that there could well be circumstances where a dismissal might be appropriate.

Additionally, as in *Equilon Enterprises, LLC, supra,* appellants are unable to demonstrate any prejudice to their ability to defend against the accusation.

This is not a case where the Department acted irresponsibly. It was reasonable for it to rely on the Marysville Police Department to see that the subpoenas were properly placed in the hands of the witnesses. It should not be punished for having done so.

III

Appellants contend that the ALJ applied an erroneous standard in judging the decoy's appearance; they say that the ALJ erred in Finding of Fact 13 when she concluded that the decoy was not trying to appear older when he produced his identification promptly when asked to do so.

Earlier in that same finding, the ALJ addressed appellants' contention that the decoy did not meet the standards set by Rule 141(b)(2):

Respondents argue that Benson did not meet the Rule 141 standards for a

> decoy. They argue that he did not display the appearance of an individual under 21 years old. Benson was 5 foot 10 inches tall, and weighed 185 pounds. They argue his appearance was mature and reserved and that he did not hesitate when asked for his identification. The evidence does not support this argument. The photograph of Benson taken on the day of the operation shows a young man who was dressed youthfully in casual clothes and a large heavy necklace. The fact that he did not hesitate at all when asked for his identification does not demonstrate a mature and reserved manner. This action may just as easily be interpreted as youthful exuberance or a blustering effect. *There is no evidence from this gesture that Benson was attempting to appear older than he was.*

Appellants focus on the italicized sentence. They cite *Southland Corporation/Te* (2001) AB-7430, a case in which the Board reversed a decision of the Department because the ALJ took into account "what he termed the 'lack of artifice' employed so as to disguise the minor as a person exceeding the age of 20."

We read the decision in *Southland/Te* as turning on the weight attributed by the ALJ to the so-called lack of artifice in his assessment of the decoy's apparent age. In the present case, the explanation of the decoy's ready production of his identification appears to be little more than an afterthought, not as a significant element in his assessment of the decoy's appearance.

Finally, appellants address the decoy's physical characteristics and his background as a member of the United States Air Force. Appellants mention his height and weight, his blue jeans and a polo shirt, all neutral considerations as indicia of age. Appellants mistakenly imply that Benson was an officer at Beale Air Force Base ("where he associated with *other* officers.") (App.Br., p.14); Benson testified that his rank was E-3. E-3 is an enlisted rank.

IV

Appellants contend that the ALJ abused her discretion by not mitigating the

penalty. They argue that the clerk's attempts to refuse the sale, the decoy's "refusal to take no for an answer," and the pressure placed on the clerk by the other young men in the store are factors that warrant mitigation. Further, they contend that the ALJ failed to take into account as mitigating factors two subsequent instances (one involving the same clerk as in this case) where attempts by decoys to purchase alcohol were rebuffed. Finally, they contend that the ALJ erred in considering, as an aggravating factor, a prior disciplinary matter.

The ALJ adopted the Department's recommendation - a 15-day suspension, with 5 days thereof stayed.

The facts surrounding the transaction itself as matters of mitigation were considered and rejected by the ALJ. That was clearly a judgment call by the person best in a position to make it. As she saw it, the prominence of the decoy's date of birth on the license made mitigation inappropriate.

The ALJ noted in one of her findings that the clerk had been targeted in a decoy operation and refused to sell, but made no specific note of this when addressing the penalty. We have no way of knowing whether or to what extent she considered it a mitigating factor.

The ALJ clearly erred in considering a prior disciplinary matter as an aggravating factor. The accusation alleges a prior sale in violation of section 25658, subdivision (a), in 1994, but, as appellants correctly allege, the Department made no attempt to prove its existence. Even if the Department had, we do not think a violation seven years earlier can be considered an aggravating factor.

Which leaves us where? The Department has uniformly maintained that its standard penalty for a sale-to-minor violation is 15 days. In this case, it recommended

a 15-day suspension, but with 5 days stayed, and the ALJ followed that recommendation. Thus, we are left with a penalty more lenient than the Department standard penalty, yet purportedly one denying mitigation and finding aggravation.

The Board could, if it so elected, decline to remand the case to the Department for reconsideration of the penalty, if it is of the belief the Department would impose the same penalty on remand. Given the lenient nature of the penalty (the Department's "standard" penalty for a sale to a minor is 15 days, none stayed). it is unlikely that the Department would reduce it even more. *(See Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 635 [166 Cal.Rptr. 826].)

In any event, the issue is moot, for the reasons stated in part I, *supra*.

ORDER

The decision of the Department is reversed for the reasons stated in part I, *supra.*[4]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, 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.