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

AB-8082
File: 20-280092 Reg: 02052348

7-ELEVEN, INC., SURESH C. JAIN, and USHA JAIN, dba 7-Eleven # 2173-20580
5962 West Pico Boulevard, Los Angeles, CA 90035,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: December 2, 2003
Los Angeles, CA

ISSUED JANUARY 22, 2004

7-Eleven, Inc., Suresh C. Jain, and Usha Jain, doing business as 7-Eleven # 2173-20580 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Suresh C. Jain, and Usha Jain, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department pursuant to Government Code section 11517, subdivision (c), dated January 28, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 3, 1993. Thereafter, the Department instituted an accusation against appellants charging that, on October 18, 2001, appellants' clerk, Anrik Singh (the clerk), sold an alcoholic beverage to 19-year-old Belen Lopez. Although not noted in the accusation, Lopez was working as a minor decoy for the Los Angeles Police Department at the time.

An administrative hearing was held on April 23 and June 13, 2002, at which time documentary evidence was received, and testimony concerning the sale was presented by Lopez (the decoy), by Los Angeles police officers Anthony Pack and Chris Porter, and by the clerk. The manager of the premises, Gurdial S. Khangura, also testified.

Following the hearing, the administrative law judge (ALJ) submitted to the Department a proposed decision, dated June 17, 2002, dismissing the accusation (first proposed decision). On August 8, 2002, the Department issued a notice that it would not adopt the first proposed decision. On December 30, 2002, the Department issued an order under Government Code section 11517, subdivision (c)(2)(E)(iv), directing the ALJ to make additional findings regarding the decoy's appearance. On January 3, 2003, the ALJ submitted a "Proposed Decision After Remand" (second proposed decision) in which he made additional findings regarding the appearance of the decoy and again dismissed the accusation.[2] On January 28, 2003, the Department issued its decision under Government Code section 11517, subdivision (c), sustaining the charge of the accusation and ordering the license suspended for 15 days. In its order, the

[2]The ALJ's first proposed decision (June 17, 2002), the Department's Order Under Government Code Section 11517(c)(2)(E)(iv) (Dec. 30, 2002), and the ALJ's second proposed decision (Jan. 3, 2003) are included in the appendix.

Department stated that the second proposed decision was considered only insofar as the ALJ's additional findings regarding the appearance of the decoy, any other findings and determinations being "void" because they were "made without authority."

Appellants filed a timely appeal in which they contend that Rules 141(a) and 141(b)(2)[3] were violated during the decoy operation, and the ALJ violated their rights to due process under the United States Constitution and the Administrative Procedure Act (Gov. Code, §11400 et seq. (APA)).

DISCUSSION

I

Appellants contend that the decoy operation was not conducted in accordance with rule 141(a), which states that a minor decoy may only be used by law enforcement agencies "in a fashion that promotes fairness." They assert that the decoy operation was conducted unfairly because officer Pack "appeared to be accompanying" the decoy when she purchased the alcoholic beverage. Appellants argue that this Board's decision in *Hurtado* (2000) AB-7246, is on point and compels reversal, as does language in *KV Mart* (2000) AB-7459.

Officer Pack testified that he stood about one foot behind the decoy while she purchased the beer, that he had no merchandise in his hand and did not purchase anything, that he did not have any conversation with the decoy or with the clerk while in the store, that he left the store about five seconds after the decoy, and that when he reentered the store, he stood by the door to keep other customers from coming in while the investigation was going on.

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[3]References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

In *Hurtado*, *supra*, a 27-year-old police officer, in plainclothes, entered the premises with a decoy, the two sat down at a table together, and each ordered his own beer. The Board reversed the decision of Department, finding that "the officer's active participation in the decoy operation" was "highly likely to affect how the decoy appeared and to mislead the seller."

