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

AB-9372
File: 20-478795 Reg: 13077991

7-ELEVEN INC. and SANDEEP SINGH CHAUHAN,
dba 7-Eleven Store 2368-25141C
6015 North Blackstone Avenue, Fresno, CA 93710-5007,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: April 3, 2014
Sacramento, CA

ISSUED MAY 9, 2014

7-Eleven Inc. and Sandeep Singh Chauhan, doing business as 7-Eleven Store 2368-25141C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for 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 Sandeep Singh Chauhan, appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Heather Hoganson.

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[1]The decision of the Department, dated September 6, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 7, 2009. On February 6, 2013, the Department instituted an accusation against appellants charging that, on December 29, 2012, appellants' clerk sold an alcoholic beverage to 19-year-old Kristen Bridges. Although not noted in the accusation, Bridges was working as a minor decoy for the Fresno Police Department at the time.

At the administrative hearing held on July 17, 2013, documentary evidence was received and testimony concerning the violation charged was presented by Bridges (the decoy). Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises, went directly to the coolers, and selected a 24-ounce can of Coors Light beer. She took the beer to the cash register area and waited in line behind two other patrons. When it was her turn, the decoy placed the beer on the sales counter. The clerk asked to see her identification. The decoy handed the clerk her valid California driver's license. The clerk examined it for approximately three seconds, then handed it back and proceeded with the sale. The clerk did not engage in any conversation with the decoy, and did not ask her age. Following the transaction, the decoy exited the premises.

After the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellants contend (1) the operation was not conducted in a fashion that promotes fairness, as required by rule 141(a),[2] because the store was busy; (2) the

[2]All 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.

decoy's appearance did not comply with rule 141(b)(2) because she was four months short of her 20th birthday, was "well-built" and confident, and had experience as a decoy; (3) the face-to-face identification was unduly suggestive, in violation of rule 141(b)(5), because the officer spoke with the clerk first; and (4) the penalty is excessive because the ALJ ignored mitigating evidence — specifically, appellants' period of discipline-free licensure.

DISCUSSION

I

Appellants contend the ALJ ignored evidence showing that the operation violated the general fairness provisions of rule 141, subdivision (a). Specifically, appellants contend that "the store was busy as there were approximately six customers in the location and the decoy even had to wait in line for approximately four minutes" before purchasing alcohol. (App.Br. at p. 5.)

The scope of the Appeals Board's review is limited by the California Constitution, statutes, and case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing. (California Constitution, art. XX, § 22; Bus. & Prof. Code §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].)

Rule 141(a) requires "fairness" in the use of minor decoys:

> A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors . . . and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

As appellants note, the requirements of rule 141 must be strictly obeyed: "The Department's increasing reliance on decoys demands strict adherence to the rules adopted for the protection for the licensees, the public, and the decoys themselves." (*Acapulco Restaurants, Inc. v. Alcoholic Bev. Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 580 [79 Cal.Rptr.2d 126, 129] [addressing face-to-face identification].)

The ALJ considered appellants' contention that the operation was unfair because the store was busy and rejected it. (Determination of Issues ¶ II.) Appellants disagree, tendering their own interpretation of the law: that "A busy premise may constitute a violation of Rule 141(a) . . . when the level of patron activity unfairly interjects itself into the operation." (App.Br. at p. 5.) This argument construes the law too broadly. The language on which they rely is actually quite narrow:

> It is conceivable that in a situation which involved an unusual level of patron activity that truly interjected itself into a decoy operation *to such an extent that a seller was legitimately distracted or confused, and the law enforcement officials sought to take advantage of such distraction or confusion*, relief would be appropriate.

(*Tang* (2000) AB-7454, at p. 5, emphasis added; see also *Equilon Enterprises* (2001) AB-7765, at p. 4.)

Appellants presented no evidence whatsoever that officers acted improperly or took advantage of the circumstances. Indeed, the number of customers seems to have had absolutely no effect on the course of the transaction beyond the decoy's relatively short wait in line. It is undisputed that the clerk took the time to request and examine

the decoy's identification. Moreover, the clerk did not testify; any claim that the clerk was "legitimately distracted or confused" is rank speculation. Appellants' arguments on this point are therefore unsupported by any evidence, and the ALJ was entitled to reject them.

