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

AB-9363
File: 20-292694 Reg: 12077329

7-ELEVEN, INC., DEBRA L. SEVILLE, and FRANK R. SEVILLE,
dba 7-Eleven #2171-13958
1365 East Citrus Avenue, Redlands, CA 92374,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 6, 2014
Los Angeles, CA

Redeliberated April 3, 2014
Sacramento, CA

ISSUED APRIL 15, 2014

7-Eleven, Inc., Debra L. Seville, and Frank R. Seville, doing business as 7-Eleven #2171-13958 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days, with 5 days conditionally stayed provided appellants complete one year of discipline-free operation, for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

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[1]The decision of the Department, dated June 11, 2013, made pursuant to Business and Professions Code section 11517, subdivision (c), is set forth in the appendix, together with the proposed decision of the administrative law judge (ALJ). Section 11517, subdivision (c)(2)(E) permits the Department to reject the proposed decision, as it did here, and decide the case upon the record, including the transcript of the hearing.

Appearances on appeal include appellants 7-Eleven, Inc., Debra L. Seville, and Frank R. Seville, appearing through their counsel, Ralph Barat Saltsman and Erica Woodruff, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 14, 1994. On August 7, 2012, the Department filed an accusation against appellants charging that, on June 22, 2012, appellants' clerk, Karen Irgang (the clerk), sold an alcoholic beverage to 19-year-old Adrian Rodriguez. Although not noted in the accusation, Rodriguez was working as a minor decoy for the Redlands Police Department at the time.

At the administrative hearing held on January 15, 2013, documentary evidence was received and testimony concerning the sale was presented by Rodriguez (the decoy), by Michael Merriman, a Redlands Police officer, and by co-appellant Debra L. Seville.

Testimony established that on June 22, 2012, the decoy entered the licensed premises and went to the cooler where he selected a six-pack of Bud Light beer in cans. He took the beer to the counter, and the clerk asked him for his identification. He handed her his California driver’s license, which she observed for several seconds before completing the sale without asking any age-related questions. Officer Merriman witnessed the transaction from inside the store. The decoy subsequently identified the clerk as the one who sold him the alcohol, a citation was issued to the clerk, and her employment was terminated.

The ALJ issued a proposed decision which determined that the violation charged had been proven, that no defense to charge had been established, and recommended

a penalty of 25-days suspension, with 10 days conditionally stayed provided appellants complete one year of discipline-free operation. The Department, in a decision made pursuant to Business and Professions Code section 11517, subdivision (c)(2)(E), adopted the Findings of Fact and Conclusions of Law in the proposed decision, but declined to adopt the penalty recommendation. Instead, the Department — after requesting and considering written argument — imposed a penalty of 25 days' suspension, with 5 days conditionally stayed provided appellants complete one year of discipline-free operation.

Appellants then filed a timely appeal contending: (1) The Department erred by not adopting the ALJ's penalty recommendation, and (2) the decoy did not display the appearance required by rule 141(b)(2).[2]

DISCUSSION

I

Appellants contend that the Department "capriciously" reduced the number of stayed days of suspension "based on a perceived but non-existent error in the ALJ's decision." (App.Br. at p. 6.) They maintain this constitutes an abuse of discretion.

At the administrative hearing, it was established that this was appellants' second sale of alcohol to a minor, with the first incident occurring on October 8, 2011. Rule 144 provides for a 25-day suspension when a licensee sells alcohol to a minor for the second time within 36 months. (Cal. Code Regs., tit. 4, § 144.) In the Penalty Considerations of his proposed decision, ALJ Lewis discussed the mitigating factors he considered, as well as the Department's argument to re-impose the previously stayed

[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.

days of suspension from the first violation:

> ¶ 1. The Department recommends that the license be suspended for 25 days. The Department further notes that it will be seeking to impose the 10 day suspension from the prior violation.
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> ¶ 2. Co-licensee Debra Seville testified as to the training given to the employees and the fact that there is a zero tolerance policy for violations of sales to minors. Clerk Irgang, an 8 year employee, was terminated as a result of this incident. She also testified that they employ the secret shopper program and use the "Come of Age" training on a regular basis.
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> ¶ 3. It should be noted that the issue of imposing the 10 day suspension from the prior disciplinary matter which had been stayed is in the hands of the Director as he is the only person who may impose that stayed penalty.
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> ¶ 4. However, it should also be noted that Respondents have been licensed since 1994 with no disciplinary matters until 2011. If in fact the 10 days is imposed for the prior matter in addition to the 25 days recommended here, Respondents will in fact not receive any mitigation for over 17 years of discipline free licensure. That would not be an equitable remedy.
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> ¶ 5. Respondents appear to have hit a streak of bad luck, given the two violations so quick in time after so many years of being discipline free. Given the facts of case [*sic*] and the preventative measures taken mitigation appears to be in order. The recommendation is consistent with the Rule 144 penalty guidelines.

The Department rejected these Penalty Considerations and substituted the following:

> ¶ 1. The Department recommends that the license be suspended for 25 days.
>
> ¶ 2. Co-licensee Debra Seville testified as to the training given to employees and the fact that there is a zero tolerance policy for violations of sales to minors. Clerk Irgang, an 8-year employee, was terminated as a result of this incident. She also testified that they employ the secret shopper program and use the "Come of Age" training on a regular basis. Ms. Seville further testified that she personally talks with her employees on a regular basis about alcohol sales and the importance of checking identifications. Following this incident, she reviewed again with the store employees the "Come of Age" requirements and had each employee sign again the "ABC Affidavit". Some mitigation in penalty is warranted.