The present case is not like *Hurtado*. The clerk had no reasonable basis for believing that the officer and the decoy were together simply because the officer was standing behind the decoy.[4] No conversation or contact occurred between the decoy and the officer, and the officer did not participate in any way in the purchase of the beer. Even if the clerk believed the officer and the decoy were together, he did not say the officer's presence influenced how old he thought the decoy looked.[5] When counsel asked him the basis for his professed belief that the decoy looked more than 25 years old, the clerk said it was because she wore "a lot of makeup" and jewelry [RT 83].

In *KV Mart*, *supra*, the Board said:

> It is conceivable that where an unusual level of patron activity that truly interjects itself into a decoy operation to such an extent that a seller may be legitimately distracted or confused, and the law enforcement officials seek to take advantage of such distraction or confusion, relief might be appropriate.

Appellants' reliance on the last part of this language is misplaced. There was no evidence that the officer took advantage of any distraction or confusion because there was no evidence presented that the seller was distracted or confused.

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[4]The clerk testified that he thought the decoy knew the man standing behind her, but this was after objections were sustained to several leading questions asked by appellants' counsel.

[5]Although the ALJ had the benefit of seeing officer Pack and judging his age, there is nothing in the record to indicate how old the officer was or appeared to be.

We conclude there was no unfairness caused by the officer standing behind the decoy while in line.

II

Rule 141(b)(2) provides that "The decoy shall 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 contend that this rule was violated, as evidenced by the decoy's experience, her wearing of makeup and "fancy jewelry," and her ability to purchase alcoholic beverages in 80 percent of the licensed establishments she visited that night.

The decoy's experience consisted of her participation in the police Explorer program and in eight or nine previous decoy operations. Appellants assert in their brief that "[s]uch depth of experience equipped the decoy with the demeanor and confidence expected of someone over the age of twenty-one (21) years old."

This Board has previously rejected the contention that a decoy's experience necessarily made the decoy appear to be over the age of 21. In *Azzam* (2001) AB-7631, the Board 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.* [Emphasis added to last sentence.]

Appellants argue that "[i]t is well established that makeup enhances ones [sic] appearance, giving the illusion of a mature older look." Even if this broad generalization were true, which it is not, the decoy testified that the only "makeup" she was wearing during the decoy operation was lip gloss.[6] It is absurd for appellants to be arguing that the decoy appeared older to the clerk because she was wearing lip gloss.

Appellants also argue the clerk was reasonable in believing that the decoy was over the age of 21 because the decoy was wearing her mother's "fancy dress watch."

In *7-Eleven, Inc./Thiara* (2001) AB-7717, this Board addressed the limited importance a watch might have in assessing the apparent age of a minor decoy:

> [W]e fail to see how a watch, if the decoy wore one, could have anything more than a minimal impact on any reasonable person's impression of a decoy's age. "Adult-styled" watches are worn by a great many people under 21, including those between 18 and 20 who are, for all purposes other than alcoholic beverage law, adults. . . . ¶ . . . A watch, no matter what kind, is only one item among many that may be considered when judging the apparent age of a person.

We conclude that it would not have been reasonable for the clerk to believe the decoy was over 21 because she was wearing her mother's watch. The clerk, however, did not believe that the decoy was over 21 because of the watch she was wearing. He testified that the decoy "was wearing certain jewelry" [RT 83], which he later described as "some rings on her fingers" [RT 88].

Appellants contend that the facts in the present case are identical to the facts in the appeal of *7-Eleven, Inc./Dianne Corporation* (2002) AB-7835 (*7-Eleven/Dianne*), where the Board reversed the Department decision. In *7-Eleven/Dianne*, the decoy

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[6]The clerk testified that the decoy "had a lot of makeup on her" [RT 83], but the ALJ found that "[s]he wore lip gloss, and no other makeup." (Finding V [second proposed decision]) .

purchased alcoholic beverages in 80 percent of the licensed premises visited, and in none of them was he asked his age or for identification. The precedent[7] set by *7-Eleven/Dianne*, appellants argue, dictates the result in the present appeal.

