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

AB-9408
File: 20-487286 Reg: 13079004

7-ELEVEN, INC. and LB OCEAN CORP.,
dba 7-Eleven Store #39238
805 East Ocean Boulevard, Long Beach, CA 90802,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 6, 2014
San Diego, CA

ISSUED DECEMBER 3, 2014

7-Eleven, Inc. and LB Ocean Corp., doing business as 7-Eleven Store #39238 (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. and LB Ocean Corp., appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

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[1]The decision of the Department, dated January 31, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 27, 2010. On August 6, 2013, the Department filed an accusation against appellants charging that, on April 9, 2013, appellants' clerk, Jennifer Lopez (the clerk), sold an alcoholic beverage to 18-year-old Matthew Merriman. Although not noted in the accusation, Merriman was working as a minor decoy for the Long Beach Police Department at the time.

At the administrative hearing held on November 20, 2013, documentary evidence was received and testimony concerning the sale was presented by Merriman (the decoy); by Detective Toby Benskin and Sergeant Eric Hooker of the Long Beach Police Department; and by appellant LB Ocean Corporation's general manager and partner, Tony Bagramyan.

Testimony established that on the date of the operation, Detective Benskin entered the licensed premises. The decoy followed a few seconds later and proceeded to the coolers, where he selected a six-pack of Bud Light beer. He took the beer to the counter and set it down. The clerk rang up the beer and told the decoy the price. The decoy handed her a $20 bill. The clerk handed the decoy some change, then asked if he wanted a bag. The decoy declined, picked up the beer, and exited the premises.

Bagramyan testified that the registers at the premises prompt clerks whenever an age-restricted product is rung up, but that the clerk in this instance overrode the prompt in order to proceed with the sale. She was terminated for the violation. Additionally, Bagramyan testified that employees receive training when they are first hired, along with ongoing training every three months. The clerk received this training. Finally, appellant LB Ocean Corporation employs secret shoppers to ensure its employees follow all applicable laws and policies.

The Department's decision determined that the violation charged was proved and no defense was established. The decision acknowledged evidence offered in an attempt to mitigate the penalty, but held that no mitigation was warranted and imposed a penalty of fifteen days' suspension.

Appellants then filed an appeal contending: (1) the ALJ improperly considered appellants' evidence under rule 141(b)(2), and (2) the ALJ improperly considered evidence warranting mitigation of the standard penalty.

DISCUSSION

I

Appellants contend that the ALJ "failed to properly consider" evidence appellants presented in support of their rule 141(b)(2) affirmative defense. (App.Br. at p. 5.) In particular, appellants challenge the ALJ's conclusion that the decoy appeared under 21 despite his physical stature, his experience with Long Beach Search and Rescue, and his status as a "professional decoy" who had participated in five prior operations. (App.Br. at p. 6.)

This Board is bound by the factual findings in the Department's decision if 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.] 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.] 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. (Masani)* (2004)

118 Cal.App.4th 1439, 1437 [13 Cal.Rptr.3d 826].)

Rule 141, subdivision (b)(2), restricts the use of decoys based on appearance:

> 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 beverage at the time of the alleged offense.

This Board has rejected the "experienced decoy" argument many times. As we noted 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. . . . 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.

(*Id.* at p. 5.)

With regard to physique and its influence on the decoy's apparent age,

> This Board has repeatedly declined to substitute its judgment for that of the ALJ on this question of fact. Minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys of large stature automatically violate the rule, or that size necessarily makes one appear older.

(*Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2014) AB-9382, at pp. 5-6 [decoy 6' 1¼", 225 lbs]; see also *Lee* (2014) AB-9359, at p. 8 [decoy 6', 210 lbs]; *Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2014) AB-9355, at p. 8 [decoy 6' 1", 195 lbs]; *Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2013) AB-9318, at p. 4 [decoy 6' 1", 175 lbs]; *7-Eleven, Inc./Lobana* (2012) AB-9164, at pp. 3-4 [decoy 5' 6", 155 lbs, which appellants characterized as "large"].) This Board has further noted that:

> An ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the

> rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJ's are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7 [an ALJ's 141(b)(2) determination cannot be collaterally estopped by another Department decision, even when the cases involve the same decoy].)

