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

AB-9198
File: 21-348519 Reg: 10073554

NAIM MITANIOS YOUNAN and NOFA YOUNAN, dba Norm's Market
16286 Foothill Boulevard, Fontana, CA 92335,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: September 6, 2012
Los Angeles, CA

ISSUED OCTOBER 17, 2012

Naim Mitanios Younan and Nofa Younan, doing business as Norm's Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days 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 Naim Mitanios Younan and Nofa Younan, appearing through their counsel, Ralph B. Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

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[1]The decision of the Department, dated October 11, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on July 13, 2000. On January 12, 2011, the Department filed an accusation against appellants charging that, on January 23, 2010, appellants' clerk, Tarek Kamel (the clerk), sold an alcoholic beverage to 17-year-old Edgar Villarreal. Although not noted in the accusation, Villarreal was working as a minor decoy for the Department at the time.

At the administrative hearing held on August 16, 2011, documentary evidence was received and testimony concerning the sale was presented by Villarreal (the decoy) and by former Department investigator Lori Pozuelos. Appellants presented no witnesses.

The evidence established that the decoy picked out a 3-pack of 24-ounce cans of Bud Light beer from the cooler in the premises. He took it to the counter, the clerk rang it up, the decoy paid for the beer, and left with it in a bag. The clerk did not ask to see the decoy's identification or ask him his age. Investigator Pozuelos was in the store observing while the decoy purchased the beer.

Shortly thereafter, the decoy re-entered the store with several Department investigators. The investigators identified themselves to the clerk and told him he had just sold alcohol to a minor. One of the investigators asked the decoy who had sold the beer to him; the decoy pointed to the clerk and said "He sold the beer to me." The decoy was standing three to four feet from the clerk while identifying him. A citation was issued to the clerk after the identification and a photograph was taken of the clerk, the decoy, and the beer.

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

Appellants then filed an appeal contending that Department rules 141(b)(2)[2] and 141(b)(5) were violated, and the ALJ failed to consider mitigation evidence in determining the penalty.

DISCUSSION

I

Appellants contend that the decoy appeared to the clerk to be over the age of 21, in violation of Department rule 141(b)(2),[3] because of his size and confidence. They also allege that the ALJ incorrectly determined that the decoy looked substantially the same at the licensed premises as he did at the hearing.

The decoy was 5'5" tall and weighed about 200 pounds at the time of the decoy operation. Appellants assert that it is uncommon for someone under the age of 21 to weigh 200 pounds. With no support for that assertion, and considering the commonly acknowledged current high rate of obesity in young people, we are not persuaded by appellants' argument that the decoy's size made him appear to be over the age of 21.

Appellants also contend the evidence does not support the finding that the decoy looked substantially the same at the licensed premises as he did at the hearing. They argue that, because the decoy lost 30 pounds between the time of the decoy operation and the hearing, his appearance could not be substantially the same. In making his determination, the ALJ took into consideration the decoy's weight loss, yet still concluded that his appearance was substantially the same. (Finding of Fact (FF) 5.)

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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.

[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."

Even if we agreed with appellants that such a change could have had an effect on the decoy's appearance, we cannot say, as a matter of law, that the trier of fact could not reasonably have concluded otherwise. Therefore, we accord our usual deference to the ALJ's factual finding.

Appellants point out that the decoy participated in several decoy operations before this one, he was a police Explorer with the rank of sergeant, and he had acted as a translator for the police on occasion. This experience, they argue, caused him to be less nervous during this decoy operation than he had been during previous ones.

"Being less nervous" does not necessarily equate with "confidence making him appear to be over 21." In any case, as the Appeals Board has said many times, a violation of rule 141(b)(2) is not established simply by showing that a decoy had training or experience; "it is only the *observable effect* of that experience that can be considered by the trier of fact." (*Azzam* (2001) AB-7631.)

The ALJ concluded that the decoy displayed the appearance required by rule 141(b)(2) based on the decoy's "overall appearance, *i.e.*, his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance/conduct in front of the clerk at the Licensed Premises on January 23, 2010." (FF 10.) Appellants are asking this Board to substitute its judgment of the decoy's appearance for that of the ALJ, a position the Board has repeatedly rejected.

> An ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJ's are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751.)

The ALJ's determination was neither arbitrary nor capricious, and we will uphold it.

II

Appellants contend that the decoy's face-to-face identification of the clerk was unfairly suggestive because the officers contacted the clerk before the decoy identified him, essentially indicating who the decoy was to identify. They state that the clerk identified by the decoy was "one of two male clerks behind the register area," perhaps implying there was at least the possibility that the decoy could have identified the wrong clerk.