Appellants overlook some of the pertinent facts in *7-Eleven/Dianne*, chief among them being the lack of similarity between the decoy's appearance at the time of the sale and at the hearing. The ALJ in *7-Eleven/Dianne* made "an implicit finding that, at the hearing, the decoy, who was still just 19 years old, clearly had the appearance of a person over 21 years of age," but, using photographs of the decoy taken just before the decoy operation as "the best evidence of how he appeared that day," found that the decoy's appearance at the time of the sale was that of a person under the age of 21. The Board reasoned that:

> the ALJ based his finding that the decoy appeared to be under 21 at the time of the sale on photographs of the decoy and on the decoy's mannerisms and demeanor at the hearing. He did so even though the physical and non-physical appearance of the decoy at the hearing was not comparable to his physical and non-physical appearance at the time of the sale. We cannot say that this finding has a reasonable basis.

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[7]Determination of Issues IV in the Department's decision states, in part:

> Pursuant to Government Code §11425.60(a) "[a] decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency." There is no evidence that the Department of Alcoholic Beverage Control adopted *Dianne* as a precedent decision. Thus, *Dianne* is not a precedent decision.

We are not sure what this means. Since *7-Eleven/Dianne* is a decision of the Appeals Board, it does not appear that the Department has the authority to adopt it or reject it as a precedent decision. The designation of a decision as precedent is made by the agency that issues the decision, not by the agency that is a party to the action being decided.

If the Department meant that the Appeals Board failed to adopt *7-Eleven/Dianne* as a precedent decision, the statement is still enigmatic, since the Appeals Board is not subject to chapter 4.5 of the APA, in which section 11425.60 is found.

In *7-Eleven/Dianne*, the Board reversed the Department's decision based on "[t]he highly suggestive 'success rate' of this decoy *and* the unreliable basis used to find the decoy's apparent age." (Italics added.) In the present case, the ALJ specifically found that the decoy's appearance at the hearing was similar to her appearance at the time of the sale, and that her appearance was that which could generally be expected of a person under 21 years of age.

The Board said in *7-Eleven/Dianne* that the high purchase rate was a "strong indication" that the decoy's appearance at the time of the sale did not comply with rule 141(b)(2), and that the ALJ's finding that it did comply was undermined by the "apparent contrary belief" of 80 percent of the clerks who saw the decoy in person that night. Neither of these statements, particularly when read in the context of the entire opinion, indicates that the Board intended a per se rule of noncompliance with rule 141(b)(2) when a decoy is able to purchase alcoholic beverages, without being asked for his or her age or identification, at 80 percent or more of the premises visited. Although an 80 percent purchase rate during a decoy operation raises questions in reasonable minds as to the fairness of the decoy operation, that by itself is not enough to show that rule 141(a) or rule 141(b)(2) were violated. Such a per se rule would be inappropriate, since the sales could be attributable to a number of reasons other than a belief that the decoy appeared to be over the age of 21. If we did not make that clear in *7-Eleven/Dianne*, we do so now.

The 80 percent purchase rate in the present case does raise the question of whether the decoy complied with rule 141(b)(2). The ALJ, however, answered that question in his findings regarding the decoy's appearance. Nothing in those findings leads us to question the ALJ's conclusion that the decoy complied with the rule. We

extend our usual deference to the judgment of the ALJ in making the finding as to apparent age, since the ALJ had the opportunity, which this Board does not, of observing the decoy in person.

III

During the hearing, appellants wanted to present the testimony of another clerk, from a different premises, regarding that clerk's perception of the decoy's apparent age. Appellants contend that their defense was prejudiced and their right to due process was violated by the ALJ's refusal to allow them to call the other clerk for that purpose.

Appellants rely on their right to a "fair, trial-like hearing" under the due process clause of the federal Constitution and their right to call, examine, and fully cross-examine witnesses on any relevant matter, as provided by Government Code section 11513. They also rely on this Board's decision in *The Southland Corporation/Rogers* (2000) AB-7030a. In that case the Board held that appellants were entitled to discover the names of other licensees whose clerks sold to the same decoy during the same decoy operation.

