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

AB-7669
File: 20-343759 Reg: 00048183

7-ELEVEN, INC., HYUNG J. KWON, and JUN A. KWON dba 7-Eleven #13882
5683 North Lake Lindero Drive, Agoura Hills, CA 91301,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 16, 2001
Los Angeles, CA

ISSUED OCTOBER 25, 2001

7-Eleven, Inc., Hyung J. Kwon, and Jun A. Kwon, doing business as 7-Eleven Store #13882 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for appellants' clerk selling an alcoholic beverage to a person under the age of 21, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Hyung J. Kwon, and Jun A. Kwon, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated June 29, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 24, 1998. Thereafter, the Department instituted an accusation against appellants charging an illegal sale to a minor. The 19-year-old minor, Cheryl Allen, was acting as a decoy for the Los Angeles County Sheriff's Department.

An administrative hearing was held on May 16, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by deputy sheriff Terry Spindler and by the minor decoy ("the decoy") concerning the transaction at issue.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been established as charged in the accusation and no defense had been established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the decoy's appearance violated Rule 141(b)(2); (2) the penalty was imposed pursuant to an "underground regulation" and without any factual basis; and (3) appellants' rights to discovery were violated by the Department's refusal to provide appellants with any prior complaints concerning the premises and its refusal to provide a stenographic record of the proceeding on appellants' motion to compel.

DISCUSSION

I

Appellants contend the decoy's appearance violated Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)) which requires that a decoy "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." Appellants characterize the decoy as "a large, matronly employee of the County of Los Angeles," who is 5'10" tall, weighs 150 pounds, colors her hair, and wears a uniform while doing her job of issuing parking citations. They conclude that "[s]he is an adult, and gives the impression and appearance of being an adult."

The ALJ found that the decoy's overall appearance complied with Rule 141(b)(2), including in the finding a description of her physical appearance and demeanor. 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 she testifies. This Board is not in a position to second-guess the trier of fact, especially where all we have to go on is appellants' partisan assertion that the decoy lacked the appearance required by the rule, and an equally partisan response by the Department that she complied with the rule.

Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant in determining the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. Extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor, mannerisms, or poise, but that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. There is no justification for contending that an experienced decoy violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or

older.

II

Appellants contend the Department's "standard" penalty of 15 days which was imposed in this case is based not on any factual determination, but on an "underground regulation," and thus is an abuse of discretion. They state that "the Department should be able to factually justify a penalty in light of a spotless record at these licensed premises."

Appellants raised this issue in their Notice of Special Defense,[2] and in their Request for Discovery they asked for "all documents and writing pertaining to any standard and/or criteria upon which the Department bases its recommended penalty in this case." The Department apparently responded to the discovery request in a manner satisfactory to appellants, because appellants did not include the penalty-related material in their Motion to Compel.

At the administrative hearing, appellants said nothing at all regarding the penalty recommendation. Finding IV of the Department's decision, which addresses appellants' Special Notice of Defense, concludes by stating: "Additionally, it was not established that the Department acted unlawfully or improperly by recommending its 'standard'

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[2] Paragraph 8 of the Special Notice of Defense states:

> "Respondent [sic] object to the penalty to be recommended by the Department on the basis that said penalty will be made pursuant to the Department's written policy, regulation and rule adopted by the Department not pursuant to the Department's rule making authority stated in Business and Professions Code Sections [sic] 25750 and pursuant to the rule and regulation adoption procedure set forth in Government Code Sections 11342 and 11343 et seq.; further; said rule and regulation has not been published pursuant to Government Code Section 11344 et seq. and as such is illegal and improper."

penalty in the instant matter."

This is a mixed question of fact and law, that is, appellants must provide evidence supporting their contention that an "underground regulation" exists and that the penalty imposed in this case was the result of the "underground regulation." Then this Board would need to decide the legal questions of whether the purported "underground regulation" was subject to the APA rule-making provisions and, if so, whether it was a regulation as defined in Government Code §11342.600.

We need not reach these questions, however, because appellants have presented no evidence that such an "underground regulation" exists. Appellants have not requested the Board to take official notice of any documents and have presented nothing other than the bald assertion that an "underground regulation" exists and the penalty was the result of it. Without a proper evidentiary showing and argument from the appellants and an opportunity for the Department to respond, we cannot consider this contention.

