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

AB-8817
File: 20-190151 Reg: 07066643

CIRCLE K STORES, INC., dba Circle K Store # 1942
31701 Riverside Drive, Lake Elsinore, CA 92530,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: February 3, 2011
Los Angeles, CA

ISSUED APRIL 1, 2011

Circle K Stores, Inc., doing business as Circle K Store # 1942 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days, all conditionally stayed, for its 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 appellant Circle K Stores, Inc., appearing through its counsel, Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

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[1]The decision of the Department, dated January 23, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 8, 1986. On August 13, 2007, the Department filed an accusation charging that appellant's clerk, Jovanna Cobos (the clerk), sold an alcoholic beverage to 18-year-old Vanessa Tepezano on July 12, 2007. Although not noted in the accusation, Tepezano was working as a minor decoy for the Riverside County Sheriff's Department at the time.

At the administrative hearing held on December 4, 2007, documentary evidence was received, and testimony concerning the sale was presented by Tepezano (the decoy) and by Kenneth Lantz, a Riverside County Sheriff's officer.

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

Appellant filed an appeal contending: (1) The administrative law judge (ALJ) erroneously precluded the introduction of evidence showing the Department's use of prohibited underground regulations; (2) the decoy operation violated rule 141(a);[2] (3) the decoy's appearance did not comply with the requirement of rule 141(b)(2); (4) the face-to-face identification violated rule 141(b)(5); and (6) the penalty imposed was excessive.

DISCUSSION

I

Appellant contends the Department based its penalty on a prohibited underground regulation, but that it was precluded from presenting evidence on this point when the ALJ erroneously granted the Department's motion to quash a subpoena appellant served on the local Department District Administrator.

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[2]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.

The Board has addressed and rejected this argument before. (See, *e.g.*, *Yummy Foods LLC* (2010) AB-8950; *Randhawa* (2010) AB-8973; *Chevron Stations, Inc*. (2010) AB-8974; *7-Eleven, Inc./ Wong* (2010) AB-8991; *7-Eleven, Inc./ Solanki* (2010) AB-9019.) Even if the District Administrator testified as the offer of proof said she would, that testimony would not establish that an underground regulation existed. We reject this argument as we have done before.

II

Appellant contends that the decoy operation was not conducted "in a fashion that promotes fairness" as required by rule 141(a) because the store was busy at the time, which would put a clerk "at a severe disadvantage." (App. Opening Br. at p. 17.)

The decoy testified that several people, perhaps as many as ten, were in the store when she entered it. Two of those people were store employees. The officer mentioned, in response to a question about the face-to-face identification following the sale, that it was "kind of busy in there." [RT 35.]

The officer also testified that, when the clerk was informed that she had sold alcohol to a minor, she said that it was busy in the store and she did not check the decoy's identification. [RT 34.][3] The clerk did not testify at the hearing.

Appellant did not raise this as an issue at the hearing, so the Board may consider the contention as waived. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §400, p. 458.) Even if the Board were to consider the issue, appellant has not provided any legal or factual argument that supports its contention. The clerk did not testify, so we cannot know if she considered herself at a "severe disadvantage." From

[3]Appellant did not mention in its brief the clerk's statement to the officer.

her statement to the officer, it appears she simply decided it was more important to have the check-out line move quickly than it was to prevent sales of alcoholic beverages to minors.

III

Appellant contends that the decoy did not present the appearance generally to be expected of a person under the age of 21, in violation of rule 141(b)(2), because her experience as a police Explorer "provided her with the confidence and demeanor uncommon for persons her age." (App. Opening Br. at p. 16.)

The ALJ addressed the decoy's appearance in paragraphs 5 and 9 of the Findings of Fact:

> 5. Tepezano appeared and testified at the hearing. She stood about 5 feet 2 inches tall and weighed approximately 108 pounds. Her hair was straight and below her shoulders. At the hearing her hair had some blond highlights. On the day of the operation her hair was brown without any highlights. When she visited Respondent's store on July 12, 2007, Tepezano wore capri blue jean pants, a pink top and white tennis shoes. (See Exhibits 2 and 3). She was not wearing any make up or jewelry. Tepezano's height and weight have remained the [*sic*] about the same since the date of the operation. Tepezano was wearing pink colored braces on her teeth when she visited Respondent's store. At Respondents' [*sic*] Licensed Premises on the date of the decoy operation, Tepezano looked substantially the same as she did at the hearing.
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> 9. Decoy Tepezano appears her age, 18 years of age at the time of the decoy operation. Based on her overall appearance, *i.e*., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance/conduct in front of Clerk Cobos at the Licensed Premises on July 12, 2007, Tepezano displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to Cobos. Tepezano appeared her true age.

Where the ALJ, who observed the decoy at the hearing, finds that the decoy's appearance complied with rule 141(b)(2), the Board will not second-guess that factual determination unless the appellant has provided a compelling reason to do so.

Appellant asserts in its brief that "[i]t should be obvious" the decoy's experience made her appear to be over the age of 21. This is not a compelling reason to question the ALJ's determination. The Board said in *Azzam* (2001) AB-7631:

> 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.

The ALJ found the decoy appeared her true age – 18 years old. He obviously did not find the decoy's experience caused her to appear to be over the age of 21. The Board has no reason to look beyond the ALJ's finding.

IV

Appellant contends that the face-to-face identification of the seller by the decoy did not comply with rule 141(b)(5). Appellant has presented any argument to support this contention beyond its assertion that "a face to face identification where two clerks only standing a few feet apart and both at the registers assisting customers does not follow the requirements set out by the Rule."

The Board is not required to search the record to find support for an appellant's contentions or to develop an appellant's legal arguments. (See *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546 [35 Cal.Rptr.2d 574].) "When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary." (*Landry v.*

Berryessa Union School Dist. (1995) 39 Cal.App.4th 691, 699-700 [46 Cal.Rptr.2d 119].) Appellant bears the burden of proving that rule 141 was violated, and its bare assertion does not meet this burden. Because appellant provided no citation to the record and no legal argument, the Board considers this issue waived.

V

Appellant contends that the penalty is excessive and the Department committed reversible error by failing to consider all the evidence of mitigation that was presented. Specifically, appellant asserts that the Department "mentions but completely ignores the entirety of this mitigating evidence [of a discipline-free record for 24 years] in its Proposed Decision." (App. Opening Br. at p. 17.)

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. “If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion.” (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

The ALJ included a section headed "Penalty" on the last page of the proposed decision, just before the Order:

> 1. The Department recommends that this license be suspended for a period of ten days with all ten days stayed for a period of one year.

2. Respondent's counsel notes that Respondent has been licensed for about 21 years and [has] been discipline free for that entire time. Counsel suggests such a history is worthy of a lesser penalty if the accusation is sustained.

3. The penalty recommended here takes into account Rule 144 and Respondent's 21 years of discipline free licensure.

The Order imposes the penalty recommended by the Department at the hearing: a 10-day penalty with all 10 days conditionally stayed.

It appears that appellant's complaint is that the decision states the number of discipline-free years to be 21 years instead of 24 years, as appellant asserts. This does not amount to an abuse of discretion by the Department. The penalty imposed is not clearly unreasonable and the Board has no authority in such a case to interfere with the Department's exercise of its discretion.

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
MICHAEL A. PROSIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]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.