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

AB-7750
File: 20-214473 Reg: 00048323

7-ELEVEN, INC., CLARA L. GONSER and GREGORY G. GONSER
dba 7-Eleven Store #2237-23947
7314 North Blackstone Avenue, Fresno, CA 93650,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: October 11, 2001
San Francisco, CA

ISSUED DECEMBER 13, 2001

7-Eleven, Inc., Clara L. Gonser, and Gregory G. Gonser, doing business as 7-Eleven Store #2237-23947 (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 minor decoy, 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., Clara L. Gonser, and Gregory G. Gonser, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

---

[1]The decision of the Department, dated December 14, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. Thereafter, the Department instituted an accusation against appellants charging that, on February 17, 2000, appellants' clerk sold a 24-ounce can of Bud Light beer to 16-year-old Allison Kinie. Kinie was working as a minor decoy for the City of Fresno Police Department at the time of the sale.

An administrative hearing was held on June 13 and October 25, 2000, at which time documentary evidence was received and testimony was presented concerning the sale by Kinie ("the decoy") and by Fresno police officer John Meyers.

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

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the decoy's testimony was not credible; (2) Rules 141(b)(3) and 141(b)(4) were violated; (3) the Department failed to make proper findings regarding credibility; and (4) the decoy's appearance violated Rule 141(b)(2). Issues (1) and (3) will be discussed together.

DISCUSSION

I

Appellants contend the decoy was not credible because she had conflicts of interest, her testimony was vague, and she was coached by the officer before the hearing. In addition, they argue, despite the significant problems with the decoy's credibility and the inability of the officer to corroborate the testimony of the decoy since

he was not present to observe the transaction, the ALJ made no attempt to explain why he accepted her testimony as credible. Appellants assert that such an explanation is required by the case of Holohan v. Massanari (2001) 246 F.3d 1195 (9th Cir.).

The decoy's conflicts of interest alleged by appellants are her "close family relationship with Officer Meyers" and the payment to her of $30 for each decoy operation in which she participated. The former allegation is based on the decoy's testimony, when asked if she knew Meyers previously, that "Our families are friends" [RT I: 28]. Appellants' characterization of the closeness of the relationship is not supported by the testimony, and they provide no further facts or reasoning that would tend to show that the decoy's relationship with the officer made her testimony biased. Likewise, the decoy's receipt of $30 for her participation does not lead to the conclusion that she had the kind of financial interest in the outcome of the hearing that might cause, or even raise the suspicion of, bias.

Appellants' allegation that the decoy was "coached" by the officer before the hearing is true, but not in a way that raises any question of unfairness or lack of credibility. In response to the question of appellants' counsel, "When you say 'coaching' what do you mean by that?" the decoy responded, "Not by giving answers, just helping me feel more comforting [sic], relaxing me, letting me know what to expect in a very general way. Just – I was kind if coming in here with no idea of not [sic] knowing what's going on." [RT I: 36.] Appellants state that they, and the Department, "have the right to this witness's own testimony and her personal observations and memory." We find no reason to believe that the officer's "coaching" made the decoy's testimony unreliable or based on other than her own observations and memory.

Appellants allege that the decoy testified she "relied extensively" on the police report, and that, when asked the basis for her testimony of facts not included in the report, "she provided vague testimony indicating that she had no true recollection of the facts." Appellants have not told this Board where in the transcript the decoy said she relied extensively on the police report, and we found no statement to that effect in the course of our review of the transcript. As to her "vague testimony" explaining the basis for her statements that were not from the report, they are vague only to the extent that it is difficult for anyone, let alone a 17-year-old on the witness stand, to explain what it is that makes one remember particular things at one time and not at another.

The decoy said, in response to the ALJ's question as to the basis of her recollection, "Being put on the spot, I guess, forces you to remember a lot more things. As we've gone through and he's asked me more questions it's kind of brought up another oh, wait, yeah, I remember this because of something he said or what not" [RT I: 72]. When the ALJ asked if she were referring to questions asked of her that day at the hearing, she responded: "Yes. It was more of just kind of a recall of I remembered something else that happened that only because he said something, a word or something that sparked a memory that came back. If that makes sense" [RT I: 72].

The decoy's explanation of why she remembered additional things during the hearing that were not included in the police report is reasonable and logical. One remembers different things about an event at different times, due to different circumstances when recollections are asked for, different questions asked, or the same questions asked different ways. A word, a sound, a picture can suddenly resurrect a memory that had not been roused by different words, sounds, or pictures. That is

simply the nature of human memory. The decoy did not give "vague testimony" nor did her testimony indicate in any way that she had no true recollection of the facts.

