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

AB-9342
File: 21-461922 Reg: 12077379

7-ELEVEN, INC. and SAP ENTERPRISES, INC.,
dba 7-Eleven
4045 West Garden Grove Boulevard, Suite D, Orange, CA 92868-4829,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 5, 2013
Los Angeles, CA

ISSUED JANUARY 31, 2014

7-Eleven, Inc. and SAP Enterprises, Inc., doing business as 7-Eleven (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 SAP Enterprises, Inc., appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J. Belvedere.

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[1]The decision of the Department, dated January 25, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on April 16, 2008. On August 20, 2012, the Department filed an accusation against appellants charging that, on August 26, 2011, appellants' clerk, Daniel Cepeda (the clerk), sold an alcoholic beverage to 18-year-old Charlie Ruelas. Although not noted in the accusation, Ruelas was working as a minor decoy for the City of Orange Police Department at the time.

At the administrative hearing held on November 6, 2012, documentary evidence was received and testimony concerning the sale was presented by Ruelas (the decoy); by Michael Murphy, a City of Orange detective; and by Somsak Pattaphongse, corporate secretary of co-licensee SAP Enterprises, Inc.

Testimony established that on the date of the operation, the decoy went to the premises with detectives from the City of Orange Police Department. The decoy entered the premises alone, went straight to the beer coolers, and selected a 24-oz. can of Coors Light Beer. He then proceeded directly to the sales counter and waited in line. When it was his turn to be served, the decoy placed the beer on the counter. The clerk asked the decoy for his date of birth, and the decoy stated “December 6, 1992.” The clerk then asked for identification. The decoy handed the clerk his California driver’s license, which showed his correct birthdate, 12/06/1992, along with a red stripe reading “AGE 21 in 2013.” The clerk took possession of the driver’s license, examined it for a few seconds, then returned it to the decoy without asking any further questions. The clerk took the money tendered by the decoy, returned some change, and bagged the beer. The decoy then exited the premises with the beer.

Detective Murphy entered the premises separately, was inside the premises when the sale took place, and witnessed the transaction. After the sale was complete,

Detective Murphy contacted the clerk and identified himself as a police officer.

Shortly thereafter, the decoy reentered the premises with two other detectives. Detective Murphy asked the decoy to identify the person who had sold him the beer. The decoy pointed to Cepeda and indicated that he was the clerk who had sold him the beer. At the time of the identification, the decoy and the clerk stood in close proximity and were facing each other. After the identification, a photograph was taken and the clerk was cited.

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

Appellants then filed an appeal contending: (1) the ALJ ignored appellants' rule 141(a) and 141(b)(2)[2] arguments; (2) the ALJ improperly interpreted compliance with rule 141(b)(3) as evidence of compliance with rule 141(b)(2); and (3) the face-to-face identification was unduly suggestive.

DISCUSSION

I

Appellants contend that the ALJ disregarded arguments and evidence that they allege establish a defense under rules 141(a) and 141(b)(2).

Rule 141(a) states:

> A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensee, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

Rule 141(b)(2) places restrictions on the decoy's appearance:

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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 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 offense.

This Board is bound by the findings in the Department's decision as long as those findings are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations omitted.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor an appellate court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations omitted.] The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Department of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Appellants argue that "the Administrative Law Judge does not seem to consider all of Appellants' evidence and arguments but, [sic] rather only rests his findings on the boilerplate language." (App.Br. at p. 7.) In particular, appellants assert that the ALJ ignored evidence of the decoy's five o'clock shadow, his experience as a Police Explorer, and the fact that four out of ten premises sold alcohol to him on the date of the operation. (App.Br. at pp. 7-8.) They assert that "the clerk stated to Detective Murphy that the decoy appeared to be over the age of 21."[3] (App.Br. at p. 7.)

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[3]Appellants misstate the record. In reality, Officer Murphy testified as follows:

> Q: Okay. And what statements regarding the violation did the clerk make to you?

(continued...)

Appellants go on to conclude that "[b]ecause the Administrative Law Judge failed to properly consider Appellant's [sic] arguments and evidence which establish that this decoy is in violation of Rules 141(a) and 141(b)(2), this Appeals Board is precluded from properly evaluating the Administrative Law Judge's findings."