III

Appellants contend the Department improperly refused to provide them with copies of "any prior complaints concerning the licensed premises." They state that, "Obviously, the absence of complaints would be [a] mitigating factor in assigning penalty." Appellants assert that the Department's refusal to disclose deprived them of "a fair argument concerning penalties."

Paragraph 16 of appellants' Request for Discovery states, in its entirety, "Respondent(s) request the Department's Complaint Form." The same request is made in Paragraph 18 of appellants' Motion to Compel.

The ALJ's Order on Motion to Compel Discovery included the following denial of

appellants' request:

> "Respondents failed to explain in their moving papers why a Complaint Form is discoverable under California Government Code Section 11507.6 as is required by California Government Code Section 11507.7(a). Counsel for respondents suggested that there may have been a citizen complaint or complaints concerning respondents' licensed premises. If there is, he suggests that the identity of the complainant(s) and their complaints would be discoverable. The Department contends respondents are merely on a fishing expedition, that any documents generated before the alleged unlawful transaction are not relevant, including any complaint form or forms which might exist.
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> "The accusation alleges a specific unlawful sale of alcoholic beverages to an underage purchaser. The complaint form or forms which respondent requests cannot contain the names of any percipient witnesses (except by pure coincidence) and must relate to incidents which occurred *before* the sale which is the subject of the within accusation. Respondent failed to show the potential relevance of knowledge of the existence of any such complaint or complainant." (Emphasis in original.)

We believe the ALJ correctly analyzed the situation. Government Code §11507.5 makes clear that discovery in administrative proceedings is limited. It states: "The provisions of Section 11507.6 provide the exclusive right to and method of discovery as to any proceeding governed by this chapter." Section 11507.6 then specifies what things are discoverable; if it is not in §11507.6, it is not discoverable. There is no provision for discovery of "complaints" or "complaint forms."

Department counsel points out that the only provision in §11507.6 that might possibly apply would be subdivision (e), which makes discoverable "Any other writing or thing which is relevant and which would be admissible in evidence." To come under this subdivision, appellants must show that the complaints requested are both relevant and admissible in evidence.

Appellants' only justification for the relevance of prior complaints made against the licensed premises is that their absence would be a factor in mitigation. We fail to

see how the absence of complaints would be mitigating. The absence of complaints could be attributable to any number of factors other than the exemplary conduct of the business at the licensed premises. For example, persons who had complaints might not know where or how to file a complaint; they might believe it would do no good to file a complaint; they might have been dissuaded from filing a complaint by the licensee; or they just might not want to get involved. Therefore, the absence of complaints would not be a factor in mitigation.

Appellants provide no other explanation of why prior complaints would be relevant. As observed by the ALJ in rejecting this discovery request, prior complaints could disclose no facts or names that would relate to the violation at issue, because they would involve some incident which occurred earlier.

On appeal, however, appellants do not contend that the *existence* of such complaints would be relevant, but only their *absence*. Following appellants' logic, if the absence of prior complaints is a mitigating factor, the existence of prior complaints must be an aggravating factor. Clearly, this is not true; the Department may only use in aggravation prior violations actually charged against the licensees and stipulated to or proven in an administrative hearing. Presumably, appellants would object if the Department tried to use uncharged prior complaints to aggravate a penalty.

The complaints requested are not relevant, which makes them inadmissible, and thus, not subject to discovery under Government Code §11507.6.

Appellants also claim error in the Department's failure to provide a court reporter for the hearing on their motion to compel discovery. Appellants cite Government Code §11512, subdivision (d), which provides, in pertinent part, that "the proceedings at the

hearing shall be reported by a stenographic reporter." The Department contends that this reference is only to an evidentiary hearing and not to a hearing on a motion where no evidence is taken.

The Board has issued a number of decisions directly addressing this issue. (See, e.g., The Circle K Corporation (Jan. 2000) AB-7031a; The Southland Corporation and Mouannes (Jan.2000) AB-7077a; Circle K Stores, Inc. (Jan. 2000) AB-7091a; Prestige Stations, Inc. (Jan. 2000) AB-7248; The Southland Corporation and Pooni (Jan. 2000) AB-7264.) The Board held in these cases that a court reporter was not required for the hearing on the discovery motion. We continue to adhere to that position.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[3]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.