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

AB-7819
File: 21-194448 Reg: 00049604

THE VONS COMPANIES, INC., dba Vons
1790 Moorpark Road, Thousand Oaks, CA 91360,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: August 15, 2002
Los Angeles, CA

ISSUED OCTOBER 3, 2002

The Vons Companies, Inc., doing business as Vons (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days, with all 15 days conditionally stayed for one year, for appellant's 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, section 22, arising from a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant The Vons Companies, Inc., appearing through its 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 May 3, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on November 30, 1988. Thereafter, the Department instituted an accusation against appellant charging that, on July 14, 2000, appellant's clerk sold an alcoholic beverage to 19-year-old Michael El-Murr. At the time of the sale, El-Murr was working for the Ventura County Sheriff's Office as a minor decoy.

An administrative hearing was held on March 22, 2001, at which time documentary evidence was received and testimony was presented concerning the transaction.

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

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the decoy operation was not conducted in a fashion that promoted fairness, in violation of Rule 141(a)[2]; (2) Rule 141(b)(2) was violated; and (3) the Department denied appellant the opportunity to examine a critical witness, which violated its right to due process.

DISCUSSION

We preface our discussion of the specific issues with the basic legal standards that guide our resolution of appeals from decisions of the Department.

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals. The

[2] Rule 141 is found at California Code of Regulations, title 4, section 141.

Appeals Board's review of Department decisions is limited by the California Constitution, by statute, and by case law. The Board may not exercise its independent judgment on the effect or weight of the evidence, but must determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[3]

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control* (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

I

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[3]Cal. Const., art. XX, § 22; Bus. & Prof. Code §§23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

Appellant contends two decoys were used in this premises, but since only one, El-Murr, appeared at the hearing, the Administrative Law Judge (ALJ) was unable to make the necessary finding that the second minor, Mike Steiner, presented the appearance of a person under 21 years of age. Without consideration of both decoys, appellant contends, substantial evidence was lacking to support the ALJ's finding that the decoy operation was not conducted in an unfair manner.

It is true that Steiner accompanied El-Murr throughout the time Steiner was in the premises, and that both Steiner and El-Murr took bottles of beer out of the cooler. However, Steiner gave his bottle of beer to El-Murr before El-Murr approached the checkout lane and it was El-Murr who placed both bottles on the counter, showed his identification to the clerk when it was requested, and paid for the beer. Although Steiner stood near El-Murr while the transaction took place, he was not asked for his identification by the clerk, and he did not participate in the purchase of the beer in any way. (Findings 5, 8-B.) Steiner's "passive presence" did not change the fact that an alcoholic beverage was sold only to El-Murr, and only he was "the decoy" for purposes of Rule 141.

Appellant is correct that the ALJ could not make a finding that Steiner's appearance complied with Rule 141(b)(2), since Steiner was not at the hearing, and the only evidence as to his appearance was testimony that he was clean-shaven that night and estimating his height and weight. However, since the only "decoy" was El-Murr, the ALJ did not need to make such a finding.

As this Board has noted before, "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." (*Chevron* (2002) AB-7790.) In the present case, the ALJ stated, in Finding 8-B, that there was "a complete lack of evidence" that the clerk was confused as to who was the purchaser of the beer, and to suggest that Steiner's presence confused the clerk was "idle speculation."

Appellant asserts that the Department must, at the outset, "demonstrate that there is substantial evidence to conclude that the decoy operation was conducted in a fair manner," before appellant is required to present any evidence that the decoy operation was conducted unfairly. Appellant misunderstands the differing natures of the various burden-of-proof standards. The requirement of "substantial evidence" to support a Department decision is the standard used by this Board, and the appellate courts, when reviewing a decision. 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.

Appellant cites this Board's decision in *The Southland Corporation/R.A.N.* (1998) AB-6967, in support of its contention that the Department failed to meet its burden of proof. The appellants in *7-Eleven/Azzam* (2001) AB-7631, also cited that Board decision when they argued that the Department had not met its burden of proving that Rule 141(b)(5) had been complied with because no specific evidence was presented of the sequence of events to show that the face-to-face identification was made before the selling clerk was cited. The Board rejected that argument, saying,

> "In our view, once there has been affirmative testimony that the face to face identification occurred, the burden shifts to appellants to demonstrate why it did not comply with the rule, i.e., that the normal procedure, for the issuance of a citation following the identification of the accused, was not followed. We are unwilling to read our decision in The Southland Corporation/R.A.N. as expanding

> the affirmative defense created by Rule 141 to the point where appellants need produce no evidence whatsoever to support a contention that there was a violation of that rule."

We reiterate here that a Rule 141 defense requires evidence that there was a violation of the rule.

The evidence presented by the Department in the present case was clearly sufficient to allow the ALJ to conclude that the violation had occurred and that the decoy operation was conducted fairly; it was appellant's burden at that point to present evidence rebutting that evidence. If appellant chose not to present any evidence, but to rely solely on its mistaken belief that the Department had not met its initial burden of producing evidence, it has no basis for complaint on appeal.

II

Appellant contends Rule 141(b)(2) was violated because the Department failed to prove that the "second decoy," Steiner, met the requirement of the rule that a decoy must display the appearance generally to be expected of a person under the age of 21.

As discussed above, El-Murr was the only decoy for purposes of Rule 141. The ALJ did not need to make a Rule 141(b)(2) determination with respect to Steiner.

Also as discussed above, the ALJ was justified in finding that no evidence showed that Steiner's presence had any influence on the clerk's behavior when he sold the beer to El-Murr. If appellant had a basis for believing this not to be true, it was obliged to present evidence to that effect. Appellant did not do so and has no basis now to complain.

III

Appellant contends that the Department violated Business and Professions Code section 25666 by not requiring Steiner to attend the hearing. Appellant also argues that

this denial of the opportunity to examine a critical witness denied it due process.

Business and Professions Code section 25666 provides:

> "In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless the licensee has waived, in writing, the appearance of the minor."

As we have already made very clear, El-Murr was the only decoy who purchased an alcoholic beverage at appellant's premises and was the only minor named in the accusation. Therefore, he was the only minor the Department was required to produce at the hearing. If appellant believed Steiner was necessary for its defense, it could have subpoenaed him, which it did not do.

ORDER

The decision of the Department is affirmed.[4]

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

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[4]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.