Appellants rely on the following language found in *The Southland Corporation/Rogers*:

> [Appellants] argue that other clerks who sold to that decoy will be able to offer relevant and admissible evidence of such things as the decoy's physical appearance, mannerisms, demeanor, manner of dress, . . . as well as other circumstances of the decoy operation, such as timing and sequence, which would assist in their efforts to effect a full and fair cross-examination.
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> We find appellants' arguments persuasive up to a point. In certain situations we can see some potential value to appellants in the experience of other sellers with the same decoy. The relevance of these experiences, however, sharply dissipates as they become more removed in time from the transaction in question.

Appellants argue that the purpose of questioning the other clerk "was to establish whether the decoy did in fact have an objective apparent age of twenty one [sic] years of age or more," and that, by prohibiting the questioning, the ALJ "rendered futile" the Board's decision in *The Southland Corporation/Rogers*.

The Board addressed, and rejected, the same argument recently in *Equilon Enterprises, LLC* (2003) AB-8022. In that appeal, the Board discussed the same language from *The Southland Corporation/Rogers*, *supra*, that appellants have quoted in the present case and said:

> [T]he Board [in *The Southland Corporation/Rogers*] was not focusing on a licensee's right to present opinion evidence of appearance, as appellant now argues. Instead, as the language of the decision preceding that quoted by appellant illustrates, the Board was moved primarily by the argument that other current sellers might assist in testing the credibility of decoy witnesses. . . .
>
> [¶] . . . [¶]
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> It is clear that the Board was attempting to assist appellants in gaining factual information about the decoy which might expose mistakes or weaknesses in the decoy's testimony, and certainly did not intend to invite an opinion survey of the decoy's apparent age. As we have said so many times, the issue of the decoy's appearance under Rule 141(b)(2) is a question for the trier of fact.
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> [¶] . . . [¶]
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> It is one thing to invite seller testimony as to what a decoy said or did, in order to contradict or impeach that decoy. It is quite another to offer opinion evidence from a seller intended to justify his or her having sold to the decoy; that is exculpatory, and has little bearing on the issue of a decoy's credibility.

The opinion of the other clerk as to her perception of the decoy's apparent age is simply not relevant. As the ALJ pointed out [RT 42], after the clerk testified that she thought the decoy was over 21, the Department could call the officer to testify that he thought the decoy did not look as if she were over the age of 21. This battle of opinions

could go on indefinitely, but it would not address the real issue that the ALJ must decide: did the decoy display the appearance generally expected of a person under the age of 21 under the actual circumstances presented to the seller?

Even if some of the clerks who saw her mistakenly believed the decoy to be older than she actually was, that does not mean that rule 141(b)(2) was violated if, in fact, the decoy's appearance is that which *could* generally be expected of a person under 21 years of age. As the Appeals Board has said before, "it is not the belief of the clerk that is controlling, it is the ALJ's reasonable determination of the decoy's apparent age based upon the evidence and his observation of the decoy at the hearing." (*7-Eleven, Inc. / Paul* (2002) AB-7791; see also *7-Eleven, Inc./Ryberg* (2002) AB-7847.) In *7-Eleven, Inc. / Grewal* (2001) AB-7602, the Board explained that rule 141(b)(2),

> 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 a person under 21 years of age.

The Board expressed the same idea in footnote 2 of *Prestige Stations, Inc.* (2000) AB-7248:

> The decoy must only present an appearance which could generally be expected of a person under the age of 21 years. If the clerk, observing a decoy who presents such appearance generally, perceives the decoy to be older than 21, he does so at his peril. A licensee cannot escape liability by employing clerks unable to make a reasonable judgment as to a buyer's age.

We conclude that the ALJ properly refused to allow testimony from the other clerk regarding her opinion of the decoy's age.

ORDER

The decision of the Department is affirmed.[8]

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

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