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

AB-9506
File: 21-477842; Reg: 14081110

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 1300
662 Boronda Road, Salinas, CA 93907,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: October 1, 2015
Sacramento, CA

ISSUED OCTOBER 27, 2015

Appearances: Melissa Gelbart, of the law firm Solomon Saltsman & Jamieson, for appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 1300. Heather Hoganson, for respondent Department of Alcoholic Beverage Control.

OPINION

This appeal is from a decision of the Department of Alcoholic Beverage Control[1] suspending appellants' license for 15 days because their clerk sold an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On

[1]The decision of the Department, dated April 1, 2015, is set forth in the appendix.

September 2, 2014, the Department filed an accusation against appellants charging that, on July 19, 2014, appellants' clerk, Christopher Manuel Ponce (the clerk) sold an alcoholic beverage to 17-year-old Melissa T. Although not noted in the accusation, Melissa T. was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on January 13, 2015, documentary evidence was received and testimony concerning the sale was presented by Melissa T. (the decoy). Appellants presented no witnesses.

Testimony established that on the day of the operation, the decoy entered the licensed premises alone. Two Department agents entered the premises shortly thereafter. The decoy went to the coolers where she selected a six-pack of Corona beer. She took it to the sales counter where she waited in line behind two people. When it was her turn, the clerk asked the decoy for her identification. She handed him her California Identification Card, which bore a red stripe indicating "AGE 21 IN 2018." The clerk viewed the ID card for about ten seconds, then handed it back to the decoy. The clerk commented "nice picture," and the decoy replied, "thank you." The clerk did not ask her any age-related questions or make any comments about her age before completing the sale. Following the sale, the decoy exited the premises.

Once outside, the decoy went to the vehicle of Department Agent Francisco. She then re-entered the premises with two other Department agents. One of the agents asked the decoy who sold her alcohol. The decoy pointed to the clerk and said, "He's the one who sold me alcohol," or words to that effect. The decoy and clerk were seven to eight feet apart at the time of the identification (RT at p. 29), and the clerk was looking at the decoy. (RT at p. 37.) The clerk came out from behind the counter, and a

photograph was taken of the clerk and decoy together. (Exhibit 5.)

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed a timely appeal contending: (1) the Department failed to meet the burden of proof required to establish its case-in-chief, and (2) the face-to-face identification of the clerk violated rule 141(b)(5).[2]

DISCUSSION

I

Appellants contend that the Department failed to meet its burden of proof by failing to prove that the employee named in the accusation was in fact the clerk who made the sale of the alcoholic beverage. This issue was not raised at the administrative hearing.

It is settled law that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1126-1127 [116 Cal.Rptr.3d 315]; *Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Bd. of Med. Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].) An issue that might have been raised at the administrative hearing, but was not, may be considered waived. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400, p. 458.)

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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.

The only issues raised by appellants at the administrative hearing were the decoy's appearance, the decoy's success rate, the face-to-face identification of the clerk, and mitigation of the penalty. (See RT pp. 42-44.) There was no claim that the Department had failed to satisfy its burden of proof by failing to establish that the clerk who made the sale was the Christopher Manuel Ponce whose name appears in the accusation.

The Board has addressed the question of establishing a prima facie case many times before and found:

> The ultimate burden of persuasion at the administrative hearing is the preponderance of the evidence. The Department's initial burden of producing evidence, however, is merely to make a prima facie case, that is, *to produce sufficient evidence to support a finding in its favor in the absence of rebutting evidence*.

(*Vons* (2002) AB-7819 at p. 5, emphasis added.) The Board finds there was sufficient evidence produced in this case to establish a prima facie case.

> Evidence of even one credible witness "is sufficient for proof of any fact." (Evid. Code, § 411.) And "questions as to the weight and sufficiency of the evidence, the construction to be put upon it, the inferences to be drawn therefrom, the credibility of witnesses . . . and the determination of [any] conflicts and inconsistencies in their testimony are matters for the trial court to resolve." [Citation.]

(*Sav-On Drug Stores, Inc. v. Superior Ct.* (2004) 34 Cal.4th 319, 334 [17 Cal.Rptr.3d 906].)

The decoy in this matter testified that she purchased alcohol at appellants' premises. (RT at p. 14.) At no time during the administrative hearing did appellants' counsel raise a question about the identity of the clerk who made the sale. Appellants never claimed that the clerk in the photograph (Exhibit 5) was not an employee of appellants, that his identification in the caption of Exhibit 5 by his last name, rather than

full name, was an issue, or that no sale took place.