In fact, the ALJ discussed appellants' arguments at length:

> C. The overall appearance of the decoy including his demeanor, his poise, his mannerisms, his size and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation.
>
> 1. The decoy is a very youthful looking male who was five feet eight inches in height and who weighed 150 pounds on the day of the sale. On that day, his hair was relatively short, he was clean-shaven and his clothing consisted of blue jeans, a blue T-shirt and blue and white sneakers. The decoy was also wearing a black watch on the day of the sale. The photograph depicted in Exhibit 3 was taken at the premises and this photograph shows how the decoy looked and what he was wearing on the day of the sale.
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> 2. The decoy has not participated in any prior decoy operations. However, he had been a police Explorer for approximately four years. As an Explorer, he had received some training, he participated in police ride-alongs and he had reached the rank of captain. The decoy also testified that he was confident in his role as a decoy and that he was not nervous when he visited the premises.
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> 3. Although the decoy had shaved approximately three hours prior to going to the premises and about three hours before testifying at the hearing, he did display a slight five o'clock shadow in person and in Exhibit 3. Nevertheless, there was nothing remarkable about the decoy's nonphysical appearance and there was nothing about the decoy's speech,

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[3](...continued)

A: He stated that he just — *he thought the person was 21 years old*, so he sold him the beer.

[RT at p. 17, emphasis added.] There is no indication, from this very limited hearsay remark, what precisely — if anything — led the clerk to believe the decoy was over 21. Because the decoy did not testify, the conclusion that his statement was based on the decoy's appearance is mere speculation.

> his mannerisms or his demeanor that made him appear older than his actual age. The decoy was soft spoken and appeared nervous while testifying.
>
> 4. The clerk who sold beer to the decoy did not testify at the hearing.
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> 5. The decoy attempted to purchase an alcoholic beverage at ten locations on August 26, 2011 and he was able to purchase an alcoholic beverage at a total of four locations.
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> 6. After considering the photograph depicted in Exhibit 3, the overall appearance of the decoy when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance that could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

(Findings of Fact ¶¶ II.C.1 through 6.) We note that of these seven paragraphs, only two sentences can be considered even partially boilerplate.

We are satisfied that the ALJ gave appellants' arguments due consideration and found them unpersuasive. Appellants would merely have this Board come to a different conclusion on the same set of facts — something we decline to do.

II

Appellants contend that the ALJ improperly interprets the fact that the decoy supplied his legitimate California driver's license, in compliance with rule 141(b)(3), as evidence that the decoy appeared to be under the age of 21, as required by rule 141(b)(2). Appellants insist that the two rules are separate and distinct, and that compliance with each subsection is required.

While appellants are correct that these subsections are separate and distinct, both are designed to ensure fairness in decoy operations. Rule 141(b)(2), recited above, restricts the decoy's appearance, and requires the ALJ to assess a wide range of factors that could potentially influence the decoy's appearance. Rule 141(b)(3), on

the other hand, restricts the decoy's conduct:

> A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages.

In their brief, appellants argue that

> the Administrative Law Judge places too much emphasize [sic] on the fact that identification was requested and therefore, Rule 141(b)(3) was complied with but, [sic] the Administrative Law Judge fails to consider that Rule 141(b)(2) can still be violated when identification is requested because compliance with Rule 141(b)(2) is separate and distinct from any other subsections of Rule 141.

(App.Br. At pp. 9-10.)

At oral argument, appellants referred this Board to the court of appeals decision, *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126]. That decision addressed a decoy operation in which the Department conceded no face-to-face identification took place, but argued none was necessary because an officer had observed the sale. (*Id.* at p. 578.) On appeal, this Board had issued an opinion agreeing with the Department, noting that there was "only a technical non-compliance with the most rigid and literal interpretation of Rule 141," and holding that "there is no need for the requirement of identification when the peace officer is already within the premises and is an eyewitness to the transaction." (*Acapulco Restaurants, Inc.* (1998) AB-6895, at p. 9.) The court, however, vigorously disagreed and reversed this Board's opinion. It held that:

> The Department's increasing reliance on decoys demands strict adherence to the rules adopted for the protection of the licensees, the public and the decoys themselves. If the rules are inadequate, the Department has the right and the ability to seek changes. It does not have the right to ignore a duly adopted rule.

(*Acapulco*, *supra*, 67 Cal.App.4th at p. 581.)

Appellants are correct insofar as compliance with subdivision (b)(3) does not absolve the Department of its obligations under subdivision (b)(2). However, neither rule 141 nor the *Acapulco* decision precludes a piece of evidence, such as valid identification indicating that the decoy is a minor, from showing compliance with more than one subdivision. Thus, the fact that the decoy provided his valid identification upon request may establish compliance with rule 141, subdivision (b)(3), but the fact that the clerk requested and examined identification bearing an accurate date of birth may also constitute persuasive evidence that the decoy appeared under age 21 under the actual circumstances presented to the clerk at the time of the sale.

