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

AB-8060
File: 20-301927 Reg: 02053125

7-ELEVEN, INC., and APAND INCORPORATED dba 7-Eleven Store #2135-13864
17720 Burbank Boulevard, Encino, CA 91316,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Richard J. Lopez

Appeals Board Hearing: August 14, 2003
Los Angeles, CA

ISSUED NOVEMBER 4, 2003

7-Eleven, Inc., and Apand Incorporated, doing business as 7-Eleven Store #2135-13864 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days for their clerk having sold a 24-ounce can of Budweiser beer to a 19-year-old police decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Apand Incorporated, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 23, 1994.

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[1]The decision of the Department, dated November 14, 2002, is set forth in the appendix.

The Department instituted an accusation against appellants on June 14, 2002, charging that, on March 7, 2002, their agent, employee, or servant, Badal Singh, sold an alcoholic beverage (beer) to Eric Herrera, who was then approximately 19 years of age.

Oral and documentary evidence was presented at an administrative hearing on October 4, 2002, over which administrative law judge (ALJ) Richard J. Lopez presided. At that hearing, testimony was presented by Eric Herrera, the decoy; by Catheline Burns, a Los Angeles police officer who observed the transaction; and by Badal Singh, the clerk. According to the evidence, Herrera was asked neither his age nor for identification before the sale was made. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and that appellants had failed to establish any affirmative defense under Rule 141.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) Rule 141(b)(2) was violated; (2) Rule 141(b)(5) was violated; and (3) the enhanced penalty, supposedly based upon a prior violation, is improper.

DISCUSSION

I

Appellants contend that the ALJ ignored the apparent age of the decoy at the time of the sales transaction, and made factual findings concerning the apparent age of the decoy at the time of the hearing. Appellants argue that the ALJ's references to hand gestures and facial expressions of the decoy, and colloquialisms common to his age, are not helpful to a determination of the decoy's appearance at the time of the transaction because the decoy did not speak to the clerk and there is no testimony of hand gestures or facial expressions.

The ALJ made these findings (Factual Findings 3 and 4) with regard to the decoy:

> Eric Herrera was born on September 12, 1982. He is employed on a part time basis by the City of Los Angeles Police Department (LAPD) as a Police Student Worker. At the request of the LAPD he served as a minor decoy during the evening of March 7, 2002. At that time he was nineteen years of age. Of the approximate 10 places he visited that day, 4 establishments sold alcoholic beverages to him. He has served as a minor decoy on numerous other occasions.
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> Herrera appeared at the hearing essentially as he had on the evening of March 7. He wore a Cardinal ("Dickies") T-shirt, khaki pants and tan work shoes at the hearing. He wore a bracelet on March 7 and no jewelry at the hearing. He is clean shaven with a short hair style. He has no visible tattoos. On March 7 he wore a plaid shirt, jeans and the same shoes he wore to the hearing. He is approximately 5' -6" tall and weighs approximately 160 pounds. On March 7 he weighed approximately 145 pounds. He is youthful appearing and in his speech uses colloquialisms common to his age. He uses hand gestures and has facial expressions common to his age. In sum, he displayed the appearance which could generally be expected of a nineteen-year-old when the transaction set forth in Finding 6 occurred.

It is true that Herrera did not speak to the clerk, nor does the record indicate he made any hand gestures at the time he bought the beer. This does not mean they are characteristics the ALJ need ignore when he is determining whether the person he is describing would have displayed the appearance of a person under 21 years of age at the time he purchased the beer. He is entitled to, and, indeed, must take into account all reasonably observable characteristics of the decoy that could bear on apparent age in order to determine whether, at the time of the transaction, the decoy would have appeared to be under the age of 21.

Rule 141(b)(2) is not the best drafted rule of the Department, and is, no doubt, difficult in application. Yet, we do not believe it was intended to handcuff an ALJ charged with the task of determining whether the decoy who appeared before him could reasonably have displayed to the seller of alcoholic beverages the appearance of a

person under 21 years of age. He necessarily must rely in large part on the appearance of the decoy as the decoy presents himself at the hearing, and the assumption, in the absence of evidence to the contrary, that he would probably have similarly appeared only a few months earlier.

It is clear from the ALJ's findings that he considered the decoy's age, his physical size and appearance, his relationship with the LAPD, his manner of speech and dress, as well as aspects of the decoy's appearance that might not lend themselves to articulation but which would contribute to the overall impression conveyed to the observer at the time of the transaction. We are satisfied that he applied Rule 141(b)(2) correctly.

II

Appellants argue that the face to face identification required by Rule 141(b)(5) was flawed because it was conducted in a way that did not reasonably inform the clerk he was being accused as a seller of alcoholic beverages. The clerk testified that he was busy caring for customers when the decoy supposedly pointed him out as the seller, and was looking out at the parking lot when the photograph (Exhibit 3) of the decoy in the act of pointing to him was taken. They assert:

> The only logical conclusion is that Mr. Herrera engaged in a face-to-face identification in some brief, surreptitious and robotic fashion that did not create the nature, style or required some communication as enunciated by this Board in *Chun*. ... A quick pass at a face-to-face identification at a time when the clerk was not in a position to know and understand that he was being identified is not strict compliance with the rule.

(App.Br., page 8.)

In *Chun* (1999) AB-7287, the Board said:

> The phrase "face-to-face identification" 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.

In this case, the decoy identified the clerk from a distance of two or three feet away. The clerk had just been informed he had sold an alcoholic beverage to a minor. Even if he was attending to other customers, we find it difficult to believe he was sufficiently ignorant of the fact that he had been made an object of attention to be unaware of the decoy two or three feet from him, pointing to him and identifying him as the seller. Moreover, when he and the decoy were photographed, he should reasonably have known that he had been accused as the seller. The facts surrounding the identification process and the taking of the photograph convince us that the standard in *Chun, supra,* was met.

III

Appellants contend that there is no evidentiary support for the finding that they had been disciplined "effective December 15, 1999,"[2] The decision states that, "[i]n assessing the discipline hereinafter ordered consideration has been given to the year 1999 discipline referenced in Finding 2."

Appellants are correct that there is no reference in the record to a prior discipline "effective December 15, 1999." That part of Finding 2 is clearly erroneous.

However, there is in the record convincing proof that appellants had been disciplined for a sale-to-minor violation. Exhibit 2 is a bulk exhibit consisting of the following separate documents, together with a cover sheet certifying their authenticity as documents on file and record in the Sacramento Headquarters Office of the

[2] Factual Finding 2.

Department:

a. Order Granting Offer in Compromise, dated November 1, 2001.
b. Decision, dated September 20, 2001.
c. Stipulation and Waiver, dated August 28, 2001.
d. Order Staying Suspension, dated September 4, 2001.
e. Notice, dated August 8, 2001.
f. Decision of Appeals Board in AB-7666, dated July 31, 2001.
g. Certificate of Decision, dated June 29, 2000.
h. Proposed decision, dated June 8, 2000.

These documents evidence a Department decision finding a sale-to-minor violation, a decision of the Appeals Board affirming that decision, and the resolution of the matter by way of payment in offer of compromise.

Factual Finding 2 is in error only with respect to the date it ascribes to the prior violation. We do not believe this discrepancy is of such magnitude as to vitiate the substance of the finding, which is amply supported by evidence in the record.

Had the foregoing documentation revealed that the previous violation occurred on some earlier date than 1999, it could have raised a different question, i.e., whether the violation was sufficiently current as to warrant its use as a penalty enhancement. However, since the previous violation is close in time to the violation involved in the present appeal, the issue becomes moot.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[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.