In the decision below, the ALJ made the following findings of fact:

> 4. Merriman appeared and testified at the hearing. On April 9, 2013, he was 6'2" tall and weighed 190 pounds. He wore a gray t-shirt, khaki shorts, and blue Vans. His hair was cut short, although it was a little longer in the front. He was clean shaven. His appearance at the hearing was the same, except that he was five pounds heavier.
>
> [¶ . . . ¶]
>
> 9. April 9, 2013 was Merriman's sixth time working as a decoy. He visited approximately 16 locations each time. Of the 16 locations he visited on April 9, 2013, this was the only one which sold him an alcoholic beverage. He learned of the decoy program through his participation in the Long Beach Search and Rescue team. During the three years he has been a member of the Long Beach Search and Rescue team, he received physical, mental, and educational experience relating to the Long Beach Fire Department and Long Beach P.D.
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> 10. Merriman 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 Lopez at the Licensed Premises on April 9, 2014, Merriman displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Lopez.

(Findings of Fact ¶¶ 4, 9-10.) Based on these findings, the ALJ reached the following conclusions of law:

> 5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)[fn] and, therefore, the accusation should be dismissed pursuant to rule 141(c). They based this argument on Merriman's participation in the search and rescue program as well as his physical build, experience, confidence, and athletic experience. This argument is rejected. Merriman's appearance was

> perfectly consistent with that of a young man under the age of 21. Phrased another way, Merriman had the appearance generally expected of a person under the age of 21.

(Conclusions of Law ¶ 5.)

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 possess 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 see no flaw in the ALJ's findings and conclusions. Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion despite substantial evidence supporting those findings. This we cannot do.

II

Appellants contend that the ALJ failed to give appropriate weight to appellants' evidence of mitigation, including three years of discipline-free history, training upon each new hire and every three months thereafter, the use of secret shoppers to ensure employees follow applicable laws and policies, and the termination of the offending clerk. Appellants direct this Board to the penalty guidelines contained in rule 144, as well as another Appeals Board case in which similar mitigating evidence led to a reduced penalty.

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].) However, it 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 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. 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 the 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:

> 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.

(Cal. Code Regs., tit. 4, § 144.)

In this case, the ALJ provided the following reasoning for the penalty imposed:

> The Department requested that the Respondents' license be suspended for a period of 15 days, arguing that there was no evidence warranting mitigation or aggravation. The Respondents argued that the training they provide to their employees, their use of a secret shopper, and their use of register prompts warranted some mitigation. Accordingly, they recommended a 10-day, all-stayed penalty if the accusation were sustained. While training and preventative measures are always commendable, their efficacy depends upon the actions of the person standing at the register. In this case, [the clerk] overrode the prompt rather than check ID or otherwise verify age. Her actions, taken together with the relatively short time the Respondents have been licensed, indicate that no mitigation is warranted. The penalty recommended herein complies with rule 144.

Appellants attempt to persuade this Board that the presence of suggested mitigated factors in rule 144 indicates, logically, that they must be binding:

> [I]f the mitigating factors that are included in Rule 144 are not considered by the Administrative Law Judge and/or Department then there is no reason to even include these mitigating factors within Rule 144 because licensees will not be given any mitigation in acting in the manner prescribed in Rule 144.

(App.Br. at p. 8.) There are two flaws in appellants' argument. First, the plain language of rule 144 indisputably leaves mitigation to the discretion of the ALJ. Second, this Board has seen many, many cases in which such factors do indeed lead to a mitigated penalty. The fact that appellants' penalty was not mitigated does not mean that mitigation never happens.

Appellants also cite rule 144's Policy Statement, which aims to impose penalties "in a consistent and uniform manner." (Cal. Code Regs., tit. 4, § 144, Penalty Guidelines App., Policy Statement.) Appellants then direct this Board to a case in which, they claim, evidence similar to that presented here led to a mitigated penalty. (See *Dinh* (2000) AB-7429.)

The two cases are actually quite different. Beyond being factually independent

and entirely unrelated, they were heard by different ALJ's, and are separated by almost fifteen years of history and four hundred miles of geography. Most important, very little of the record described in *Dinh* is comparable to the present case.

Ultimately, we need not compare the cases at all. Neither this Board nor the ALJ is bound by the penalty determination in an unrelated case. By providing penalty guidelines, rule 144 itself accomplishes the consistency described in its Policy Statement, without requiring an ALJ to excavate and scrutinize decades of decisions simply to guarantee that the penalty is absolutely consistent with every single case the Department has ever issued.

Whether appellants' evidence serves to mitigate the standard penalty is a discretionary determination left in the hands of the ALJ. Depending on the facts of the individual case, the factors cited by appellants may indeed constitute mitigating evidence; in other cases, such as appellants', the ALJ may determine that these factors do *not* mitigate the penalty. In this case, it was well within the ALJ's discretion to impose a full 15-day suspension.

The penalty is reasonable and in line with rule 144; our inquiry ends there.

ORDER

The decision of the Department is affirmed.[2]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[2]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.