Indeed, it would be absurd for this Board to accept appellants' literal parsing of Rule 141 and a few decisions interpreting it — *i.e.*, that even though the minor decoy presented upon request his valid driver's license to appellant's clerk showing him to be under 21 years of age, thereby complying with Rule 141(b)(3), he must also have the appearance of a person under 21 years of age (Rule 141(b)(2)); and, if he does not, appellant is free from discipline because every provision of Rule 141 must be independently satisfied before discipline can be imposed. In other words, appellants would have us rule that tendering (upon request) one's true identification to a seller of alcoholic beverages showing the minor decoy to be underage for the purchase of alcohol will not subject appellant to any discipline if the decoy happens to appear to be over 21 years of age. None of the authorities cited by appellants in their brief or at oral argument support this peculiar limning of Rule 141.

Thrifty Payless, Inc. v. Department of Alcoholic Beverage Control (1998) AB-7050, for example, involved a factual situation materially different from that presented here. There the clerk directly asked the minor decoy her age, which Rule

141(b)(4) requires the decoy to "answer truthfully." (*Id.* at p. 2.) Instead of answering truthfully, however, the minor decoy instead offered to show the clerk her driver's license, which did show her to be under 21. (*Ibid.*) The clerk declined to look at the driver's license, however, and consummated the illegal sale. (*Ibid.*) Under these circumstances, the Board found the requirement of Rule 141(b)(3) that a minor decoy "carry his or her own [correct] identification or . . . no identification" and, if the former, "shall present it *upon request* to any seller of alcoholic beverages" was "separate and distinct" from the requirement of Rule 141(b)(4) that the decoy "answer truthfully" a question about his or her age. (Cal. Code Regs, tit. 4, §§ 141(b)(3) and (b)(4), emphasis added; *Thrifty Payless, Inc.*, *supra*, AB-7050 at p. 3.) The Board explained that though the issue presented in *Thrifty Payless, Inc*. was a close call, "[t]he [decoy's] offer of a driver's license instead of [providing] an [honest] answer to the question which was asked had the potential of creating a distraction," misleading the clerk into believing she was being told, in substance, "of course I'm old enough to purchase liquor; go ahead and check my identification." (*Thrifty Payless, Inc.*, *supra*, AB-7050 at pp. 6-7.)

Neither does *Kyung Ok Chun v. Department of Alcohol Beverage Control* (1999) AB-7287, another decision from which appellant seeks succor, help it in this case. There the Board reversed an order of discipline by the ALJ because (1) there was no substantial evidence supporting the conclusion that an alcoholic beverage was sold to the minor; (2) the police did not conform to rule 141(b)(5) concerning the face-to-face requirement; and (3) the decoy is to convey the appearance generally of a person under 21 years of age. (*Id.* at pp. 2-7.) Specifically, the Board found rule 141(b)(2) was not satisfied because the ALJ "failed to make a finding that the decoy's appearance

conformed to the rule of the Department, but merely pontificated that others may think the decoy older than 19 years, and then added the irrelevant statement [respecting (b)(2)] that a ‘prudent seller would ask for identification,’ mixing fact, conjecture, and defenses.” (*Id*. at p. 6, emphasis added.)

It is elementary that “general expressions in” a judicial or administrative decision which “may seem to countenance [a proposition] must be limited by reference to the facts . . . under consideration.” (*Petaluma Savings Bank v. Superior Court* (1896) 111 Cal. 488, 501 [44 P. 177].) A legal proposition that is stated in broader terms than called for by the facts to which it was applied has little value when invoked in a different factual situation. (*Estate of Michael F. O’Dea* (1940) 15 Cal.2d 637, 639-640 [104 P.2d 368] [“The facts in the instant case have no similarity to those in the [other cited] case and for that reason the decision herein should not in any manner be controlled by what was said in that case”].) What this Board wants and needs from counsel appearing before it is argument based on a literate, not a literal, reading of pertinent authorities that provide useful guidance to us in rendering a just decision. (Roger J. Traynor, *Reasoning in a Circle of Law* (1970) 56 Va. L.Rev. 739, 749.) A slapdash, out-of-context application of general snippets (e.g., “separate and distinct”) from cases animated by completely dissimilar facts will not wash, and counsel should assiduously avoid inflicting that sort of pretend analysis upon us.