The court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Keller)* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339] said that "an unduly suggestive one-person show-up is impermissible." Immediately before that statement, however, the court said, "We note that single-person show-ups are not inherently unfair. (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 [269 Cal.Rptr. 447].)"

The Appeals Board has addressed this argument a number of times before and consistently rejected it. In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board said:

> The fact that the officer first contacts the clerk and informs him or her of the sale to a minor has been used to show that the clerk was aware of being identified by the decoy. (See, e.g., *Southland & Anthony* (2000) AB-7292; *Southland & Meng* (2000) AB-7158a.) ¶ . . . ¶ As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

(See also, e.g., *7-Eleven, Inc./Dars Corporation* (2007) AB-8590; *BP West Coast Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.) Appellants

have presented no evidence or argument to convince us that we should treat this appeal any differently from the previous ones raising this issue.

Appellants mention the presence of a second employee, but do not make any argument built upon that basis. In closing argument at the administrative hearing, appellants argued that the officer should have asked the decoy, "Which of the clerks sold you the alcohol?" Instead, appellants assert, the officer identified the clerk he wanted the decoy to point out, making this an unduly suggestive identification. The decision addresses that argument in paragraph 6 of the Conclusions of Law (CL):

> CL 6. Respondent also argues that Rule 141(b)(5) was violated because there possibly was a second employee behind the counter during that time. That argument is also rejected. Both Decoy [Villarreal] and Investigator [Pozuelos] testified credibly that Clerk Kamel was the person who sold [Villarreal] the beer and was also the person that [Villarreal] identified during the face to face identification. Both [Villarreal] and Investigator [Pozuelos] were present and witnessed the entire sales transaction. Respondents' argument calls for pure speculation and is not based on fact.

If appellants had made that argument on appeal, we would have rejected it in much the same way the ALJ did.

III

Appellants contend that the ALJ abused his discretion in imposing the Department-recommended 25-day penalty because he considered only the aggravating evidence of a prior violation and failed to consider the mitigation evidence they presented. They argue that letters from the Fontana Police Department acknowledging that minor decoys were not able to purchase alcoholic beverages at the licensed premises on two occasions following the date of this violation show that they took

corrective action to prevent additional violations, actions included in rule 144[4] as a mitigating factor.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds may differ with regard to the propriety of the disciplinary action, no abuse of discretion has occurred." *(Flippin v. Los Angeles City Bd. of Civil Service Commissioners* (2007) 148 Cal.App.4th 272, 279 [55 Cal.Rptr.3d 458].)

The ALJ's statement in the "Penalty" section of the decision that "There was no evidence presented that would warrant a mitigated penalty," does not mean that the ALJ failed to consider the mitigation evidence presented. (See *People v. King* (2010) 183 Cal.App.4th 1281, 1322 [108 Cal.Rptr.3d 333]; *People v. Holguin* (1989) 213 Cal.App.3d 1308, 1317-1318 [262 Cal.Rptr. 331].) Absent a statute to the contrary, findings on matters of mitigation are not required (*Otash v. Bureau of Private Investigators* (1964) 230 Cal.App.2d 568, 574-575 [41 Cal.Rptr. 263]), and "[i]n the

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[4]Rule 144 (4 Cal. Code Regs., § 144) states the Department's guidelines for imposition of penalties, including a "Penalty Schedule" which is described as a "schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated)." The guidelines "are not intended to be an exhaustive, comprehensive or complete list"; aggravating or mitigating circumstances may result in higher or lower penalties, based on the individual case "in the proper exercise of the Department's discretion." "Positive action by licensee to correct problem" is listed as a possible mitigating factor.

absence of evidence to the contrary, it must be presumed that the hearing officer properly performed his duty and considered all of the evidence introduced." (*Bailey v. Department of Alcoholic Beverage Control* (1962) 201 Cal.App.2d 348, 355-356 [20 Cal.Rptr. 264].)

A suspension of appellant's license for a period of 25 days is in line with the standard penalty of rule 144 for a second sale-to-minor within 36 months and clearly within the discretion of the Department. Rule 144 permits, but does not mandate, the fine-tuning of a standard penalty authorized by the rule, thereby allowing – but not compelling – the ALJ to consider factors in aggravation or mitigation. We think the ALJ's decision was well within the power authorized by rule 144, and we cannot say that the penalty imposed was unreasonable or an abuse of discretion.

ORDER

The decision of the Department is affirmed.[5]

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[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.