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

AB-9086
File: 20-395537 Reg: 09070379

7-ELEVEN, INC. and SIRISUT CORPORATION, dba 7-Eleven #2174
225 Orange Avenue, Long Beach, CA 90802,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew Ainley

Appeals Board Hearing: June 2, 2011
Los Angeles, CA

ISSUED JULY 19, 2011

7-Eleven, Inc. and Sirisut Corporation, doing business as 7-Eleven #2174 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 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. and Sirisut Corporation, appearing through their counsel, Ralph Barat Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated December 23, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 21, 2003. On January 26, 2009, the Department filed an accusation against appellants charging that, on November 30, 2008, appellants' clerk, Suwannee Sirisomboonwong (the clerk), sold an alcoholic beverage to 17-year-old Jacob Lyons. Although not noted in the accusation, Lyons was working as a minor decoy for the Long Beach Police Department at the time.

At the administrative hearing held on August 11, 2009, and October 30, 2009, documentary evidence was received and testimony concerning the sale was presented by Lyons (the decoy) and by Tim Van Coutren, a detective with the Long Beach Police Department.

The Department's decision determined that the violation charged was proven and no defense to the charge was established.

Appellants then filed an appeal contending: (1) The decoy's appearance did not comply with rule 141(b)(2)[2]; and (2) the decoy operation did not comply with the fairness requirement of rule 141(a).

DISCUSSION

I

Appellants contend that the decoy did not display the appearance required by Rule 141(b)(2) which dictates: "[t]he 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

[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.

offense."

In his Findings of Fact 9, the administrative law judge (ALJ) stated:

> Lyons appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of Sirisomboonwong at the Licensed Premises on November 20, 2008, Lyons displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Sirisomboonwong.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that he possessed 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.

We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that he did not.

The fact that this decoy had seven months' experience as an Explorer with Long Beach Search and Rescue, and had volunteered as a decoy one time prior to November 20, 2008, does not convince us that *this* decoy's appearance failed to comport with the requirements of rule 141. As we 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.

We see no evidence that this decoy's experience as an Explorer or as a decoy resulted in him displaying the appearance of a person 21 years old or older.

The rule, 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 that of a person under 21 years of age.

The factual determination of the ALJ is determinative in this case.

II

Appellants contend secondly that the decoy initiated the transaction at a time when he knew the clerk was distracted by conversation with another clerk, in violation of the fairness requirement of rule 141(a).

Rule 141(a) provides, in pertinent part, that law enforcement agencies may only use minor decoys "in a fashion that promotes fairness." Appellants claim the decoy operation was conducted in an unfair manner because the decoy went forward with the operation even though he was aware that the clerk was engaged in a conversation with another clerk, and, as a result, sufficiently distracted as to neglect to ask the decoy for identification.

In *Circle K* (2001) AB-7473, the Board articulated their position on so-called "rush hour" sales:

> The prevention of sales to minors requires a certain level of vigilance on the part of sellers. It is nonsense to believe a minor will

> attempt to buy an alcoholic beverage only when the store is not busy, or that a seller is entitled to be less vigilant simply because the store is busy.
>
> We believe it asks too much to require law enforcement to predict the time of day that, for a particular premises, would fairly be considered "rush hour."
>
> 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. This does not appear to be such a situation.

We have no testimony from the clerk. As far as we can tell from the record, there is no evidence that the police officer or the decoy knew anything was amiss when he approached the counter with his purchase. The ALJ resolved the issue against appellants, summarizing the facts as follows (Finding of Fact 6):

> On November 20, 2008 Det. Tim Van Coutren entered the Licensed Premises. Lyons entered a short time later and went to the cooler. He removed a 24-ounce can of Budweiser beer and went to the counter. He had to wait in line. The clerk, Suwannee Sirisomboonwong, was engaged in conversation with another clerk. Nonetheless, when it was Lyons' turn, Sirisomboonwong scanned the beer and told him the price. He paid her, she gave him some change, and she bagged the beer. Lyons exited the Licensed Premises with the beer. Sirisomboonwong did not ask Lyons how old he was, did not ask to see his identification, and did not inquire as to his date of birth.

And, in Conclusions of Law 5, he added the following:

> With respect to Rule 141(a), Respondents argued that it was unfair foy Lyons to approach Sirisomboonwong while she was distracted by her conversation with another clerk. This argument is also rejected. Since Sirisomboonwong did not testify it is impossible to determine if she was or was not distracted. Moreover, the so-called distraction was entirely self-created - Sirisomboonwong could have stopped the conversation at any time in order to focus on the transaction or could have told customers to wait while she finished the conversation. She did neither. Instead, she tried to do both, selling an alcoholic beverage to a minor in the process.

For us to disagree with the findings and conclusions of the ALJ, we would have to conduct our own review and reweigh the evidence. It is well settled that we do not

have the power to do so. The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings.[3]

There is no dispute that there was a sale to a minor. The ALJ carefully considered the evidence relating to the claim of unfairness in the operation of the decoy operation and found appellants' claims lacked merit. We see no basis for questioning his decision.

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

[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.