> ¶ 3. In closing argument Department counsel mentioned that the Department would, in addition to any discipline imposed in this case, seek to re-impose the 10-day stayed suspension from the previous violation involving a sale of alcohol to a minor. This is not part of the consideration for purposes of determining the appropriate discipline in this or any other case. The decision as to whether or not a stayed portion of prior discipline is to be re-imposed is independent from the determination of discipline in a subsequent case, and is wholly within the purview of the Director, not the ALJ. Although the ALJ here observed that this was not within his discretion or authority, he then proceeded to recommend mitigation of the discipline based, in part, upon the presumption that the Director would in fact re-impose the stayed suspension. Such consideration by the ALJ is inappropriate. This is not a matter that the ALJ should have even been made aware of, let alone used by him as the basis for mitigating the discipline in this case.

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].)

Appellants argue that the Department's decision demonstrates an abuse of discretion by imposing a 25-day suspension with 5 days stayed, instead of the 10 days stayed recommended by the ALJ, based on the Department's view that the ALJ had overstepped his authority in discussing the fact that the Department might re-impose the stayed days of suspension from 2011. The Department's decision makes the assumption that the ALJ's recommended penalty presumes that this would occur, when in fact such a presumption appears to be speculation on the part of the Department. The Department's statement, "[t]his is not a matter that the ALJ should have even been made aware of, let alone used by him as the basis for mitigating the discipline in this case" is not only incorrect as a matter of law — since prior disciplinary history is one of the factors to considered under rule 144 — but also seems to be a petty swipe at the

ALJ for what the Department seems to view as his overstepping of authority.

The Department's decision omits any discussion of the 17 years of discipline-free operation by this licensee from 1994 to 2011 — a fact which was considered by the ALJ, but then ignored by the Department in its effort to admonish the ALJ. We also believe the Department incorrectly chastised the ALJ for his alleged "presumption." However, we are cognizant that under rule 144 the Department would be entirely within the guidelines if it imposed a penalty in this matter *and* re-imposed the previously stayed 10 days of suspension — leaving appellants even worse off than the result contemplated here. While we fail to see any misconduct on the part of the ALJ, we also do not believe the Department's decision demonstrates an abuse of discretion.

The Department's discretion, while not unfettered, is very broad, and this Board is not entitled to disturb the exercise of that discretion unless there is palpable abuse. There is nothing in rule 144 that says discipline-free licensure for a certain period of time requires a mitigated penalty. The guidelines merely indicate that the length of licensure at the subject premises without prior discipline or problems may be considered as a mitigating factor.

Appellants' disagreement with the penalty imposed does not mean the Department abused its discretion. This Board's review of a penalty looks only to see whether it can be considered reasonable, not what considerations or reasons led to it. If it is reasonable, the Board's inquiry ends there.

II

Appellants contend that the decoy did not display the appearance required by rule 141(b)(2) and that the "ALJ did not analyze whether the minor's non-physical mannerisms, combined with this [*sic*] physical traits gave him the general appearance

of someone over the age of twenty-one." (App.Br. at p. 8.)

Appellants maintain that the decoy answered questions with a "military style" and possessed experience both as an Explorer and as a minor decoy which made him appear more mature. Appellants contend that the decoy's wearing of a hearing aid contributed to his appearing older, but discount the fact that he had braces on his teeth — something normally associated with a much younger individual.

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

> We cannot interpose our judgment on the evidence, and we must accept as conclusive the Department's findings of fact. *CMPB Friends,* [*Inc*. *v*. *Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.4th [1250,] 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.4th 364, 367 [3 Cal.Rptr.2d 770; . . . 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. (See *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*). 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.

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

The ALJ's Findings of Fact paragraphs 5 and 9, adopted by the Department, were as follows:

> ¶ 5. Rodriguez appeared and testified at the hearing. He stood about 5 feet, 6 inches tall and weighed approximately 135 pounds. His hair was short and "spikey". When he visited Respondents' store on June 22, 2012, he wore a gray t-shirt, blue jeans and black Vans shoes. (See Exhibit 4). Rodriguez' height and weight have remained the [*sic*] about the same since the date of the operation. At Respondents' Licensed Premises on the date of the decoy operation, Rodriguez looked

substantially the same as he did at the hearing.

> ¶ 9. Decoy Rodriguez appears his age, 19 years of age at the time of the decoy operation. Based on his overall appearance, *i.e.*, his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance/conduct in front of Clerk Irgang at the Licensed Premises on June 22, 2012, Rodriguez displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to Irgang. Rodriguez appeared his true age.

Appellants maintain the ALJ failed to consider factors which made the decoy appear older, but in Conclusions of Law paragraph 5, adopted by the Department, the ALJ noted:

> ¶ 5. Respondents argue that Rule 141(b)(2) was violated because the decoy appeared to be over 21 years of age. This argument is rejected. Respondents argued that physical abnormalities of Decoy Rodriguez' hands and ear[3] caused him to have an appearance of someone over the age of 21. It should be noted that there was no testimony relating to the decoy's physical characteristics. Further, clerk Irgang did not testify at the hearing. Any reference as to what she may have thought would be pure speculation. Decoy Rodriguez appeared his true age, 19 at the time of the operation. (Findings of Fact, ¶¶ 5 through 10.)

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. Appellants have given us no reason to depart from our general rule of deference to the ALJ's factual determination regarding the decoy's appearance. 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 requirements of rule 141.

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[3]See RT at p. 85 and Exhibit 3.

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.