This Board has little sympathy for the "rush hour" defense because the policy concerns weighing against it are too great:

> When commerce reaches the point where the desire not to inconvenience customers overrides the importance of preventing sales of alcoholic beverages to minors, the public safety and morals of the people of the State of California will be irreparable injured. Such an unacceptable result will not occur on this Board's watch.

(*The Vons Company, Inc.* (2001) AB-7788, at p. 4.) Appellants have certainly given us no cause to look beyond those concerns in this case.

II

Appellants contend that the decoy's appearance violated rule 141(b)(2) because she was approaching 20 years of age, was tall and "well-built," was confident, and had substantial experience as a minor decoy.

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 independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] 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.) 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 Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004)

118 Cal.App.4th 1439, 1437 [13 Cal.Rptr.3d 826].)

Rule 141, subdivision (b)(2), restricts the use of decoys based on appearance: "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." The rule provides an affirmative defense, and the burden of proof lies with appellants.

Appellants contend that the ALJ "failed to properly consider" their evidence and arguments that the decoy's appearance did not comply with the rule. (App.Br. at p. 6.) But the ALJ made extensive factual findings regarding the decoy's age and appearance:

> A. On December 29, 2012, an underage decoy, Kristen Bridges . . . went to the Respondent's premises . . . . Bridges was born on April 5, 1993. On December 29, 2012, Bridges was nineteen years old.
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> ¶ . . . ¶
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> D. The decoy's overall appearance including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of a person under the age of twenty one years. No evidence was presented that her appearance was substantially different on the date of the decoy operation.
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> 1. On the day of the sale and at the hearing, the decoy weighed around 140 pounds and was 5 feet 8 inches tall. Bridges wore a dark blue long sleeve t-shirt and jeans during the decoy operation.
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> She has brown eyes and dark brown hair, which she was wearing past her shoulders at hearing. Bridge [sic] has olive skin and her complexion is smooth and wrinkle free. The decoy did wear mascara on December 29, 2012. However, she wore no lipstick or other makeup during the decoy operation nor did she wear any earrings, rings, or necklaces. Bridges was wearing two rubber bracelets during the decoy operation, similar to "Live Strong" type wrist bands.
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> 2. The decoy testified politely at hearing and answered questions in a straight forward manner. There was nothing remarkable about the decoy's nonphysical appearance and there was nothing about the decoy's

> speech, mannerisms, or her demeanor that made her appear to be 21 years of age or older. Although Bridges had turned 20 years old by the hearing date, she actually appeared to be 18 or 19 years old at the hearing.
>
> 3. Bridges participated in approximately eight decoy operations prior to this incident. During each of the prior operations, the decoy would visit fifteen stores. There was no evidence presented that Bridges prior experience as a decoy caused or contributed to the clerk selling an alcoholic beverage to her. The selling clerk did not testify at the hearing.
>
> 4. After viewing the decoy's overall appearance when she testified, and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under the age of twenty-one years under the actual circumstances presented to the seller at the time of the sale.

(Findings of Fact ¶¶ II.A, II.D.1 through II.D.4.) Based on these findings, the ALJ rejected appellants' arguments:

> [A]rguments that Rule 141(b)(2) was violated because the decoy was 5 feet 8 inches tall, her prior experience as a decoy made her too confident, and that she was 4 months shy of her 20th birthday all lack merit.
>
> There was compliance with rule 141(b)(2) of Division 1, Title 4, California Code of Regulations as set forth in Findings of Fact II.

(Determination of Issues ¶ III.)

The ALJ did not "summarily dismiss" the 141(b)(2) issue, as appellants claim. (See App.Br. at p. 6.) In fact, the decision below provides an unusually detailed set of findings, and we are not entitled to second-guess them. When appellants assert that the ALJ "failed to properly consider" the evidence, they are, in essence, asking this Board to consider the same set of facts and reach the opposite conclusion — something this Board cannot do.

III

Appellants contend the face-to-face identification was unduly suggestive because the decoy only made the identification after she observed the officer initiate

contact with the clerk. Thus, appellants claim, the decoy was left no choice but to identify the clerk with whom the officer made contact.

Rule 141, subdivision (b)(5), provides:

> 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.

Failure to conform to this rule provides an affirmative defense.

