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

AB-8947
File: 20-268865 Reg: 08068453

7-ELEVEN, INC. and BARBARA L. LUNA, dba 7-Eleven Store #2121-20337
2805 Garnet Avenue, San Diego, CA 92109,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: March 3, 2011
Los Angeles, CA

ISSUED APRIL 26, 2011

7-Eleven, Inc. and Barbara L. Luna, doing business as 7-Eleven Store #2121-20337 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, with all 10 days conditionally stayed for one year of discipline-free operation, for their clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc. and Barbara L. Luna, appearing through their counsel, Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

[1] The decision of the Department, dated September 19, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 24, 1992. On April 18, 2008, the Department filed an accusation against appellants charging that, on January 26, 2008, appellants' clerk, Maria Luisa Tinoco (the clerk), sold an alcoholic beverage to 17-year-old Dallas Colton Castro. Although not noted in the accusation, Castro was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on August 5, 2008, documentary evidence was received and testimony concerning the sale was presented by Castro (the decoy) and by Vic Duong, a Department Investigator.

The Department's decision determined that the violation charged was proven and no defense to the charge was established.

Appellants then filed an appeal contending: (1) They were prevented from introducing evidence that would show that the decision is the product of an underground regulation; (2) the decoy did not display the appearance required by rule 141(b)(2)[2]; and (3) the decoy failed to respond to the clerk as required by rule 141(b)(4).

DISCUSSION

I

Appellants contend that the decision is the product of an underground regulation, a policy governing discipline in first strike minor cases, and that they were prevented from introducing evidence that would show that such an underground regulation existed.

[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 issue raised by appellant is no stranger to this Board. In fact, since it was raised in embryonic form in 2009 (see *Cirrus Investments* (2009) AB-8766), it has been addressed by the Board at least 16 times,[3] and rejected each time.

There is nothing said in appellants' brief, and nothing raised in oral argument, that has not been said in one form or another in the matters cited in the footnote. This appeal is equally lacking in merit.

II

Appellants also contend that the decoy did not display the appearance required by Rule 141(b)(2) which dictates: "[t]he 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."

The administrative law judge (ALJ) made the following findings of fact about the decoy's appearance (FFII-D):

> D. The overall appearance of the decoy including his demeanor, his poise, his size, his mannerisms and his physical appearance were consistent with that of [a] person under the age of twenty-one and his appearance at the time of the hearing and on the day of the decoy operation was similar except that he had a slightly darker suntan and he

[3] *Cirrus Investments* (March 12, 2009) AB-8766; *Randhawa* (May 19, 2010) AB-8973; *Yummy Foods LLC* (July 22, 2010) AB-8950; *7-Eleven, Inc./Del Rosario* (August 4, 2010) AB-8786;*7-Eleven, Inc./Raqba, Inc.* (August 5, 2010) AB-8988; *Chevron Stations, Inc.* (August 9, 2010) AB-8996*; 7-Eleven, Inc./Solanki* (August 9, 2010) AB-9019; *Murshed (August 9, 2010) AB-9073; Wong* (August 18, 2010) AB-8991; *7-Eleven, Inc./Triplett* (September 15, 2010) AB-8864; *7-Eleven, Inc./Salem Enterprises* (September 21, 2010) AB-8965; *Sharmeens Enterprises, Inc*. (October 25, 2010) AB-8782 (review denied November 5, 2010); *7-Eleven, Inc./Malldiv Associates* (December 7, 2010) AB-8951 *7-Eleven, Inc./Aziz* (December 9, 2010) AB-8980; *7-Eleven, Inc./Ghuman & Sons, Inc. (*December 9, 2010) AB-8910*; Sharmeens Enterprises, Inc.* (December 9, 2010) AB-8781.

was approximately ten pounds heavier on the day of the hearing.

1. The decoy is a very youthful looking teenager who was five feet seven inches in height and who weighed approximately one hundred seventy pounds on the day of the sale. On that day, he was clean-shaven and his clothing consisted of blue jeans and a black, hooded sweatshirt. The decoy testified that he had shaved about three or four hours before going to the premises.

2. The decoy further testified that he had participated in two prior decoy operations, that he visited 15 to 20 locations during the two prior operations, that he had been a cadet with the San Diego Police Department for approximately six months prior to the instant decoy operation and that he had participated in two prior police ride-a-longs. The cadet position is voluntary and it was not a paid position. As a cadet, he wore a cadet's uniform and he assisted with things like traffic control at special functions such as festivals.

3. The photograph depicted in Exhibit 3 was taken inside the premises on the day of the sale and the photograph depicted in Exhibit 4 was taken at the Department's district office before going out on the decoy operation. These two photographs depict how the decoy appeared and what he was wearing when he was at the premises except that he is not wearing the hooded sweatshirt in Exhibit 4.

4. There was nothing remarkable about the decoy's nonphysical appearance and there was nothing about his speech, his mannerisms or his demeanor that made him appear older than his actual age of seventeen.

5. After considering the photographs depicted in Exhibits 3 and 4, the decoy's overall appearance when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

Appellants maintain that the decoy's physical appearance, coupled with his experience as a police cadet, caused him to appear older than 21 to the clerk, and to display a confident demeanor, uncharacteristic of a person under the age of 21. Further, appellants contend that no substantial evidence supports the Department's decision. (AOB at p. 16.)

We can dispose of this latter point quickly. We simply do not agree that an administrative law judge who must determine the apparent age of a decoy, and actually sees the decoy in person, lacks substantial evidence to make such a determination. The Board's concern throughout has been whether, in doing so, the administrative law judge has applied the correct standard under the rule.

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 he testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that he 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. The ALJ has made that finding here, and 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 lacked the appearance required by the rule, and an equally partisan response that he did not.

We do feel compelled to address specifically, however, the contention that the decoy's police training and experience disqualifies him from acting as a decoy. As we 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.

We see no evidence that this decoy's experience as a police cadet resulted in him displaying the appearance of a person 21 years old or older.

III

Appellants contend finally that the decoy had a duty to clarify his age to the clerk in response to the clerk's muffled statement that sounded like "17." (AOB at p. 17.)

Rule 141(b)(4) requires a decoy to "answer truthfully any questions about his or her age." Appellants contend that by not responding to the clerk, the decoy violated this rule.

Appellant is trying to create an affirmative duty where none exists. A decoy is only required by this rule to truthfully answer a question about his age if one is asked, and the clerk's mumbled statement simply cannot be contorted into a question.

The statement about the decoy's true age did not reveal a miscalculation or question, it was merely an observation by the clerk. As noted by the ALJ (FF II-F):

> F. The Respondents' attorney argued that the decoy's failure to respond to the almost inaudible statement by the clerk that sounded like "17" violated the fairness provisions of the Department's Rule 141. This argument is rejected. The utterance by the clerk was an accurate statement regarding the decoy's actual age and it did not demonstrate that the clerk was mistaken or confused. Under the circumstances of this case, the decoy was under no duty to make any kind of response and the fairness provisions of Rule 141 were not violated.

We might be compelled to look at the spirit or intention of the rule if there were some ambiguity in applying its terms to this transaction. That simply is not the case. The rule requires a question about the decoy's age, and the clerk here did not ask a question, or anything resembling a question, about the decoy's age. There was no violation of rule 141(b)(4).

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
MICHAEL A. PROSIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4] 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.