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

AB-9162
File: 20-413011 Reg: 10072687

7-ELEVEN, INC. and ROBERT E. HAUSER, dba 7-Eleven # 2171-13968D
5102 La Sierra Avenue, Riverside, CA 92505,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 2, 2012
Los Angeles, CA

ISSUED FEBRUARY 29, 2012

7-Eleven, Inc. and Robert E. Hauser, doing business as 7-Eleven # 2171-13968D (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days, with 5 days stayed conditioned on the license remaining discipline free for a period of one year, 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 Robert E. Hauser, appearing through their counsel, Ralph B. Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

---

[1]The decision of the Department, dated March 16, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 4, 2004. On March 11, 2010, the Department filed an accusation charging that, on December 2, 2009, appellants' clerk, Jodiee Lassiter (the clerk), sold an alcoholic beverage to 16-year-old Trever Strand. Although not noted in the accusation, Strand was working as a minor decoy for the Riverside Police Department at the time.

At the administrative hearing held on January 20, 2011, documentary evidence was received and testimony concerning the sale was presented by Strand (the decoy), by Riverside police officer James Barrette, and by Department investigator Eric Burlingame. Co-licensee Robert Hauser testified on behalf of appellants.

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

Appellants then filed an appeal contending: (1) Rules 141(b)(2), 141(b)(3), and 141(b)(4)[2] were violated and 2) the penalty imposed was based on a prohibited underground regulation.

DISCUSSION

I

Appellants contend that the decoy operation was not conducted in a manner that promoted fairness, in violation of rule 141(a), because the decoy violated the requirements of rule 141(b)(2), 141(b)(3), and 141(b)(4). These rules require, respectively, that the decoy display an appearance that could generally be expected of a person under the age of 21, that the decoy present his or her own valid identification

[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.

upon request to any seller of alcoholic beverages, and that a decoy answer truthfully any questions about his or her age.

Appellants state that rule 141(b)(2) was violated because the decoy was 5'11" tall and weighed 160 pounds, rule 141(b)(3) was violated because the decoy presented his ID even though the clerk did not request it, and rule 141(b)(4) was violated because the decoy's presentation of his ID without request constituted "falsely asserting that he was at least 21 years old." (App. Br. at p. 8.)

The Board need not address these arguments because appellants did not raise and argue them at the administrative hearing. Numerous cases have held that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564,576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

In any case, appellants' arguments are meritless. The administrative law judge (ALJ) determined the 16-year-old decoy's appearance complied with rule 141(b)(2). The decoy's height and weight did not make him appear to be over 21 to the ALJ, and we see no reason to question the ALJ's determination.

We cannot agree with appellants' contention that the decoy falsely asserted he was at least 21 years old, simply because he had his ID in his hand, rather than in his pocket, when he got to the counter. There certainly is no evidence that the clerk made any such assumption when she saw the ID in the decoy's hand.

Similarly, no violation of rule 141(b)(4) arose from the decoy holding his ID in his hand. The clerk did not ask a question about the decoy's age, and the decoy did not give an untruthful answer, both of which are required for a violation of rule 141(b)(4).

Even if the Board were to consider appellants' contentions, they would fail.

II

Appellants contend that the ALJ's suggested penalty, adopted by the Department, was excessive and based on a prohibited underground regulation. The penalty was excessive, they argue, because it disregarded the many years they held the same type of license at the premises while the ex-wife of co-licensee Hauser was a named co-licensee. When her name was removed from the license in 2004, a new license was issued to appellants. The premises' location and management remained unchanged.

Appellants contend that the ALJ determined the penalty without regard to the prior license history, having "created, ad hoc, an additional penalty guideline" (App. Br. at p. 5) as described in paragraphs 4 and 5 of the decision's Penalty Considerations (italics added):

> 4. When the Department issues a license a new license number is assigned. Any mitigating or aggravating factors apply to that license only, not any prior license or additional licenses. If the Department were recommending an aggravated penalty because of a sale to minor that occurred prior to the issuance of this license, under the prior license number, it would not be allowed. These types of things happen frequently in the form of partner changes, self incorporations, etc. Some licensees avoid aggravated penalties because of these changes.
>
> 5. The Department is also entitled to fairness in dealing with these cases. *If the Department cannot aggravate a penalty because of what happened under a different license number, then fairness dictates that Respondents not be permitted to mitigate a penalty because of what happened under a different license number as is being requested here.*

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 use by an agency of an "underground regulation" is prohibited by Government Code section 11340.5, which provides, in pertinent part:

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation . . . .

