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

AB-8533
File: 20-261314 Reg: 05060603

7-ELEVEN, INC. and USMAN AZIZ dba 7-Eleven Store #2171-29172
73740 29 Palms Highway, 29 Palms, CA 92277,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: May 3, 2007
Los Angeles, CA

ISSUED SEPTEMBER 19, 2007

7-Eleven, Inc., and Usman Aziz, doing business as 7-Eleven Store #2171-29172 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, all of which were conditionally stayed, subject to one year of discipline-free operation, for their clerk, Samantha Jo Seeber, having sold a 24-ounce can of Budweiser beer to Christopher W. Ballinger, a 17-year-old Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Usman Aziz, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

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[1]The decision of the Department, dated February 23, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 20, 1991. Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on August 12, 2005.

An administrative hearing was held on December 15, 2005, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established and no affirmative defense had been shown.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the APA prohibition against ex parte communications was violated; (2) appellants were denied proper discovery; and (3) Rules 141(a)[2] and 141(b)(4)[3] were violated.

DISCUSSION

Because we believe there was a violation of Rule 141 in this case which requires reversal, we confine our remarks to that issue.

The testimony established that when the decoy brought to the counter the beer he had removed from the cooler, the clerk asked him if he was born in 1984. Instead of a spoken response, the decoy shook his head from side to side. The clerk then looked side to side, put the can of beer into a bag, and made the sale. Appellants contend that the failure of the decoy to provide a spoken response to the clerk's question violated

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[2] Rule 141(a) (4 Cal. Code Regs., §141, subd. (a)) provides, in pertinent part: "A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages ... in a fashion that promotes fairness."

[3] Rule 141(b)(4) (4 Cal. Code Regs., §141, subd. (b)(4) provides: "A decoy shall answer truthfully any questions about his or her age."

the requirement of Department Rule 141(a) that the decoy operation be conducted in a manner which promotes fairness, as well as the requirement of Rule 141(b)(4) that a decoy shall answer truthfully any question about his or her age.

The Department contends that the ALJ ruled correctly that Rule 141(b)(4) does not require a "verbal or out loud" answer to a question about age, and that the decoy intended to make, and by his head movement, in fact made a negative response. Thus, there was compliance with the rule.

It is a close question whether, in the factual context of this case, the decoy's response to the clerk's question was insufficient, and, thus, did not meet the requirement of the rule. Looking at the decoy's testimony on this issue as a whole, and the clerk's reaction, this Board believes there was not compliance with the rule:

Q. (Department counsel): Did the clerk say anything to you?

A. Yes, she did.

Q. What did she say?

A. She asked if I was born in 1984.

Q. Okay. Did you respond?

A. No. I just shook my head side to side, back and forth.

Q. You gave no verbal response?

A. No verbal.

Q. You shook your head side to side, back and forth; is that what you said?

A. Yes, sir.

Q. And what did that indicate?

A. No.

Q. All right. Did the clerk say anything else to you at that time after you shook

your head back and forth, side to side?

A. No, sir.

Q. What if anything, did you [sic] the clerk do?

A. She then looked side to side *and it appeared to me as if she was looking to see if anyone was watching her.*

Ms. Weglarz: Objection. Lacks foundation.

Mr. McCarthy: Well, everything after side to side is stricken. I want you to say what you said at first though, she did what side to side?

A. She looked side to side.

Mr. McCarthy: Looked?

A. Looked as it appeared to me.

Mr. McCarthy: Your impression of what she meant is not to be heard at this point.

[RT 11-12.]

If it could be said with some degree of certainty that the shaking of his head from side to side and back and forth was unambiguous as to what the decoy intended, then the Department's decision was correct. Our concern is that such a response was not, in the overall context, unambiguous, and does not comport with the standard that has been applied in the cases this Board has decided involving the rule.

There is some evidence that the clerk did not understand the decoy intended his response to be the equivalent of "No." Department Investigator Burlingame testified that, when he told the clerk she had sold an alcoholic beverage to a minor, she "said something to the [effect] that she believed he was born or she asked him if he was born

in 84. "She said he said, 'Yes.'"[4]

The Board has, in other cases involving Rule 141(b)(4), addressed issues similar to, although not identical with the issue in this case, and its reasoning as expressed in those decisions lends some guidance to us.

In *Thrifty Payless, Inc*. (1998) AB-7050, the Board reversed a Department decision which rejected a proposed decision finding non-compliance with Rule 141(b)(4) when the decoy, asked if she was 21, simply offered the clerk her driver's license. The Department deemed the offer a "truthful answer" within the meaning of the rule. The Board described the response, "illuminated by her hearing testimony," as "borderline misleading." "[Her] explanation for her non-responsive offer of her driver's license suggests that her objective was not to test whether the clerk would sell to a minor, but, instead, actually to make a purchase of an alcoholic beverage."

