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

AB-8211
File: 20-214253 Reg: 03054924

7-ELEVEN, INC., BONNY A. CUMMINGS, and PATRICK C. CUMMINGS
dba 7-Eleven #2237-25585
1170 N. Clovis Avenue, Clovis, CA 93612,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

Appeals Board Hearing: October 7, 2004
San Francisco, CA

ISSUED DECEMBER 8, 2004

7-Eleven, Inc., Bonny A. Cummings, and Patrick C. Cummings, doing business as 7-Eleven #2237-25585 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Ramie Rachelle Barnes, having sold a six-pack of Budweiser beer to Chad D. Watkins, an 18-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Bonny A. Cummings, and Patrick C. Cummings, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

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[1] The decision of the Department, dated November 13, 2003, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. The Department instituted an accusation against appellants on April 28, 2003, charging the unlawful sale of an alcoholic beverage to a minor. An administrative hearing was held on September 26, 2003. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and ordered the suspension from which this timely appeal has been taken.

Appellants raise the following issues: (1) there was no finding of compliance with Rule 141(b)(2); and (2) the penalty was imposed pursuant to an illegal underground regulation.

DISCUSSION

I

Appellants contend that the decision must be reversed because there was no finding of compliance with Rule 141(b)(2).

The only reference in the decision to the decoy's appearance is in Finding 4:

> During the decoy operation on December 21, 2002, and when testifying at the administrative hearing on September 26, 2003, the decoy's physical appearance and demeanor were that of a person of not more than 19 years of age.

During the course of the hearing, the following colloquy occurred [at RT 13-14] when an issue arose regarding the admissibility of a photograph of the decoy that had not been produced during discovery:

> THE COURT: Is this photograph pivotal to this case?
>
> MR. LUEDERS: From the current state of the appeals board, I have no idea what would be pivotal to this case, your honor.
>
> THE COURT: I don't think that 8206.dec
it is. He has described his appearance. You can talk to him. You can question him

some more about his appearance as he sits here before me, if it differs at all from the way he looked on the day in question. If I felt it were pivotal, I would offer counsel for respondent a continuance to deal with this discovery problem, which is how I usually handle such matters. I don't think it is pivotal to the case, but I would like to know more about how his appearance – today, for the record, I will make a finding on.

> He appears to be a young man certainly no older than 19, based on the way he appears to me today. So if you want to inquire how his appearance differs at all from how it did on the day in question, you may do so.
>
> MR. EVANS: Your Honor, may I make an inquiry of you at this time since you made a finding on the record?
>
> THE COURT: Yes, sure.
>
> MR. EVANS: Are you making a finding then of compliance with 141B2, based on your finding just a minute ago of his appearance?
>
> THE COURT: At this moment, as he sits here before me, he appears to be no older than 19.
>
> ...
>
> It was limited to that. I don't know how he looked on the day in question.

Other than a few additional questions on direct examination about the decoy's appearance, the balance of the hearing dealt with what a surveillance video showed about the decoy's face to face identification of the clerk. Appellants' counsel was attempting to demonstrate the clerk's lack of awareness that she was being identified. At the close of the hearing, appellants' counsel argued there had been no compliance with Rule 141(b)(5). The administrative law judge (ALJ) ultimately concluded that the clerk had acknowledged the identification by responding "Oh, yeh, I sold it to him." Appellants have not raised this issue in their appeal.

Nor did appellants' counsel address the issue of the decoy's appearance and Rule 141(b)(2) in his closing argument. It is not surprising, therefore, that the ALJ's finding with respect to the decoy's appearance was abbreviated. Under the

circumstances, however, we think it would be unfair to criticize the ALJ for not fully anticipating an argument that for all practical purposes appeared to have been abandoned.

We are aware that, several months prior to the hearing, appellants filed a document entitled Special Notice of Defense, setting forth 19 claimed grounds of defense, one of which (number 8) asserted that there had been no compliance with any of the itemized requirements of Rule 141 there set forth. We find no reference to this document or any claim regarding Rule 141(b)(2) anywhere in the transcript other than in the material quoted at the bottom of page 3 and the top of page 4 of this decision. We do not think appellants reserved this issue for their appeal. (See 9 Witkin, Cal.Procedure (4th ed. 1997) Appeal, §394, p.444; 7-*Eleven, Inc./Twomey* (2003) AB-8030.)

II

Appellant contends that the 15-day suspension was imposed pursuant to an illegal underground regulation, one never adopted as a rule pursuant to the Administrative Procedure Act.

Appellants did not raise this issue at the hearing. However, they argue that the Board's holding in *Vicary* (2003) AB-7606a, should control. *Vicary* was decided on November 12, 2003, one day before the Department certified the decision in this case. In effect, appellants ask the Board to give the decision in *Vicary* application to cases heard before it was decided, even where the issue had not been raised.[2]

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[2] We again note that in their "boilerplate" Special Notice of Defense," appellants predicted that the penalty would by tainted by its association with the Department's penalty guidelines. Without raising the issue at the hearing, it has not been preserved. (See authorities cited in part I, *supra*.)

There was no reference at the hearing to any policy, guideline or rule with respect to penalty. Counsel for the Department argued for a 15-day suspension, and counsel for appellants was silent on the issue of penalty.

Nor does the decision explain how the ALJ arrived at 15 days as "reasonable and appropriate." However, his use of the phrase "reasonable and appropriate" suggests that the penalty was adapted to the specific facts of the case rather than derived from any rigid schedule of penalties.[3]

ORDER

The decision of the Department is affirmed.[4]

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

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[3] The Department's brief mistakenly identifies the penalty imposed by the ALJ as revocation. The penalty we affirm is a 15-day suspension.

[4] 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.