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

AB-7702
File: 20-317924 Reg: 00048536

7-ELEVEN, INC., NARINDER DHILLON, and GURBINDER KAUR
dba 7-Eleven Food Store #2175-13993
861 W. Alosta Avenue, Glendora, CA 91740,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: August 17, 2001
Los Angeles, CA

ISSUED DECEMBER 28, 2001

7-Eleven, Inc., Narinder Dhillon, and Gurbinder Kaur, doing business as 7-Eleven Food Store #2175-13995 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 24 days for their clerk, Mandhar Gill, having sold an alcoholic beverage to Joseph Broussard, a minor, 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., Narinder Dhillon, and Gurbinder Kaur, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing

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[1]The decision of the Department, dated September 7, 2000, is set forth in the appendix.

through its counsel, Michele L. Wong .

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 16, 1996. Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor, in violation of Business and Professions Code §25658, subdivision (a). Although not stated in the accusation, the minor was acting as a police decoy.

An administrative hearing was held on June 28, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Broussard ("the decoy"), and Glendora police officer Gregory Cunningham. Appellants' offer of proof, that appellant Dhillon would testify that he was induced by an unidentified Department representative to waive a "309 conference," as a result of which he signed a stipulation and waiver admitting an earlier violation, without knowing what the downstream consequences of his action would be, was rejected.

Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged, and entered the order from which this appeal is taken.

Appellants' timely appeal raises the following issues: (1) Business and Professional Code §25658.1 is an unconstitutional invasion by the Legislature of the powers of the executive branch; (2) the Department erred in refusing to allow a collateral attack on the prior decision; (3) the Department erred in excluding evidence of the circumstances surrounding appellants' entry into the stipulation and order upon which the prior decision was based; and (4) the Department violated Rule 141(b)(2). Issues 2 and 3 are related and will be discussed together.

DISCUSSION

I

Appellants' constitutional challenge to Business and Professions Code §25658.1 appears to be premised on three interdependent contentions. First, appellants claim that the Legislature invades the powers of the executive by its enactment of §25658.1, and that unless the Department, in its application of §25658.1, will reconsider the legality of its prior decisions finding violations, §25658.1 violates the California and United States Constitution. Second, appellants argue that the Department is required to permit a collateral attack on a prior decision, and thirdly, they contend that they must be permitted to explore the circumstances and explain the motivations connected with their entry into a stipulation and waiver which permitted the Department to find appellants responsible for a prior sale to minor violation.

The contention that the Legislature has invaded the province of the executive branch by its enactment of that part of Business and Professions Code §25658.1 which provides that no licensee guilty of a second or subsequent sale of an alcoholic beverage to a minor may petition for an offer of compromise pursuant to Business and Professions Code §23095 is easily disposed of. The California Constitution, in article XX, §22, creates the Department of Alcoholic Beverage Control, and provides, among other things, that the Department shall have the exclusive power "except as herein provided and in accordance with laws enacted by the Legislature" to license the manufacture, importation and sale of alcoholic beverages in the state. Given this express constitutional reservation of jurisdiction in the Legislature, it seems absurd to say the Legislature lacked the power to enact §25658.1, or that it invaded the province of the executive branch when it did so.

Appellants claim that co-licensee Narinder Dhillon was told in a telephone conversation with an unnamed representative of the Department that he should sign a stipulation and waiver instead of coming to the Department for a 309 conference, and could then pay a fine. They assert that Dhillon was not told that, by doing so, his action could have an impact on future proceedings. A 15-day suspension was ordered, and appellants were eligible to petition the Department to accept payment of a fine in lieu of the suspension. The record is silent as to whether this occurred. Appellants now claim that, had the Administrative Law Judge (ALJ) been willing to hear Dhillon's explanation, he would either have not considered the prior at all, or would have considered the circumstances as a mitigating factor in his determination of the penalty.

When making their offer of proof, appellants did not claim that appellants had not committed the violation to which Dhillon stipulated. Their claim is only that he was not informed of the downstream consequences of the stipulation. Thus, there is no reason to consider their contention that they were denied the opportunity to attack the prior decision collaterally.

Appellants believe that, had Dhillon been permitted to explain the circumstances behind this earlier decision to stipulate to a violation, rather than defend against an accusation, the Department would have, in this case, ordered a penalty of only 15 days or less in this case, permitting them to petition under §23095. While we may doubt that the Department would have been moved to that degree, there is the possibility that the Department could adjust its views as to penalty in this case if satisfied that in the earlier case such a conference had been waived on the basis of misinformation.[2]

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[2] If, as appellants allege, Dhillon was misled by a Department representative, that falls short of proof that the agency exceeded its fundamental jurisdiction or

We do not mean by this decision to approve of the practice of attacking decisions which have become final. We simply believe that, in this case, the ALJ should have extended the minimal amount of time it would have taken to hear the franchisee/licensee's story. We trust that, upon remand, the Department will do so.