This Board has recently explained the interaction of rule 141, subsections (b)(2) and (b)(3). We reiterate that explanation here:

> [R]ule 141's subdivisions (b)(2) and (b)(3) should not be considered in isolation from each other. They are, in fact, supplementary. Where a decoy has provided her valid identification at the clerk’s request, in compliance with rule 141(b)(3), it will necessarily influence whether the clerk is justified in relying on the decoy’s physical appearance.

(*7-Eleven, Inc./Ali* (2013) AB-9242 at p. 5.) Where a seller requests — and a decoy volunteers — concrete evidence that the decoy is a minor, it may indeed be considered a persuasive factor in the decoy's overall appearance. At the very least, it is a more reliable indicator of age than nervousness, experience, or facial hair.

In this case, however, the point is purely academic. The ALJ did, in fact, consider the rule 141(b)(2) issue in isolation — he made no reference whatsoever to the decoy's identification in his findings addressing the decoy's appearance. (See Findings of Fact II.C.1 through 6, *supra*; Legal Basis for Decision III; Determination of Issues II.)

While the ALJ did make findings regarding the provision of identification, they were comparatively brief, purely factual, and entirely separate from his rule 141(b)(2) analysis:

> When the male clerk, who was on duty behind the sales counter, asked the decoy for his age, the decoy stated, "December 6, 1992". The clerk then asked for identification and the decoy handed his California driver license to the clerk. This driver license indicted that the decoy's date of birth is 12/06/1992 and it also contained a red stripe indicating "AGE 21 in 2013." The clerk took possession of the driver license, looked at it for a few seconds, returned the driver license to the decoy without asking any questions, took the money tendered by the decoy, gave some change to the decoy and bagged the beer.

(Findings of Fact II.A.1.)

At no point in the decision below does the discussion of the decoy's identification overlap with the assessment of the decoy's appearance. Appellants' assertion that the ALJ relied on compliance with rule 141(b)(3) as evidence of compliance with rule 141(b)(2) is simply false.

III

Appellants contend that the face-to-face identification was unduly suggestive because the decoy overheard Detective Murphy informing the clerk that he had sold alcohol to a minor. Appellants assert that Detective Murphy essentially made the identification for the decoy, and the decoy merely confirmed it.

Rule 141(b)(5) states:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

Notably, the plain language of the rule in no way forbids the officers to first make contact with the suspected seller.

Appellants nevertheless assert that “when a law enforcement officer is the person who is identifying the seller of the alcoholic beverages for the decoy, then the decoy is not in fact identifying the seller of the alcoholic beverage, as required.” (App.Br. at p. 9.) Appellants rely on a case before this Board, *Keller*, in which the officers first escorted the clerk outside before conducting the face-to-face identification. (See *7-Eleven, Inc./Keller* (2002) AB-7848.)

Appellants, however, overlook the fact that *Keller* was overturned on appeal. (See *Department of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Board* (*Keller*) (2003) 109 Cal.App.4th 1687 [1 Cal.Rptr.3d 339]; see also *7-Eleven, Inc./Morales* (2013) AB-9312 [addressing appellants’ misplaced reliance on *Keller*].) In overturning this Board’s decision, the court of appeal held that “single-person show-ups

are not inherently unfair." (*Id.* at p. 1698, citing *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 [269 Cal.Rptr. 447].) The court went on to discuss the policy justification for rule 141(b)(5):

> There is nothing in the language of the Regulations section 474, subdivision (b)(5) . . . that suggests the section was written to require any particular kind of identification procedure except that it be face-to-face. There is no suggestion the section was promulgated to correct identification procedures which resulted in a history of misidentification of sellers. Indeed, there is no suggestion that correct identification of sellers by decoys presented any problem whatsoever.

(*Keller*, *supra*, 109 Cal.App.4th at pp. 1697-1698.) The goal of rule 141(b)(5), according to the court's analysis, was instead to ensure "that the seller be given the opportunity, soon after the sale, to come 'face-to-face' with the decoy." (*Id.* at p. 1698.)

This Board has addressed a number of cases factually similar to this one, and has repeatedly rejected the argument made here. In one case, this Board said:

> The fact that the officer first contacts the clerk and informs him or her of the sale to a minor has been used to show that the clerk was aware of being identified by the decoy. (See, e.g., *Southland & Anthony* (2000) AB-7292; *Southland & Meng* (2000) AB-7158a.)
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> ¶ . . . ¶
>
> As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

(*7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983 at pp. 7-8; see also *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *BP West Coast Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

We find no unfairness in the execution of the face-to-face identification.

ORDER

The decision of the Department is affirmed.[4]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, 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.