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

AB-9487
File: 20-523075 Reg: 14080959

7-ELEVEN, INC. and DHALIWAL BROS., INC.,
dba 7-Eleven #2172-35601A
6602 Irvine Center Drive, Irvine, CA 92618-2116,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: June 4, 2015
Los Angeles, CA

ISSUED JUNE 19, 2015

7-Eleven, Inc. and Dhaliwal Bros., Inc., doing business as 7-Eleven #2172-35601A (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellants 7-Eleven, Inc. and Dhaliwal Bros., Inc., through their counsel, R. Bruce Evans and Margaret Warner Rose of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 7, 2012. On

[1]The decision of the Department, dated December 8, 2014, is set forth in the appendix.

August 11, 2014, the Department filed an accusation against appellants charging that, on February 21, 2014, appellants' clerk, Magali Araujomarin (the clerk), sold an alcoholic beverage to 18-year-old Stephanie Shi. Although not noted in the accusation, Shi was working as a minor decoy in a joint operation between the Irvine Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on November 12, 2014, documentary evidence was received and testimony concerning the sale was presented by Shi (the decoy); by Sarah Tunnicliffe, an Irvine Police detective; and by Harjinder Dhaliwal, president of appellant Dhaliwal Bros., Inc.

Testimony established that on the date of the operation, the decoy entered the licensed premises and went to a cooler, where she selected a six-pack of Bud Light beer in twelve-ounce bottles. The decoy took the beer to the sales counter for purchase, and placed the beer on the counter. The clerk scanned the beer and asked the decoy for identification. The decoy handed the clerk her California driver's license, which bore her correct date of birth as well as a vertical orientation and a red stripe reading "AGE 21 IN 2017." The clerk took possession of the license, appeared to look at it for a few seconds, then handed it back to the decoy. The clerk then continued with the transaction. The clerk did not ask the decoy any age-related questions, nor did she ask any questions regarding the information on the decoy's driver's license. The decoy paid for the beer, received her change, and exited the store with the beer.

Dhaliwal testified that appellants use 7-Eleven's "Come of Age" training program to train employees on sales of age-restricted products. Appellants also use a secret shopper program to check on employees and ensure they are complying with the law.

The clerk did not inform Dhaliwal of her illegal sale; Dhaliwal learned of it when

he received a letter from the Department. He then terminated the clerk. He also removed the override button from appellants' registers.

The Department's decision determined that the violation charged was proved and no defense was established, and imposed a penalty of fifteen days' suspension.

Appellants then filed an appeal contending: (1) the ALJ failed to consider evidence in support of appellants' rule 141(b)(2) defense, and (2) the ALJ abused his discretion by imposing a penalty greater than that requested by the Department at the administrative hearing.

DISCUSSION

I

Appellants contend that the ALJ failed to consider evidence in support of their defense under rule 141, subdivision (b)(2). In particular, appellants argue that their "counsel elicited from [the decoy] that she was a police explorer for one year prior to acting as a minor decoy on February 21, 2014," and that "in her role as an explorer, [the decoy] participated in PR events, and interacted with the community at large, all while dressed in uniform." (App.Br. at pp. 5-6.) Appellants insist "[t]hese are not experiences generally expected of a person [the decoy's] age and contributed to her apparent age," and that the ALJ's failed to proceed in the manner required by law when he omitted mention of the decoy's Explorer experience from the Department decision. (App.Br. at p. 6.)

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." The rule provides an affirmative defense, and the burden of proof lies with

appellant. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

This Board is bound by the factual findings in the Department's decision so 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. (*CMPB Friends, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.App.4th 1250, 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; . . .) 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. Alcoholic Bev. Control* (*Lacabanne*) (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].) 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 1429, 1437 [13 Cal.Rptr.3d 826].)

It is true that the ALJ omitted mention of the decoy's Explorer experience, or what that experience entailed. The omission, however, is utterly unsurprising given that appellants never once argued, in the course of the administrative hearing, that the decoy's Explorer experience had any effect on her apparent age.

The fact that the decoy served as an Explorer was elicited during cross-examination. The exchange occurred as follows:

> [MR. SALTSMAN:]
> Okay. And why are you a decoy? Do you know how you were picked to be a decoy?
>
> A Detective Tunnicliffe sent an E-mail [*sic*] out to the explorer advisor at our Department and the advisor expressed that E-mail [*sic*] to all

of us.

Q So you are an explorer?

A That's correct.

Q At the Police Department?

A That's correct.

Q How long had you been an explorer before February of 2014?

A Just about a year.

Q So you were like patrol rank; is that right?

A No, we are just high school age volunteers for the Department.

Q You didn't get particular rank?

A No.

Q Okay. What duties and responsibilities did you have as an explorer for Irvine?

A We do things like go to PR events, and we talk to the people of the community, hand out stickers to the children. Help out raffles and things like that.

Q In uniform?

A Yes.

Q What kind of uniform?

A It was a light blue button up with an explorer patch and dark blue pants.

Q And the explorer patch said something about Irvine PD?

A There was an Irvine PD patch, but it also had a very large explorer —

Q Oh, I see.

A Right underneath it.

Q So it's both?

A Yes.

