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

AB-9312
File: 20-437029 Reg: 12076453

7-ELEVEN, INC. and MARIA LUISA MORALES,
dba 7-Eleven Store
8000 El Camino Real, Atascadero, CA 93422,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 5, 2013
Los Angeles, CA

ISSUED JANUARY 31, 2014

7-Eleven, Inc. and Maria Luisa Morales, doing business as 7-Eleven Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for their 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. and Maria Luisa Morales, appearing through their counsel, Ralph Barat Saltsman and Erica Woodruff, 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 September 19, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 4, 2006. On February 8, 2012, the Department filed an accusation against appellants charging that, on December 14, 2011, appellants' clerk, Robert Espinoza (the clerk), sold an alcoholic beverage to 19-year-old Lauren Starke. Although not noted in the accusation, Starke was working as a minor decoy for the Department of Alcoholic Beverage Control and Atascadero Police Department at the time.

At the administrative hearing held on July 17, 2012, documentary evidence was received and testimony concerning the sale was presented by Starke (the decoy); by Robert Root, a Department agent; and by Maria Luisa Morales, a co-licensee.

Testimony established that on the day of the operation, the decoy entered the premises alone, walked straight to the beer coolers, and selected a twelve-pack of Bud Light beer in cans. The decoy then proceeded to the sales counter. She placed the beer on the counter. The clerk, who had been seated behind the counter, got up from his seat, scanned the beer, recited the price, accepted the twenty dollar bill offered by the decoy, put the money in the register, and returned some change to the decoy. The clerk did not ask for identification, nor did he ask any age-related questions. The decoy took the beer and exited the premises.

The decoy then reentered the premises with Agent Root and Detective Keith Falerios of the Atascadero Police Department. The clerk was standing behind the counter. Agent Root identified himself to the clerk, and advised him that he had sold beer to a nineteen-year-old. When Root asked the decoy to identify the person who sold her the beer, the decoy pointed at the clerk and stated, “He did and I’m only nineteen.” When the identification took place, the decoy and the clerk were standing in

close proximity on opposite sides of the sales counter. Following the identification, a photograph was taken showing the clerk and the decoy on opposite sides of the sales counter.

The Department's decision determined that the violation charged was proved and no defense to the charge was established. The ALJ took note of mitigating factors, including length of discipline-free licensure, and imposed a 10-day suspension.

Appellants then filed an appeal contending: (1) Rule 141(b)(2)[2] was violated, and (2) the face-to-face identification was unduly suggestive.

DISCUSSION

I

Appellants contend that the decoy's appearance violated rule 141(b)(2). Specifically, appellants contend that the decision below focuses solely on the decoy's physical appearance and fails to consider evidence of her experience, level of nervousness, and a comment she made to the clerk regarding the weather.

Rule 141(b)(2) states, "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." This Board has indeed reversed or remanded cases in which the ALJ failed to consider nonphysical aspects of appearance such as poise, demeanor, maturity, and mannerisms, or where the ALJ relied solely on the decoy's photograph in determining compliance. (See, e.g., *Circle K Stores* (2000) AB-7378; *Circle K Stores* (1999) AB-7080.) We see no such shortcomings in the present case.

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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.

This Board is bound by the findings in the Department's decision, as long as those findings are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations omitted.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor an appellate court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations omitted.] The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Department of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Appellants assert that "the ALJ fails to consider that this decoy had visited approximately 225 licensed premises" or to assess "how confident and experienced the decoy was in her role as a minor decoy." (App.Br. at p. 7.)

First, there is no support in the record for appellants' assertion that the decoy had previously visited 225 licensed premises as a decoy. The ALJ found, based on the decoy's testimony, that she had participated in "five to ten prior decoy operations." (Findings of Fact ¶ 2.) The decoy also testified that she visited between five and fifteen premises during the course of each operation. [RT at p. 46.] During closing arguments, counsel for appellants relied on this number and calculated that, taken together, she had visited "between 25 and 150 stores prior to this decoy operation." [RT at p. 63.] Now, however, appellants argue, without citation to any part of the record, that the decoy had visited 225 premises. Either appellants have manufactured this number to add weight to their case, or counsel for appellants has its facts confused.

More importantly, we are perplexed by counsel's assertion that the ALJ failed to address evidence of nonphysical appearance. In fact, the ALJ discussed the decoy's experience and level of nervousness and concluded that her appearance, both physical and nonphysical, complied with the rule:

> 2. The decoy testified that she had participated in approximately five to ten prior decoy operations, that she had volunteered to act as a minor decoy, that she was less nervous at the premises than when she first started acting as a decoy, that she was sometimes compensated for acting as a minor decoy, that the compensation usually consisted of a twenty-five dollar gift card and that the compensation was not dependent on whether she was able to purchase alcoholic beverages.
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> 3. The decoy is a youthful looking young lady who provided straight forward answers while testifying and there was nothing about her speech, her mannerisms, or her demeanor that made her appear older than her actual age.
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> 4. After considering the photographs depicted in Exhibits 2-A, 2-B and 3, the overall appearance of the decoy when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance that 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.

(Findings of Fact ¶¶ B.2 through 4.)

