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

AB-9464
File: 47-443435 Reg: 14080069

DAVE & BUSTERS OF CALIFORNIA, INC.,
dba Dave & Busters
940 Great Mall Drive, Milpitas, CA 95035-8033,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: January 8, 2015
Sacramento, CA

ISSUED JANUARY 29, 2015

Dave & Busters of California, Inc., doing business as Dave & Busters (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 15 days because its bartender sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellant Dave & Busters of California, Inc., through its counsel, Ralph Barat Saltsman of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, Kelly Vent.

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[1]The decision of the Department, dated July 29, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on September 18, 2007. On March 8, 2014, the Department filed an accusation against appellant charging that, on February 8, 2014, appellant's bartender, Margeaux Casillas (the bartender), sold an alcoholic beverage to 18-year-old Remy Loubriel. Although not noted in the accusation, Loubriel was working as a minor decoy at the time.

At the administrative hearing held on June 18, 2014, documentary evidence was received and testimony concerning the sale was presented by Loubriel (the decoy) and by Siamack Nik-Pay, appellant's manager.

Testimony established that on the date of the operation, the decoy entered the licensed premises, accompanied by an unnamed second decoy. The two decoys proceeded to the bar counter. Decoy Loubriel ordered a Coors Light beer from appellant's bartender. The bartender asked to see the decoy's identification. The decoy handed the bartender her California driver's license, which showed her date of birth as September 13, 1995 and bore a red stripe reading "AGE 21 in 2016." The bartender took the identification and looked at it.

After showing her driver's license to the bartender, the decoy paid for the beer.

During the transaction, the second decoy stood approximately five feet away, watching television. He did not participate in the transaction.

The Department's decision determined that the violation charged was proven and no defense was established. The ALJ declined to find mitigation and assigned a standard penalty of fifteen days' suspension.

Appellant then filed an appeal contending (1) proper appellate review of the ALJ's findings mandates that the decoy appear in person before the Appeals Board;

(2) the decision ignores "key evidence" that the decoy's appearance did not comply with rule 141(b)(2); (3) the decision fails to reach a legal conclusion regarding the presence of the second decoy; and (4) the decision ignores mitigating evidence.

DISCUSSION

I

Appellant contends that in order for this Board to conduct a meaningful review of the Department's decision, it must assess this "unusual" decoy in person — that is, the decoy must appear at oral argument.

This is little more than a paraphrase of the decoy-as-evidence argument we addressed at length — and firmly rejected — in *Chevron Stations* (2015) AB-9415. (See also *7-Eleven, Inc./Niaz* (2015) AB-9427; *7-Eleven, Inc./Jamreonvit* (2015) AB-9424; *7-Eleven, Inc./Assefa* (2015) AB-9416.) We offer only a summary of our reasoning here, and refer appellant to that case for a more comprehensive analysis.

Section 23083 limits our review to evidence included in the administrative record. (Bus. & Prof. Code § 23083; see also *7-Eleven, Inc./Grover* (2007) AB-8558, at p. 3.) Section 1038(a) of the California Code of Regulations defines the items to be included in the administrative record — none of which conceivably allows for an actual human being. (See Cal. Code Regs., tit. 1, § 1038(a).) The properly compiled record — including testimony, arguments, photographs of the decoy, and the Department's decision containing the ALJ's firsthand impressions — is both legally and practically sufficient for the Board to determine whether the conclusions reached regarding the decoy's appearance are supported by the evidence.

As we noted in *Chevron Stations*, *supra*, this argument has no merit, and we encourage appellant to seek a writ of appeal if it disagrees. Otherwise, we expect not

to see it in future cases and advise counsel that if they ignore our expectations in this regard, they risk sanctions.

II

Appellant contends that the ALJ ignored appellant's evidence showing that the decoy appeared over the age of 21. In particular, appellant objects that this decoy was "unusual" in that she was a "working professional" — that is, she was employed as a parking enforcement officer with the South San Francisco Police Department — and had two years' experience as a police Explorer. Appellant argues that the decision below fails to make any findings regarding the decoy's "unusual attributes," and that the findings that do appear in the decision only support appellant's position.

Rule 141(b)(2) provides: "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 appellant. (*7-Eleven, Inc./Lo* (2006) AB-8384.)

This Board is bound by the factual findings in the Department's decision so 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. (*CMPB Friends, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.App.4th 1250, 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; . . .) 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. Alcoholic Bev. Control* (*Lacabanne*) (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].) 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 1429, 1437 [13 Cal.Rptr.3d 826].)

The ALJ made the following findings regarding the decoy's appearance:

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> The decoy was 5'8" tall and weighed approximately 140 pounds on the day of the decoy operation. She wore blue jeans, a jacket, foundation, no make-up, and no jewelry. As a result of her experience as a police explorer and police decoy — having visited at least a hundred stores in approximately ten to twenty decoy operations — the decoy was not nervous while purchasing the beer at Respondent restaurant.
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> The decoy was 5'8" tall and weighed approximately 140 pounds on the day of the hearing. She spoke softly, giving her answers in few words. She sat with her hands folded. Her appearance was very similar to her appearance in the photograph taken on the day of the decoy operation.
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> VII
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> After considering 1) the testimony about the decoy's appearance on the day of the decoy operation, 2) the photograph of the decoy (with the bartender) taken that day, and 3) the decoy's appearance, including her demeanor and mannerism [*sic*], at the hearing, the Administrative Law Judge finds that the decoy displayed the appearance of a person under twenty-one years old while purchasing the beer from Respondent's bartender.