(RT at pp. 25-26.) At no point in this exchange did counsel for appellants show how the decoy's Explorer experience in any way related to or affected her appearance before the clerk on the date of the operation. Moreover, counsel for appellants made no mention whatsoever of the decoy's Explorer experience during the course of either opening or closing arguments. (See RT at p. 8 [reserving argument] and pp. 68-70.)

While appellants certainly raised a rule 141(b)(2) defense generally at the administrative hearing, they failed to raise the factual argument that the decoy's Explorer experience affected her apparent age. It is settled law that, for questions of fact, 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. (*Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1126-1127 [116 Cal.Rptr.3d 315]; *Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Bd. of Med. 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]; *Wilke v. Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].) Appellants bear the burden of proof on a rule 141(b)(2) defense; by failing to argue this factual issue as part of that defense, they have forfeited it.

Because this issue was not argued at the administrative hearing, it would be impossible for this Board to find error in its omission from the decision. As we have noted elsewhere, an ALJ is a finder of fact, not a clairvoyant; an appellant must actually *make* an argument if it wishes to see that argument addressed. (See, e.g., *Semaan*

(2014) AB-9419, at p. 5; *7-Eleven, Inc./Samra* (2014) AB-9387, at p. 9; *7-Eleven, Inc./Kidane* (2008) AB-8528a, at pp. 5-6.)

II

Appellants contend that the penalty represents an abuse of discretion because, according to appellants, it exceeds the penalty recommended by Department counsel at the administrative hearing. (App.Br. at p. 7.) Moreover, appellants argue that Dhaliwal presented "extensive mitigating evidence" and "goes above and beyond the average licensee in order to deter sales to minors." (App.Br. At p. 8.)

The Board may examine the issue of extensive 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 Board & 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 its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

With regard to the penalty, the ALJ made the following relevant findings of fact:

> 12. Corporate president Harjinder Dhaliwal utilizes 7-Eleven's "Come of Age" program to train employees on sales of age restricted products. He also uses a secret shopper program to check up on employees to insure that they are complying with the law. Clerk Araujomarin did not inform Mr. Dhaliwal of this incident. He first learned of it when he received a letter from the Department in the mail. Mr. Dhaliwal then terminated clerk Araujomarin's employment.

(Findings of Fact ¶ 12.) Additionally, the ALJ reached the following conclusion of law:

> 7. The Department recommends that this license be suspended for a period of fifteen days. Respondent requests a mitigated penalty if the accusation is sustained. Respondent fired the clerk and removed the "override" button from the store's cash registers. Although these are corrective measures, it is consistent with what a responsible licensee would do in this situation. The argument presented in support of mitigation is not persuasive. On the other hand, Respondents were only licensed for 15 months when this incident occurred. The recommendation made here is consistent with the penalty guidelines, Rule 144.

(Conclusions of Law ¶ 7.)

Appellants' argument on appeal turns largely on their assertion that the Department requested a penalty of less than the fifteen days assigned. In their brief, appellants insist,

> After Harjinder Dhaliwal, the president of the franchisee/licensee, testified as to the extensive, comprehensive mitigating measures he took both before the sale and the corrective measures he took after the sale, the Department, through its counsel, acknowledged that a standard penalty was not appropriate. In closing argument at the hearing, the Department's counsel agreed that, "based on the testimony here today, the Department believes some mitigation would probably be warranted." (RT 68:15-19.) Despite that the Department recommended a lower penalty, the ALJ imposed an unmitigated, standard 15-day suspension.

(App.Br. at p. 7.) It is not until two pages later that appellants acknowledge the full comment from Department counsel:

> Based on the evidence presented, *the Department is asking for a 15-day penalty*. I don't believe that 15-day penalty took into consideration any mitigation, and based on the testimony here today, the Department believes some mitigation would probably be warranted, *and we will leave that up to Your Honor to make that determination*.

(RT at p. 68, emphasis added.) Appellants have misstated the Department's position. The Department unequivocally requested a fifteen-day suspension, and though counsel expressed an opinion, she concluded her comment by leaving the question of mitigation in the hands of the ALJ.

The ALJ weighed the mitigating evidence — specifically, the termination of the

clerk and the removal of the override button from appellants' registers — and found it unpersuasive, since these were measures any responsible licensee would take. Though he did not discuss the measures appellants took *before* the sale, he was not required to do so. (*Vienna v. Cal. Horse Racing Bd.* (1982) 133 Cal.App.3d 387, 400 [184 Cal.Rptr. 64] [an administrative agency's decision need not include findings regarding mitigation absent a statute to the contrary].) Moreover, his decision to omit them is unsurprising, since these measures appear to be little more than the standard requirements of a 7-Eleven franchisee, and were certainly insufficient to prevent the instant sale; there is no reason to believe they will prevent additional violations in the future. Finally, we find it curious that the illegal sale managed to escape Dhaliwal's notice for a full two weeks. (See Findings of Fact ¶ 12; RT at pp. 64-65.) Who, if anyone, was supervising this clerk? Where was Dhaliwal — or any other staff, for that matter — when this sale took place? In the context of appellants' brief fifteen-month licensure, we cannot say that it was unreasonable for the ALJ to refuse mitigation.

The ALJ found mitigation inappropriate and assigned the penalty requested by the Department. That penalty falls well within the guidelines outlined in rule 144. There is no abuse of discretion here.

ORDER

The decision of the Department is affirmed.[2]

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

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[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.