For all these reasons, appellants' contention lacks merit, and the Board agrees with the administrative law judge (ALJ) that the evidence is in the record sufficient to support a finding that a sale of alcohol to a minor took place at these licensed premises, as charged in the accusation.

II

Appellants contend that the face-to-face identification of the clerk failed to comply with rule 141(b)(5). Appellants argue that the identification of the clerk was made from too great a distance to constitute a valid face-to-face identification, that the clerk was not aware he was being identified as the seller of the alcohol, and that the clerk did not acknowledge having been identified. (App.Br. at p. 6.)

Rule 141(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.

The rule provides an affirmative defense. The burden is therefore on the appellants to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

The ALJ made the following findings about the face-to-face identification:

> Once outside, the decoy went to Department Agent Francisco's vehicle. The decoy re-entered the premises to conduct a face-to-face identification of the seller. Two Department agents accompanied the decoy back inside. Almost immediately upon re-entering the premises, one of the Department agents asked her who sold her alcohol. [The decoy] pointed to the selling clerk and said, "He's the one who sold me alcohol," or words to that effect. At the time she was standing close to the entrance door. [The decoy] could not remember if the clerk was helping a customer at the time. However, the decoy testified she was seven to eight feet away from

> the clerk during the identification. The decoy was looking at the clerk and he was looking at her during the process. The selling clerk "just stood there." Following her identification of the seller, the clerk walked out from behind the counter.

(Findings of Fact ¶ II-C.) Based on these findings, the ALJ reached the following conclusion:

> Respondents also contend that the Department failed to prove there was compliance with Rule 141, subsection (b) (5). They assert the clerk was not aware he was being identified because he did not respond to the decoy's identification of him. Further, they contend the photograph of the decoy and the seller was taken after the agents directed them to stand together. Presumably, the Respondents are contending this was too suggestive. These arguments ignore the dipositive facts surrounding the face-to-face identification. The decoy was approximately seven (7) feet away from the clerk when she identified him as the seller, and the clerk and decoy were looking right at one another during the identification process. The clerk then emerged from behind the counter to have his photograph with the decoy, and she was holding the Corona beer and her CIC. The clerk had ample opportunity to come "face-to-face" with the decoy. The clerk knew, or ought to have known, he was being identified as the seller. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control App. Bd.* (2003) 109 Cal.App. 4th 1687; *Garfield Beach CVS, LLC* (2014) AB-9382)

(Determination of Issues ¶ III.)

In *Chun* (1999) AB-7287, this Board observed:

> 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. 5.) And in *Greer* (2000) AB-7403, the Board said it is not necessary that the clerk *actually* be aware that the identification is taking place. (*Id.* at p. 4.) The only "acknowledgment" required is achieved by "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." (*Chun, supra,* at p. 5, emphasis added.)

The court in *Acapulco* said that there must be "strict adherence" to the provisions of rule 141. (*Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126].) Appellants rely on this language for their contention that there must be evidence that the clerk knew he was being identified for the face-to-face identification to be valid. This misstates the rule.

The core objective of rule 141 is fairness to licensees when decoys are used to test their compliance with the law. (*Dept. of Alcoholic Bev. Control v. Alcoholic Beverage Control Appeals Bd.* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339].) Rule 141(b)(5) is concerned with both identifying the seller and providing an opportunity for the seller to look at the decoy again, soon after the sale. (*Ibid*.) It does not require a direct face off or any overt acknowledgment to accomplish these purposes.

The clerk did not testify, so there was no direct testimony to establish whether the clerk actually knew he was being identified. However, there was no evidence of misidentification presented, or even the possibility of misidentification of the clerk in this matter, since only one clerk was present in the licensed premises at the time of the decoy operation. (RT at p. 24.) Regardless of whether the clerk heard what the decoy said, he had the opportunity to look at the decoy again from seven feet away. The opportunity is all that needs to be provided.

A response is not required from the clerk. If the rule required a response, licensees could avoid discipline simply by instructing their clerks not to respond when being identified as having sold alcohol to a minor decoy. If indeed this clerk was *not* the clerk who sold alcohol to this minor decoy, he had ample opportunity during the initial identification, and the taking of the photograph in Exhibit 5, to proclaim that he was not the individual who had made the sale. No such claim was made.

The record here contains sufficient evidence to support a finding that the clerk knew, or reasonably ought to have known, that he was being identified as the person who sold alcohol to a minor. This constitutes compliance with rule 141(b)(5).

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, 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.