Section 11342.600 defines "regulation" as "every rule, regulation, order, or standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."

Appellants have presented no evidence that would lead us to believe that the reasoning expressed by the ALJ constitutes an underground regulation. On the contrary, we are convinced that the ALJ did no more than make a quasi-judicial interpretation of the Department's Penalty Guidelines and then applied that interpretation to the particular facts of this case.

There is no indication that this ALJ's interpretation has been adopted as an agency-wide practice set by agency-wide policymakers. (See Gov. Code, § 11342.600 [a rule must be "adopted by [a] state agency" to be a regulation].) This is not a general rule intended to be applied across the board. Indeed, appellants seem to concede as much, describing the ALJ's interpretation as "ad hoc," which means "for a particular purpose only; lacking generality or justification." (Collins English Dict. (10th ed.) <Dictionary.com http://dictionary.reference.com/browse/ad hoc> [Feb. 6, 2011].)

Although we conclude that the ALJ's reasoning in this case did not constitute a prohibited underground regulation, we also conclude that it is not an appropriate standard for this case.

The statement of the ALJ in paragraph 4 of the decision, above, that the Department would not be allowed to aggravate a penalty for violations that occurred under a prior license, is not supported by any evidence that we can find, but appears to be the opinion of the ALJ. When presented with similar questions, the Appeals Board has concluded that, under certain circumstances, violations under a prior license may be considered when imposing discipline for a violation under a current license.

In *Yakow* (2000) AB-7268, a sale-to-minor violation occurred while the appellant and two of his relatives held a prior license of the same type, at the same location. At some point, a new license was issued, the only difference being that the two other family members were removed as licensees. Under the new license, another sale-to-minor violation occurred. The Department treated the new violation as a second sale-to-minor violation. The Board agreed, saying:

> [I]t is our opinion . . . that it was not error to impose an aggravated penalty in the present case. We also believe the Department is entitled to carry over discipline from the prior license under the circumstances present in this case.

> Prior to the transfer of the previous license, appellant, as a member of the partnership which held the license, was equally responsible for the violations which resulted in the accusation and ensuing decision affecting that license. There is no persuasive reason why he should be permitted to escape the consequences of that license history simply by eliminating family members from the license.

In 1993, the appellant in *Hawamdeh* (2000) AB-7393, was disciplined for condition violations, and additional condition violations occurred in 1994. At some time subsequent to the second set of violations, the appellant was allowed to transfer his license to another premises on the other side of the street. The Department then entered an order reimposing the stayed 15-day portion of the penalty ordered in 1993. The appellant argued that the Department lacked jurisdiction to impose a suspension on the current license where the suspension arose from the operation under the previous license. The Appeals Board sustained the order of the Department, saying:

> We are not aware of any rule which dictates that in all circumstances the Department is precluded from continuing a disciplinary order to a newly-issued license, especially where there is no change in the identity of the licensee or the privileges for which the license is issued, and all that is involved is a simple geographical relocation.

More recently, the Board considered the application of mitigating circumstances attributable to a prior license in determining the penalty to be imposed for a violation under a current license. In *The Jug Shop* (2010) AB-8895, the licensee had operated discipline free for more than 27 years, when he was forced to move the licensed premises across the street. A new license was issued in 2006, the only change being the location of the premises. When a violation occurred at the new location, the Department refused to consider the discipline-free years at the previous premises, insisting that it could only consider the license period under the new license. The Appeals Board remanded the matter for reconsideration of the penalty, concluding

that it was an abuse of discretion for the Department to ignore the long discipline-free history under the previous license, where there had been no change other than the move across the street.

It may be that, in some circumstances, mitigating or aggravating factors must apply to only the particular license number involved in a particular case, and such factors that existed under a prior license should be excluded. However, in the present case, it is not only illogical, but patently unfair, to disregard the extensive discipline-free history that occurred under another license number that was exactly the same as the license number that was issued in 2004, save for the name of Hauser's ex-wife.

ORDER

The decision of the Department is affirmed, but the penalty is reversed and the matter is remanded to the Department for reconsideration of the penalty in accordance with the foregoing opinion.

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