There were no significant problems with the decoy's testimony, and, therefore, the officer's inability to corroborate some parts of her testimony is of no consequence. As for the alleged requirement of Holohan v. Massanari, supra, the Board considered and rejected this contention in 7-Eleven, Inc. and Huh (8/16/01) AB-7680, saying:

> "We have reviewed the decision in [Holohan], and the court decisions cited in support of that portion of the court's holding, and are satisfied that the view expressed by the court is peculiarly related to federal Social Security disability claims, and does not reflect the law of the State of California. While it may be true that a statement of the factors behind a credibility determination may be of considerable assistance to a reviewing court, and is welcomed by this Board, we are not prepared to say that a decision which does not set forth such considerations is fatally flawed."

There is no reason for us to decide the issue any differently in the context of the present appeal.

II

Appellants contend that the decoy violated both Rule 141(b)(3) and Rule 141(b)(4) because the decoy did not present her true identification and did not state her true age to the clerk.

Rule 141(b)(3) provides that "A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages," and Rule 141(b)(4) provides that " A decoy shall answer truthfully any questions about his or her age."

Appellants contend "there is nothing to indicate that the decoy brought her own, true, identification," because the officer could not see the identification she showed the

clerk and he did not pat-down the decoy before she entered the premises to ensure she had no other identification. It is simply untrue that there is nothing to indicate that the decoy had her own identification. The decoy's testimony is sufficient to establish that the identification she carried and showed to the clerk was her own. If appellants had some evidence indicating that the decoy had other identification, they did not produce it. If appellants have no evidence indicating that the decoy had other identification, they should not assert a violation of Rule 141, which is an affirmative defense. They attempt to establish entitlement to this affirmative defense on the basis of speculation and attacks on the credibility of the Department's witnesses. But speculation is not evidence, and the ALJ already determined that the Department's witnesses were credible.

Appellants also contend Rule 141(b)(4) was violated, in spite of clear, unrefuted testimony that the decoy told the clerk her correct date of birth when he asked her. [RT I: 21, 52.] The ALJ specifically rejected this argument in Finding VII-A. Once again, appellants attempt to base entitlement to an affirmative defense on sheer speculation and fruitless attacks on the credibility of the Department's witnesses. There is absolutely no merit to appellants' contentions.

III

Appellants contend that Rule 141(b)(2) was violated because "[t]he overwhelming weight of the evidence presented at the hearing indicates that Kinie had the looks and demeanor of an individual who appeared over 20 years of age at the time of the sale . . . ." In support of their contention, they state that, on the day of the decoy operation, the decoy's hair "had been dyed brown," that she wore face powder and earrings, and that she was an experienced decoy, which would certainly have caused

her to display the appearance of someone 21 years old or older.

As a factual matter, the decoy's hair was *not* dyed brown at the time of the decoy operation. The decoy testified that at the time of the hearing, she highlighted her hair, but it was not highlighted at the time of the decoy operation. [RT I: 43.] Contrary to appellants' assertion that "she likely wore earrings during the operation," the decoy testified that she didn't remember whether she wore earrings then. [RT I: 39.] Appellants are correct that the decoy testified she wore "light face powder" during the decoy operation and at the hearing. [RT I: 41.]

The ALJ did not find that the overwhelming weight of the evidence indicated the decoy appeared to be over 20 years old. On the contrary, after describing his observations of the decoy's physical appearance and demeanor at the hearing, and considering the photographs of her taken shortly before the decoy operation, the ALJ determined that "nothing apparent at the hearing indicates that the decoy exhibited an age beyond her actual age of sixteen years; . . ." He concluded that "at the time of the sale of beer to her the decoy displayed the appearance which could generally be expected of a person under twenty-one years old." (Finding VI.)

The ALJ concluded, regardless of the decoy's hair color, or if she wore face powder or earrings, that the decoy did not appear to be older than her actual age of 16. Appellants pick out two or three items or features and argue that, because of them, the decoy looked over the age of 20. A decoy's apparent age, however, is based on a number of factors in combination. The ALJ who presided over the administrative hearing in 7-Eleven and Apend Incorporated (7/31/01) AB-7666, was presented with an argument similar to that made by the present appellants and this Board quoted his

analysis with approval in its opinion. It bears repeating here:

> "It is not one or two elements in the makeup and impression of a minor that are usually controlling in assessing whether a person has the appearance which could generally be expected of a person under 21. It is the overall impression based on numerous factors, such as the appearance, demeanor, mannerisms, attitude, etc., that form the foundation for a finding on this critical issue. The [appellants'] argument is based on a few selected characteristics and impressions which, without more, are misleading in making a reasonable assessment of the appearance of the minor's age."

The ALJ was able to observe the decoy's demeanor and mannerisms as well as her physical appearance, and he obviously did not find her experience as a decoy gave her the appearance of someone 21 or older. The Board has addressed this contention before. In 7-Eleven and Assam (4/26/01) AB-7631, we said:

> "Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. While 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 or mannerisms or poise, 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 the mere fact of the decoy's experience 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."

(See also Kim (6/21/01) AB-7523; 7-Eleven and Virk (4/12/01) AB-7597.)

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. Under these circumstances, this Board is not in a position to second-guess the trier of fact.

ORDER

The decision of the Department is affirmed.[2]

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

---

[2]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.