(Findings of Fact VI and VII.) Ultimately, the ALJ reached the following conclusions regarding appellant's rule 141(b)(2) defense:

> Respondent argued that the decoy's confidence and lack of nervousness made her appear older than her age to Respondent's bartender. However, Respondent did not cite, and the Administrative Law Judge is not aware of, any authority to support such an argument. Even if the argument had merit, there is no reason to conclude that the eighteen-year old decoy appeared at least twenty-one years old. And, with no testimony from Respondent's bartender, there is no evidence of how the decoy

> appeared to her. Finally, as stated in Paragraph VII of the Findings of Fact, the decoy did display the appearance of a person under twenty-one years old when she purchased the beer from Respondent's bartender.

(Determination of Issues II.)

Appellant objects to the omission of specific details:

> What the ALJ failed to mention are Ms. Loubriel's experiences that make her unusual. Not only was Ms. Loubriel a Police Explorer, but she had been a participating [*sic*] as an Explorer for approximately two years by the time of the operation on February 8, 2014. (RT 9:17-23.) As an Explorer, she, among other things, received tactical training, learned self-defense, and learned how to do car stops. (RT 11:25, RT 12:1-13.) These key facts were omitted from the Proposed Decision.
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> In addition to her Explorer training, she had gone on over 50 ride alongs, each for around 10 hours. (RT 12:15-25; RT 13:1-3.) In other words, Ms. Loubriel observed and had exposure to around 500 hours of live law enforcement work. These key facts were omitted, as well.
>
> Most unusual of all, Ms. Loubriel was more than what amounts to, from Appellant's perspective, a professional decoy. By the time of the operation in February of 2014, Ms. Loubriel was also a working professional. She was, and remained so at the hearing, employed by the South San Francisco Police Department as a parking enforcement agent. (RT 14:1-8.) Her employment duties included issuing parking citations, dealing with car accidents, dealing with stolen cars, and dealing with complaints. (RT 14:14-19.) The ALJ omitted these key facts, as well.

(App.Br. at p. 11-12.)

While these facts were indeed elicited during the course of testimony, appellant itself omitted mention of them while building its case in closing argument:

> In addition, there was a violation of Rule 141(b)(2). Your Honor had an excellent view of the decoy's physical appearance, but most importantly, her demeanor. As she testified to, she was a professional decoy. She has preformed [*sic*] at least — gone to at least 100 stores as a decoy.
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> She testified that this prior experience impacted her because she was no longer nervous. While it would be typical for a first-time decoy or any person under the age of 21 trying to purchase alcohol would be nervous [*sic*], she testified she was not nervous at all during this investigation.

> Rule 141(b)(2) requires the Department to make a decision based upon the actual circumstances presented to the clerk. And the actual circumstance is the mature-looking decoy with extensive experience including not only being a decoy but a police explorer for several years, and also at the time employed by the police department as a parking enforcement agent.

(RT at pp. 57-58.)

There are numerous errors in appellant's argument. First and foremost, appellant bears the burden of proving its rule 141(b)(2) defense. It cannot object to an ALJ's failure to discuss miscellaneous facts that arise in the course of testimony when appellant itself failed to argue the relevance of those facts in asserting its defense. Most of the details appellant now insists are essential to its case — the content of the decoy's Explorer training, the duration of her ride-alongs, or her specific duties in parking enforcement — were entirely absent from appellant's closing argument. It cannot object to their absence in the decision below.

Second, even where appellant did argue the relevance of specific facts, it does not follow that the ALJ was required to include them in the decision. In making findings on a rule 141(b)(2) defense, an ALJ need not provide a laundry list of factors he found inconsequential. (See, e.g., *7-Eleven, Inc./Samra* (2014) AB-9387, at p. 9; *7-Eleven, Inc./Convenience Group, Inc.* (2014) AB-9350, at p. 4.)

Finally, in pressing these omitted facts, appellant is merely insisting — with renewed fervor — that the decoy did not appear nervous. The ALJ, however, acknowledged as much. (See Findings of Fact VI.) In the end, he did not reject the conclusion that the decoy was not nervous; he rejected appellant's argument that the decoy's confidence and lack of nerves necessarily made her appear over the age of 21. (See Determination of Issues II.)

The same logic applies for other factual findings in the decision below. While appellant is adamant that these facts implicitly support its case, it fails to show how, for example, a height of 5'8" necessarily indicates that a woman is over the age of 21. Again, appellant carries the burden of proving its affirmative defense; the gap in reasoning is therefore fatal.

Ultimately, appellant buries this Board in fresh evidentiary minutiae, but fails to show how the ALJ's reasoning is flawed.