Appellants do not claim that the decoy did not identify the clerk. Instead, they assert that because the officer initiated contact with the clerk *before* the decoy, it was essentially the officer, and not the clerk, who completed the identification. (App.Br. at p. 7.) Appellants argue that even if the decoy herself later identified the clerk, the face-to-face identification was nevertheless unduly suggestive and in violation of the rule because the decoy "had no other choice but to identify the clerk whom the officer had initiated contact with." (*Ibid.*)

Appellants cite only one case, *Chun* (1999) AB-7287, which, they claim, stands for the proposition that the decoy must initiate contact with the clerk, and not the accompanying officer. They rely on one passage in particular:

> The phrase "face to face" means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id.* at p. 4.) We read nothing in that passage or in the rest of the *Chun* decision that precludes the officer first initiating contact with the clerk before the decoy proceeds with her identification. Indeed, one can imagine many circumstances in which it would be necessary and wholly appropriate for the officer to approach first — for the safety of the

decoy and the clerk, for example, or to avoid undue attention from other customers.

The ALJ rejected appellants' affirmative defense on this issue and cited *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687 [1 Cal.Rptr.3d 339]. (Determination of Issues ¶ IV.) That case provides a better interpretation of the rule:

> There is nothing in the language of the Regulations section 141, subdivision (b)(5), in the history of section 25658, subdivision (f), or in the arguments advanced by the Appeals Board 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.

(*Id.* at pp. 1697-1698.)

Decisions from this Board consistently reflect the position that the rule is not violated where the officer first initiates contact:

> 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; see also *Hilu* (2013) AB-9262; *Chevron Stations, Inc.* (2012) AB-9215; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *West Coast Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.) The facts establish that there was a face-to-face identification. Appellants neither allege nor present evidence that the identification was incorrect. The ALJ properly applied the law, and we see no reason to reconsider.

IV

Appellants contend that the ALJ abused his discretion when he held that they

had failed to establish any evidence to mitigate the standard penalty. Appellants argue that they presented evidence, which the ALJ ignored, that the premises had been licensed for over four years with no disciplinary action.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, the Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. 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 might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Unless some statute requires it, an administrative agency's decision need not include findings with regard to mitigation. (*Vienna v. Cal. Horse Racing Bd.* (1982) 133 Cal.App.3d 387, 400 [184 Cal.Rptr. 64]; *Otash v. Bureau of Private Investigators* (1964) 230 Cal.App.2d 568, 574-575 [41 Cal.Rptr. 263].) Appellants have not pointed out a statute with such requirements. Findings regarding the penalty imposed are not necessary as long as specific findings are made that support the decision to impose disciplinary action. (*Williamson v. Bd. of Med. Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-1347 [266 Cal.Rptr. 520].)

Appellants challenge the ALJ's conclusion that they "failed to establish any evidence to mitigate the standard penalty for an offense of selling an alcoholic

beverage to a minor." (Finding of Fact ¶ IV.) During the administrative hearing, the parties stipulated that, prior to the present violation, the premises had remained discipline-free since the issuance of the license on July 7, 2009. [RT at p. 6.] During closing arguments, counsel for appellants argued for mitigation of the penalty, claiming that "this licensed premises has been licensed for over four years now, and this is the only alleged violation." (RT at p. 28.) Appellants again claim, before this Board, that the premises had been licensed for "over four years with no record of disciplinary action." (App.Br. at pp. 3-4.) In reality, appellants had been licensed for just under 43 months when the violation occurred. Appellants nevertheless claim that the ALJ abused his discretion by failing to consider the period of discipline-free licensure in his penalty determination.

Appellants' argument is flawed. The ALJ did not conclude that no evidence was presented whatsoever; he concluded that appellants presented "no evidence *to mitigate the standard penalty*." (Determination of Issues ¶ IV, emphasis added.) Essentially, appellants take issue not simply with the ALJ's failure to discuss their disciplinary record, but with his failure to characterize it as mitigating evidence.

Whether appellants' evidence serves to mitigate the standard penalty is a discretionary determination left in the hands of the ALJ. Depending on the facts of the individual case, a stipulated 43 months without a violation may indeed constitute mitigating evidence. In other cases, such as appellants', the ALJ may determine that the same time period does *not* mitigate the penalty. Either way, the law is clear: the ALJ is not required to make findings regarding the penalty imposed.

A 15-day suspension is reasonable. We find no abuse of discretion.

ORDER

The decision of the Department is affirmed.[3]

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

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[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.