II

Appellants contend that the decoy did not display the appearance which could generally be expected of a person under 21 years of age, and that the ALJ's findings to the contrary are at odds with the facts.

The ALJ, who observed the decoy as he testified, found the following with respect to his appearance, both on the day of the transaction and when he testified at the hearing [Finding of Fact VI]:

> "A. On December 3, 1999, decoy Broussard was approximately five feet, eleven inches tall and weighed approximately 165 pounds. His dark brown hair was shaved on the sides and the rear and worn short on the top. He looked much the same as he appears in photographs received in evidence as Exhibit 4, which photographs were taken in late November 1999.
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> "On the night in question, Broussard wore khaki trousers and a button-down polo shirt, with short sleeves. He wore the same shoes shown in Exhibit 4 and they may have added half an inch to his height. Broussard was clean shaven when he entered respondents' store, having shaved between 6:30 and 7:00 p.m., prior to going out on the decoy operation. He may have worn a wristwatch, but wore no other jewelry. He did not wear sunglasses or any other spectacles during his visit to respondents' premises.
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> "Based upon the photographs, Exhibit 4, and Broussard's testimony, decoy Broussard looked substantially the same on the day of the decoy operation as he did at the hearing. At the hearing, Broussard was 20 years of age and wore a dark jacket and a tie. He had shaved that morning at about 7:15 a.m. and at

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statutory authority, so to warrant an attack on the previous decision no matter how belatedly. It does not mean, however, that a party litigant in a subsequent proceeding should be precluded from even offering testimony that might lead to a more lenient penalty, as happened here.

10:00 a.m. appeared clean shaven. Broussard has worked out with weights on a regular basis since mid-1998, but no sign of the strength training was apparent at the hearing. Based on physical appearance alone, that is, as he appeared before clerk Gill and as he appeared at the hearing, Broussard displayed the appearance generally expected of a person under 21 years of age.

"B. The December 3, 1999, decoy operation was the second time decoy Broussard had worked as a decoy. The first time was about a year before. He recalled being a bit nervous when he entered respondents' store. He indicated that he was not nervous at the hearing and he did not exhibit any sign of nerves. Decoy Broussard had been a cadet working with the Glendora Police Department since August 1998. He has aspirations of becoming a police officer.

"Broussard testified in a straightforward, competent manner. He was soft-spoken and mild-mannered in carriage and demeanor.

"C. The court has observed the decoy's overall appearance, considering his physical appearance, his dress, his poise, demeanor, maturity and mannerisms as shown at the hearing. The court has considered the photographs, Exhibit 4, and the other evidence concerning Broussard's overall appearance and his conduct at respondent's store on December 3, 1999. In the court's informed judgment, decoy Broussard gave the appearance at the hearing and before respondents' clerk which could generally be expected of a person under the age of 21 years."

Appellants focus on Broussard's hairline, suggesting that it appears to be receding. They also assert that the photograph of the decoy shows a "five o'clock shadow." Lastly, appellants assert that the decoy's "station in life," as a police cadet, is such that a reasonable fact finder would find his appearance to be that of someone older than 21 years of age.

It is apparent from the ALJ's findings which are set forth above that the ALJ considered the same factors as do appellants, and simply came to a different conclusion. There is nothing in the ALJ's findings indicating that the conclusion he drew from the facts was not justified, and we have seen nothing in the record inconsistent with his findings.

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 requirement of Rule 141, that he possessed 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.

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 present the requisite appearance.

The rule, through its use of the phrase "could generally be expected" implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of that of a person under 21 years of age. We have no doubt that it is the recognition of this possibility that impels many if not most sellers of alcoholic beverages to pursue a policy of demanding identification from any prospective buyer who appears to be under 30 years of age, or even older.

We think it worth noting that we hear many appeals where, despite the supposed existence of such a policy, the evidence reveals that the seller made the sale in the supposed belief that the minor was in his or her early or mid-20's, and for that reason did not ask for identification and proof of age. It is in such cases, and in those where there is a completed sale even though the buyer - not always a decoy - displayed identification which clearly showed that he or she was younger than 21 years of age,

that engenders the belief on the part of the members of this Board that many sellers, or their employees, do not take sufficiently seriously their obligations and responsibilities under the Alcoholic Beverage Control Act.

By the same token, we appreciate the fact that, on occasion, police have used decoys whose appearance, because of large physical stature, facial hair, or other feature of appearance, is such that a conscientious seller may be unfairly induced to sell an alcoholic beverage to that person. Within the limits that apply to this Board as a reviewing tribunal, we have attempted to deter such practices, either by outright reversal, or by stressing the importance of compliance with Rule 141. If licensees feel more is necessary, their resort must be to another body.

ORDER

The decision of the Department is affirmed except as to penalty, which is reversed, and the case is remanded to the Department for reconsideration in light of the comments herein.[3]

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

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[3] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.