> The offer of a driver's license instead of an answer to the question which was asked had the potential of creating a distraction. The clerk could well have thought, as appellant contends, that she was being told, in substance, "of course I'm old enough to purchase liquor; go ahead and check my identification. By analogy, a person attempting to cash a check who tenders a driver's license which would show he is not the payee must believe he will fool the merchant to whom the check is presented. Not that he or she will necessarily succeed, but certainly the possibility of confusion or distraction has been created.
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> The experienced ALJ saw this as a case of first impression, and we do also. For that reason, and because of the views we have expressed in the text preceding, we invite the Department to reassess its approach to what will satisfy the Rule's requirement regarding what is a truthful answer. In this case, we think the decoy's response fell short, invited confusion, and led to unfairness.

(*Thrifty Payless, Inc., supra*.)

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[4] Despite Burlingame's testimony, the ALJ found "no direct evidence in the record as to what the clerk saw or thought since she was not presented as a witness." He dismissed the investigator's testimony of the exchange he had with the clerk - that she thought the decoy said. "Yes," - by stating "the sense of the exchange is lost in the translation."

In *Bhanot & Shukla* (1999) AB-6993, decided in January 1999, the ALJ found more credible a police officer's testimony that he heard the decoy answer "No" to a question whether he was 21, than the testimony of the seller that the decoy had failed to answer when asked. The Board affirmed, based on the ALJ's findings, but, in dicta, ventured that were the facts of the case as appellants cast them, it would agree with their contention that a failure to answer a question about age would entitle them to a defense just as much as an affirmatively false answer would.

In *The Southland Corp./Dandona* (1999) AB-7099, decided in April 1999, the Board reversed a decision of the Department where the decoy did not respond to the clerk's remark "1978. You're 21." The decoy testified she understood the clerk's remark to be a statement rather than a question, but also testified that she had been instructed by the police that if she presented her driver's license, she did not have to answer a question about her age. The Board stated:

> It is clear from the testimony of the decoy that it would have meant little to her whether [the clerk's] remark was a question or a statement. ... Consequently, to accept her after-the-fact characterization of the clerk's remark as a mere statement is too charitable. There can be a very fine line between a remark that is a mere statement and a remark that is really a question. Delegating that determination to one who believed she should not have answered in either case tacitly ignores the requirement of fairness.

In *Lucky Stores, Inc.* (1999) AB-7227, decided in October of the same year, the Board reversed a decision of the Department where the decoy made no response when the clerk said "1978. You are just 21" (per the decoy) or "1978. You are 21" (per the clerk). The clerk testified he intended what he said to be a question, and got only a grin in response, while the decoy testified he understood it to be a statement, to which no reply was necessary. The Board stated:

> Our concern is that it is asking too much of a decoy to leave it to him or to

her to make that critical judgment whether a remark about age is intended to elicit from them either a confirmation or a correction, or is simply conversation. If fairness of the decoy operation is an important goal, as the Rule proclaims, then, in its implementation, it ought to be the case that where the clerk's remark about age is such that an honest clarification from the decoy may prevent a sale from occurring, the decoy has the obligation to offer such clarification by saying "No, I am not 21," or words to that effect.

In *Equilon Enterprises, LLC* (2002) AB-7845, the Board again reversed a decision of the Department where the decoy remained silent after the clerk examined the decoy's driver's license, which showed he would be 21 in 2003, and said "Born in 1981. You check out okay."

The Board explained why it thought the decision must be reversed:

> Rule 141 requires that a decoy shall answer truthfully questions about his or her age. There is nothing in the rule that requires a decoy to volunteer information about his or her age, or to clear up what may be a misconception about age where a seller is silent and simply goes ahead with the sale either without having requested proof of age or, upon request, having been provided identification. Since a decoy is engaged in a law enforcement process to determine the extent to which sellers are complying with the law regarding sales of alcoholic beverages to minors, it would seem unreasonable to expect that process to function if the decoy was obligated to clear up what might be a mistake or misconception on the part of the seller.
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> For example, many transactions involve a seller who requested identification, was furnished identification which showed the decoy to be a minor, yet proceeded with the sale. It could reasonably be assumed the seller was careless, or unable to interpret the information provided. It might also be assumed the seller really did not care, although this is undoubtedly much less frequent.
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> However, where there has been a verbalization of the seller's thought processes such as that in this case, a decoy may be expected to respond. Rule 141 says that a decoy is required to respond to a question. As the Board has said in an earlier case, there may be a thin line between what is a statement and what is a question. And when that line blurs, and the verbalization borders on the ambiguous, it may well be that a response is required.

The Board then quoted the same passage from its decision in *Lucky Stores, Inc., supra*, that we have quoted earlier at pages 7-8.

It is apparent from our discussion of these cases that the Board considers an appropriate response to a statement or question by a clerk one which is free of ambiguity, and unlikely to cause confusion or distraction. An unspoken response which leads a clerk to guess at what the decoy intended to say is not in the spirit of the rule and will not suffice.

We are satisfied that the result we reach here will not only yield justice in this case, but at the same time assist the Department and law enforcement generally in the conduct decoy operations, fairly and within the spirit and intent of Rule 141.

ORDER

The decision of the Department is reversed.[5]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMEBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5] 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.