Additionally, appellants contend that the ALJ failed to address evidence of the decoy's "modus operandi of conversing with the clerk in order to effectuate a sale of an alcoholic beverage." (App.Br. at p. 8.) First, and most significantly, there is absolutely no evidence whatsoever in the record that the decoy's comment about the weather constitutes a "modus operandi" or even a pattern of conduct. Secondly, even if appellants had attempted to introduce evidence from other cases indicating that the decoy routinely made a comment about the weather — information which is irrelevant and almost certainly inadmissible — it would in no way establish that the present operation was unfair. Finally, this Board takes issue with appellants' attempt to

characterize the minor decoy as a criminal engaged in an illicit scheme of deceit.

Moreover, the ALJ addressed this detail specifically:

> E. The Respondent's attorney argued that the decoy operation was conducted in an unfair manner because the decoy mentioned to the clerk that she was cold. This argument is rejected. The evidence established that it was in fact cold outside on the day of the operation and that the decoy was wearing a sweater and a sweatshirt.

(Findings of Fact ¶ E.)

We are satisfied that the ALJ properly addressed and resolved all issues of appearance. We see no reason to reweigh the evidence.

II

Appellants contend that the face-to-face identification was unduly suggestive because the identification took place after Agent Root initiated contact with the clerk, thus leaving the decoy with no other choice but to identify the clerk as the seller.

Rule 141(b)(5) states:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

Notably, the plain language of the rule in no way forbids the officers to first make contact with the suspected seller.

Appellants nevertheless assert that "when a law enforcement officer is the person who is identifying the seller of the alcoholic beverages for the decoy, then the decoy is not in fact identifying the seller of the alcoholic beverage, as required." (App.Br. at p. 9.) Appellants rely on a case before this Board, *Keller*, in which the officers first escorted the clerk outside before conducting the face-to-face identification. (See *7-Eleven, Inc./Keller* (2002) AB-7848.) At first glance, that case does appear to

support appellants' position:

> Rather than the decoy identifying the seller for the officer, in this case the officer, essentially, identified the seller for the decoy by bringing the clerk outside to the decoy for identification. By bringing the clerk outside for the identification, they created something akin to a line-up with only one person in the line. . . . The rule was presumably designed, at least in part, to help ensure an unbiased identification process. Although the officer who observed the violation presumably brought out the right clerk and there is no indication in the present case that the decoy mis-identified the clerk as the seller, the manner in which the identification process was handled does not comply with the strict adherence to the rule dictated by the court in *Acapulco*, *supra*.

(*Id.* at p. 10.)

Keller, however, was overturned on appeal — a fact which appellants fail to note in their brief. (See *Department of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Board* (*Keller*) (2003) 109 Cal.App.4th 1687 [1 Cal.Rptr.3d 339].) This omission is troubling, since the appeal involved the same corporate co-licensee, 7-Eleven, Inc., represented by the same firm, appearing as the real party in interest. (See *id.* at p. 1688.) We are at a loss to explain how counsel for appellants managed to ignore the final disposition of a case in which it represented this very client.

In any event, in overturning this Board's decision in *Keller*, the court of appeal held that "single-person show-ups are not inherently unfair." (*Id.* at p. 1698, citing *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 [269 Cal.Rptr. 447].) More importantly, the court went on to discuss the policy justification for rule 141(b)(5):

> There is nothing in the language of the Regulations section 474, subdivision (b)(5) . . . that suggests the section was written to require any particular kind of identification procedure except that it be face-to-face. There is no suggestion the section was promulgated to correct identification procedures which resulted in a history of misidentification of sellers. Indeed, there is no suggestion that correct identification of sellers by decoys presented any problem whatsoever.

(*Keller*, *supra*, 109 Cal.App.4th at pp. 1697-1698.) The policy justification for rule 141(b)(5), according to the court's analysis, was instead to ensure "that the seller be given the opportunity, soon after the sale, to come 'face-to-face' with the decoy." (*Id.* at p. 1698.)

At oral argument, counsel for appellants suggested that the court of appeal's ruling in *Keller* reversed the decision below on an unrelated issue. Counsel is incorrect — the opinion directly undermines the citation on which appellants rely on both on a practical and policy level. The reversed decision provides no support for appellants' case on this point.[3]

This Board has addressed a number of cases factually similar to this one, and has repeatedly rejected the argument made here. In one case, this 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.)
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> ¶ . . . ¶
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> 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.

(*7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983 at pp. 7-8; see also *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *BP West Coast Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

Moreover, testimony from co-licensee Morales indicated that the clerk was

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[3]During questioning at oral argument, appellants also asserted that the citation they supplied from *Keller*, *supra*, AB-7848, was dicta, and therefore not subject to reversal. The citation was not dicta, and was soundly reversed.

working alone at the time of the sale. [RT at pp. 59-60.] It is absurd to suggest that Agent Root advising the clerk that he had sold alcohol to a minor somehow biased the decoy's identification when the clerk was the only employee on the premises. If these facts provided a defense, a licensee could escape liability simply by understaffing her premises.

In light of accurately researched law and policy, we find no unfairness in the execution of the face-to-face identification.

ORDER

The decision of the Department is affirmed.[4]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[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.