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

AB-9399
File: 20-293674 Reg: 13078730

7-ELEVEN, INC., SANGITA SOLANKI, and YOGENDRA SOLANKI,
dba 7-Eleven #2133-13932
2331 Chester Lane, Bakersfield, CA 93304,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: August 7, 2014
Los Angeles, CA

ISSUED AUGUST 20, 2014

7-Eleven, Inc., Sangita Solanki, and Yogendra Solanki, doing business as 7-Eleven #2133-13932 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 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., Sangita Solanki, and Yogendra Solanki, appearing through their counsel, R. Bruce Evans and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated December 13, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 4, 1994. On June 18, 2013, the Department filed an accusation against appellants charging that, on December 7, 2012, appellants' clerk, Mandeep Singh (the clerk), sold an alcoholic beverage to 18-year-old Tabitha Cox. Although not noted in the accusation, Cox was working as a minor decoy for the Bakersfield Police Department at the time.

At the administrative hearing held on October 23, 2013, documentary evidence was received and testimony concerning the sale was presented by Cox (the decoy) and by Detective Dennis Murphy, a Bakersfield Police officer. Appellants presented no witnesses.

Testimony established that on December 7, 2012, the decoy entered the licensed premises and went to the beer coolers where she selected a 3-pack of Bud Light beer. She took the beer to the register and placed it on the counter. The clerk scanned the beer, told her the price, and completed the sale. The clerk did not ask for identification nor did he ask the decoy her age. The decoy exited the premises with the beer and met up with the officers who were waiting outside. The decoy and officers re-entered the premises. Det. Murphy contacted the clerk and identified himself, then explained the violation to the clerk. He obtained the clerk’s identification and asked him to step out from behind the counter. Det. Murphy then asked the decoy to identify the person who sold her the beer. She identified the clerk by pointing at him and saying “He did.” A photograph was taken of the clerk and decoy, then the clerk was cited.

The Department's decision determined that the violation charged had been proven and that no defense had been established.

Appellants then filed a timely appeal contending: (1) the decoy’s appearance did

not comply with rule 141(b)(2);[2] (2) the face-to-face identification of the clerk did not comply with rule 141(b)(5); and (3) the ALJ abused his discretion by not mitigating the penalty.

DISCUSSION

I

Appellants contend that the decoy did not display the appearance required by rule 141(b)(2).

Rule 141(b)(2) provides: “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.” Appellants maintain that the decoy appeared older than 21 because of her physical appearance — in particular, her wearing of a “tremendous amount of makeup” (App.Br. at p. 3) — as well as her training and experience as a decoy and police Explorer.

The Appeals Board has rejected the "experienced decoy" argument many times before. As the Board said in *Azzam* (2001) AB-7631:

> 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. . . .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.

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

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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.

> We cannot interpose our judgment on the evidence, and we must accept as conclusive the Department's findings of fact. *CMPB Friends, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.4th 1250, 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.4th 364, 367 [3 Cal.Rptr.2d 770]; . . . 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. (See *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) 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.

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

The administrative law judge (ALJ) describes the decoy as follows:

> 5. Cox appeared and testified at the hearing. On December 7, 2012, she was 5' 1" tall and weighed between 110 and 118 pounds. She wore a gray sweatshirt with a t-shirt underneath, blue jeans, and Converse tennis shoes. She wore eye-line [*sic*], mascara, eye shadow, and foundation. Her hair was pulled up into a ponytail. (Exhibit 2.) At the hearing her appearance was the same.
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> 10. Cox appeared her 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 and conduct in front of Singh at the Licensed Premises on December 7, 2012, Cox displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Singh.

(Findings of Fact ¶¶ 5 and 10.) The ALJ then comes to the following conclusion:

> 5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)[fn.] and rule 141(b)(5) and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Cox's use of make-up and her demeanor gave her the appearance of a person over the age of 21, particularly in light of the fact that three of seven locations sold to her. This argument is rejected. Cox's use of make-up did not make her appear to be older; rather, it was consistent with the sort of make-up an 18-year-

> old might wear. As already noted, Cox had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

(Conclusions of Law ¶ 5.)

Appellants maintain the ALJ failed to consider factors which made the decoy appear older, but the above description goes into extensive detail about why the decoy did *not* appear to be over the age of 21 at the time of the sale. Appellants have provided no valid basis for the Board to question the ALJ's determination that the decoy's appearance complied with rule 141. This Board has repeatedly declined to substitute its judgment for that of the ALJ on questions of fact, and we must do so here as well.

