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

AB-9213
File: 20-367923 Reg: 11074179

7-ELEVEN, INC. and SUKHVINDERJEET SINGH SANDHU,
dba 7-Eleven Store 2237-20680B
9110 Thornton Road, Stockton, CA 95209,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: November 1, 2012
Los Angeles, CA

ISSUED DECEMBER 5, 2012

7-Eleven, Inc. and Sukhvinderjeet Singh Sandhu, doing business as 7-Eleven Store 2237-20680B (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 20 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 7-Eleven, Inc. and Sukhvinderjeet Singh Sandhu, appearing through their counsel, Ralph Barat Saltsman and Autumn M. Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

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[1]The decision of the Department, dated November 3, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on September 19, 2000. On January 12, 2011, the Department filed an accusation against appellants charging that, on August 23, 2010, appellants' clerk sold an alcoholic beverage to 18-year-old Kayla Cole. Although not noted in the accusation, Cole was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on September 20, 2011, documentary evidence was received and testimony concerning the sale was presented by Cole (the decoy) and by co-licensee Sukhvinderjeet Singh Sandhu. Testimony established that on August 23, 2010, the decoy entered the licensed premises and selected a six-pack of Bud Light beer. She took the beer to the sales counter where the clerk requested her identification. The decoy handed the clerk her California driver's license which contained the decoy's correct date of birth and the words "AGE 21 IN 2012." The clerk observed the license and completed the sale. The clerk's employment at the licensed premises was subsequently terminated.

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: (1) Rule 141(b)(2)[2] was violated, and (2) factors in mitigation were not adequately considered by the administrative law judge (ALJ).

[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.

DISCUSSION

I

Appellants contend that the decoy did not display the appearance required by rule 141(b)(2), which states: “[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.” They maintain that she displayed the “physical appearance of a mature female with a vast amount of previous decoy experience.” (App.Br. at p. 1.) This experience, they contend, gave her the self-confidence and self-assuredness of an individual over the age of 21. (App.Br. at p. 6.)

Appellants assert that “the best evidence for determining how a minor decoy appeared to the clerk . . . are photographs of the decoy taken on the date of the alleged sale." (App.Br. at p. 5.) The photographs in this case, appellants say, "do not depict a childlike teenager." (*Ibid*. at p. 6.)

With regard to the importance of photographs of the decoy, the Board has said previously:

> While an appellate court has said that a photograph taken immediately following an illegal sale is "arguably the most important piece of evidence in considering whether the decoy displayed the physical appearance of someone under 21 years of age" (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (*The Southland Corporation*) (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652]), no court has said that such a photograph must be the only evidence to be considered.

(7-Eleven/Cacy (2012) AB-9193.)

In any case, the standard is not that the decoy must display the appearance of a "childlike teenager" but "the appearance which could generally be expected of a person

under 21 years of age." In Determination of Issues II, the ALJ found that she did:

> Respondents argued that, because of her experience in decoy operations, the decoy appeared at least twenty-one years old when she purchased the beer, in violation of the Department's Rule 141(b)(2). The argument is rejected. There is no evidence that the decoy's experience made her appear at least twenty-one years old. Moreover, with no testimony from the clerk, there is no evidence that the decoy appeared at least twenty-one years old to the clerk.
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> . . . . Respondents have not shown, and the Administrative Law Judge does not see, how the decoy's appearance in Exhibit 2C was not that of an eighteen year old woman.

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 lacked the appearance required by the rule, and an equally partisan response that she did not.

We, of course, have no idea what the clerk thought about the decoy's age or appearance because the clerk did not testify at the hearing. We do know, however, that the clerk asked for identification, looked at a driver's license showing she would not be 21 until 2012, and made the sale anyway. This would tend to refute, or certainly question, any suggestion that the clerk may have thought the decoy to be of legal age to purchase alcohol.

It is difficult to understand how experience could change the appearance that is presented to the seller, other than, perhaps, by eliminating nervousness. Nervousness,

or lack thereof, is only one consideration, to be balanced against such other considerations as overall appearance, demeanor, manner of dress, manner of speaking, physical movements, and the like. And, while facial appearance alone is not determinative, it is certainly an important consideration. In this regard, we note that the photographs of the decoy, in Exhibits 2A through 2C, depict a very youthful appearing person, one who appears, at least to this Board, to be well under 21 years of age.

The rule, through its use of the phrase "could generally be expected" implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes a decoy to be older than his or her actual age is not a defense if, in fact, the decoy's appearance is one which could generally be expected of that of a person under 21 years of age.

II

Appellants contend secondly that factors in mitigation were not adequately considered by the ALJ when he recommended a 20-day suspension, rather than the standard penalty for a second violation in a thirty-six month period which is a 25-day suspension. Appellants maintain that the failure of the ALJ to recommend an even lesser penalty constitutes an abuse of discretion because "the licensee has gone above and beyond most licensees in terms of mitigating factors." (App.Br. at p. 8.)

The ALJ took note of appellants' efforts to avoid further violations in Findings of Fact (FF) IV, V, and VI:

> FF IV: Respondent Sandhu and Respondents' manager once a week review their surveillance tapes to check whether their clerks ask for identifications from youthful-appearing customers purchasing alcoholic beverages. A clerk who fails to do so receives warnings from Respondents. Continued failure could result in dismissal of the clerk.
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> FF V: Respondent Sandhu participated in implementing 7 Eleven's "secret

> shopper" program. Under this program, youthful appearing "secret shoppers" would try to purchase alcoholic beverages at 7 Eleven stores to test whether the clerks check their (the shoppers') identifications. Prior to the August 23 transaction, a "secret shopper" visited Respondents' store once a month. Since then, a "secret shopper" visits the store once a week.
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> FF VI: Since the August 23 transaction, Respondents established a new policy of checking identifications of customers purchasing alcoholic beverages if they appear under forty years old. The prior policy was to check the identifications of those who appeared under thirty years old. Under the new policy, the clerk must scan the identification into the register for verification that the customer is a least twenty-one years old. Visual inspection of the identification card is no longer sufficient. For a customer who appears at least forty years old, the clerk must ask for the customer's date of birth and punch in that date into the computer.

In addition to the efforts noted by the ALJ, appellants point out that the licensee trains his employees and requires them to pass a test on alcohol laws and the checking of identification. As a result of this incident, the licensee also removed the ability of employees to press a "bypass" key on the register to avoid having to scan identification or enter the customer's birth date. (See FF VI, *supra*.)

The Appeals Board may examine the issue of an excessive penalty raised by an appellant (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785, 798 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (*Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].)

"'[U]nless the record affirmatively indicates otherwise, the trial court is deemed to have considered all relevant criteria, including any mitigating factors.'" (*People v. King* (2010) 183 Cal.App.4th 1281, 1322 [108 Cal.Rptr.3d 333]; *People v. Holguin* (1989) 213 Cal.App.3d 1308, 1318 [262 Cal.Rptr. 331].)

A suspension of appellant's license for a period of 20 days is in line with the

standard penalty of rule 144 (Cal. Code Regs., tit. 4, §144), and clearly within the discretion of the Department. The ALJ reduced the usual 25-day suspension to 20 days, based on positive actions taken by the licensee to correct the problem. We do not believe this represents an abuse of discretion simply because appellants believe the penalty should have been reduced further.

ORDER

The decision of the Department is affirmed.[3]

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

[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.