III

Appellant contends that the decision below fails to reach a legal conclusion on appellant's argument regarding the second decoy. Appellant concedes that the ALJ did rule that section 25666 does not require the presence of the second decoy at hearing, but insists that he ignored the relevance of the second decoy to appellant's defenses under rule 141.

In a case very similar to this one, *CEC Entertainment, Inc.* (2004) AB-8189, this Board discussed the relevance of a second decoy and when the second decoy's presence may be required at hearing:

> Appellant contends that the administrative law judge (ALJ) should have compelled the presence of Carlos Perez, a second decoy who accompanied the decoy to whom the beer was sold, so that he (the ALJ) could conduct a full and fair analysis of the apparent age of Duran. Appellant cites *Hurtado* (2000) AB-7245, a decision of the Appeals Board which ruled that consideration of the effect of another person who accompanied a decoy was "essential for disposition."
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> In *Hurtado*, a 27-year-old plain-clothes policeman sat at a small table with a minor decoy. Each ordered and were served a beer. The Appeals Board concluded that the "active participation" of the police could have misled the seller as to how the decoy appeared. Thus, the decoy operation was unfair and violated Rule 141.
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> This case is nothing like *Hurtado*, *supra*. There is no evidence in

> this case that the second decoy did anything, by way of word or gesture, that might have distracted the clerk or caused the kind of confusion that was the concern of the Board in *Hurtado*, *supra*, or *Southland Corporation/R.A.N., Inc.* (1998) [AB-6967], another Board decision cited by appellant.
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> In *7-Eleven, Inc./Jamizeh* (2002) AB-7790, the Board explained that "the real question to be asked when more than a single decoy is used is whether the second decoy engaged in some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law."
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> Thus, the mere fact that a second decoy accompanied the decoy who made the purchase is not, in and of itself, enough to persuade us that the decoy operation was unfair. The clerk did not testify, so any claim that the clerk was actually misled is wholly speculative.

(*Id.* at pp. 2-3.)

Substitute "bartender" for "clerk" and we have appellant's case. The undisputed testimony, courtesy of decoy Loubriel, was that the second decoy entered the premises with her and proceeded to play absolutely no role whatsoever in the transaction. (See RT at pp. 17-20.) Indeed, he stood five feet away watching television. (RT at p. 22.) This testimony is reflected accurately and fully in the findings below. (See Findings of Fact II, IV.)

As noted in part II, *supra*, appellant carried the burden of proving its rule 141 defense. Appellant's entire argument, however, turns on the mere presence of the second decoy within the premises; it produced no evidence showing that the second decoy in any way influenced the transaction. The ALJ correctly concluded there were no grounds to require the second decoy to appear at the hearing. By logical extension, there was no cause to reach any legal conclusions regarding the second decoy's presence. Simply put, in light of uncontroverted testimony, the second decoy's presence was irrelevant.

IV

Appellant contends that the ALJ "unilaterally" rejected evidence appellant offered in order to mitigate the penalty. (App.Br. at p. 14.) Appellant directs this Board to the Penalty Guidelines contained in rule 144, which, it claims, mandate that the Department accept appellant's remedial measures and mitigate the penalty. Appellant insists "the Department does not have the discretion to ignore its own regulations." (App.Br. at p. 15.)

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, it 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].)

Rule 144 provides:

> In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act [citation], and the Administrative Procedures Act [citation], the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" . . . which are hereby incorporated by reference. Deviation from these guidelines is appropriate *where the Department in its sole discretion* determines that the facts of the particular case warrant such a deviation — such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144, emphasis added.) While appellant is correct that the Department is bound by its own regulations, the regulation itself expressly grants the

Department discretionary authority to mitigate or aggravate a penalty as it sees fit.

Additionally, the Penalty Guidelines outline factors potentially relevant to mitigation, but explicitly use permissive language to reaffirm the breadth of the Department's discretion:

> These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; *nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater or less than those listed herein, in the proper exercise of the Department's discretion*.
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> Higher or lower penalties from this schedule *may* be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances.
>
> [¶ . . . ¶]
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> Mitigating factors *may* include, but are not limited to:
> 1. Length of licensure at subject premises without prior discipline or problems
> 2. Positive action by licensee to correct problem
> 3. Documented training of licensee and employees
> 4. Cooperation by licensee in investigation

(*Id.*, Penalty Guidelines Appendix, emphasis added.) The Penalty Guidelines are precisely what they purport to be — *guidelines*. While they offer suggestions regarding the sort of conduct the Department wishes to encourage, and which *may* lead to a mitigated penalty, nothing in their language requires an ALJ to reduce a penalty simply because one or more of these factors exist. The rule grants the Department broad discretion, provided the penalty is reasonable.

The ALJ considered appellant's remedial measures, found them insufficient to support mitigation, and assigned the standard penalty of fifteen days' suspension, as recommended by the Penalty Guidelines. The penalty is reasonable and fully within the Department's discretion.

ORDER

The decision of the Department is affirmed.[2]

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

[2]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.