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 she testifies, and making the determination whether the decoy's appearance met the requirements of rule 141. We must decline appellants' invitation to re-weigh the evidence — particularly when, as here, the ALJ has made extensive findings on both the physical and non-physical characteristics of the decoy.

II

Appellants contend that the face-to-face identification of the clerk failed to comply with rule 141(b)(5) because it took place after the police officer initiated contact with the clerk. (App.Br. at p. 7.)

Rule 141(b)(5) provides:

> 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.

Appellants maintain the face-to-face identification was unduly suggestive because the officer made the initial contact with the clerk, and informed him that he had sold an alcoholic beverage to a minor. They contend that the identification was actually made by the police officer, rather than by the decoy, and thus failed to comply with the requirement that the decoy make the identification. They argue that the face-to-face identification failed to strictly comply with this Board's decision in *Chun* (1999) AB-7287, which defined face-to-face identification as:

> . . . the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

Appellants fail to support this argument, and as the ALJ found in Conclusions of Law ¶ 5, the face-to-face identification complied with rule 141(b)(5):

> 5. With respect to rule 141(b)(5), the Respondents argued the officers identified Singh by contacting him first. This argument is rejected. Det. Murphy and Cox testified that Singh was the person who sold the beer to Cox. When she re-entered the Licensed premises, Cox identified Singh (correctly) as the person who sold her the beer. The fact that the officers explained the violation to Singh and drew his attention to the identification process does not vitiate this identification — indeed, by doing so they ensured that Singh was aware that he was being identified and why.

The Board has addressed this issue before, and rejected the same argument appellants make here:

> 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.) ¶ . . . ¶ 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.)

Appellants' contentions are not supported by the evidence. While an "unduly suggestive" identification is impermissible, appellants have presented no evidence that the identification in this instance was unduly suggestive.

III

Appellants contend that the ALJ abused his discretion when he failed to consider appellants' mitigating evidence.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of Cal. v. Alcoholic Bev. 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 Bev. 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 Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Department rule 144, which sets forth the Department's penalty guidelines, provides that higher or lower penalties from the schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances. (Cal. Code Regs., tit. 4, § 144.) Mitigating factors may include, but are not limited to, the length of licensure without prior discipline or problems, positive action by the licensee to correct the problem, documented training of licensee and employees, and cooperation by the licensee in the investigation.

Rule 144 itself addresses the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

> **Penalty Policy Guidelines**:
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> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

Unless some statute requires it, an administrative agency's decision need not include findings with regard to mitigation. (*Vienna v. Cal. Horse Racing Bd*. (1982) 133 Cal.App.3d 387, 400 [184 Cal.Rptr. 64]; *Otash v. Bureau of Private Investigators* (1964) 230 Cal.App.2d 568, 574-575 [41 Cal.Rptr. 263].) Appellants have not pointed out a statute with such requirements. Findings regarding the penalty imposed are not necessary as long as specific findings are made that support the decision to impose disciplinary action. (*Williamson v. Bd. of Med. Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-1347 [266 Cal.Rptr. 520].)

Whether an appellant’s evidence serves to mitigate the standard penalty is a discretionary determination left in the hands of the ALJ. Depending on the facts of an individual case, evidence of mitigation may or may not serve to lessen the penalty imposed. Either way, the law is clear: the ALJ is not required to make findings regarding the penalty imposed, nor is he bound to mitigate the penalty according to

some formula.

In this case, appellants maintain that "the location has been licensed for approximately 20 years with little disciplinary history." (App.Br. at p. 9.) This statement ignores, however, that the premises have been subject to discipline three times (in 1994, 1996, and 2008) for the sale of alcohol to minors. As the ALJ notes in his Penalty section of the decision:

> The Department requested that the Respondents' license be suspended for a period of 15 days on the basis that the length of licensure (mitigation) was offset by the three prior violations (aggravation). The Respondents argued that, if the accusation were sustained, a 10-day, all stayed penalty was appropriate given that the Respondents had been licensed for 19 years. Under the circumstances, the Department is correct — the Respondents have sold alcoholic beverages to minors four times over 19 years. This once-every-five-years average does not warrant any mitigation. The penalty recommended herein complies with rule 144.

We agree, and find that the ALJ in this case acted within the discretion provided to him by the rule.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]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.