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

AB-9555
File: 20-551486 Reg: 15082536

7-ELEVEN, INC. and DTLA SERVICES, INC.,
dba 7-Eleven #15191B
7390 Calle Real, Goleta, CA 93117,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 4, 2016
Los Angeles, CA

ISSUED AUGUST 24, 2016

Appearances: *Appellants:* Melissa H. Gelbart, of Solomon Saltsman & Jamieson, as counsel for appellants 7-Eleven, Inc. and DTLA Services, Inc., doing business as 7-Eleven #15191B.
Respondent: Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and DTLA Services, Inc., doing business as 7-Eleven #15191B (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for fifteen days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 23, 2014. On June 2, 2015, the Department instituted an accusation against appellants charging that, on or about

1. The decision of the Department, dated November 18, 2015, is set forth in the appendix.

February 27, 2015, appellants' clerk, Sukhpreet Singh Waraich (the clerk) sold and alcoholic beverage to 19-year-old Chase King. Although not noted in the accusation, King was working as minor decoy for the Santa Barbara County Sheriff's Department at the time.

At the administrative hearing held on September 9, 2015, documentary evidence was received and testimony concerning the violation charged was presented by King (the decoy), by Deputy Wayne Johnson of the Santa Barbara County Sheriff's Department, and by Ranjeet Thiara, secretary of appellant DTLA Services, Inc.

Testimony established that on the day of the operation, the decoy entered the licensed premises, walked to the coolers, and selected a six-pack of Bud Light beer. He took the beer to the counter and set it down. The clerk asked to see the decoy's identification. The decoy handed the clerk his California driver's license, and the clerk looked at it before handing it back. The decoy paid, and the clerk gave him some change. The decoy then exited the premises with the beer.

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

Appellants filed this appeal contending (1) the Department ignored the plain language of rule 141(b)(1); (2) misstated the legislative purpose of rule 141(b)(1); (3) improperly separated rule 141, subdivisions (a) and (b)(1); and (4) improperly held that rule 141(b)(1) only matters in some situations. (See Code Regs. tit. 4, § 141(a) and (b)(1).) These issues will be discussed together.

DISCUSSION

Appellants contend the Department misinterpreted rule 141(b)(1) and failed to apply it in conjunction with the general fairness requirement of rule 141(a). In particular, appellants claim the Department ignored the plain language of rule 141(b)(1), misstated its legislative purpose,

improperly separated it from rule 141(a), and wrongly held that the rule matters only in some situations, but not in others.

Rule 141(a) imposes a broad fairness requirement on minor decoy operations. That subdivision states:

> (a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, 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.

Further subdivisions of the rule impose more restrictive terms. Rule 141(b)(1), at issue in this case, states:

> (b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage:
>
> (1) At the time of the operation, the decoy shall be less than 20 years of age.

(Code Regs., tit. 4, § 141(b)(1).) Rule 141 and its subdivisions provide an affirmative defense, and the burden of proof lies with the party asserting it. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

While there is no case law interpreting it, the plain language of rule 141(b)(1) is objective, clear, and requires no interpretation—only application to the facts. Here, it is undisputed that the decoy was 19 years old on the date of the operation. He was, objectively, "less than 20 years of age." (See Code Regs., tit. 4, § 141(b)(1).) Therefore, the use of this decoy did not violate rule 141(b)(1).

Appellants nevertheless insist the fairness mandate of rule 141(a) somehow extends the language of subdivision (b)(1) to include this decoy, even though they concede he was "less than 20 years of age" on the date of the operation. (See Code Regs., tit. 4, § 141(b)(1);

see also App.Br. at p. 2 ["On the day of the operation, [the decoy] . . . was only two weeks shy of his twentieth birthday."].)

For support, appellants direct this Board to the rule's legislative history. (App.Br. at pp. 6-7.) We find this argument utterly perplexing. Rule 141 is not a statute. It is a regulation, duly adopted by the Department—*not* the legislature—pursuant to the rulemaking provisions of the Administrative Procedure Act. (See Gov. Code, § 11340 et seq.) Thus, rule 141 has no legislative history, only a rulemaking file, which contains the Department's justifications for the rule along with any public commentary. Appellants make no reference whatsoever to this rulemaking file, so this Board cannot say whether the technicalities of a red stripe on a 20-year-old's license arose during public commentary or played any part in the Department's rule drafting process.

It is true, however, that the Department enacted these regulations at the direction of the legislature. The authorizing statute, section 25658(f), explicitly permits the use of minor decoys and grants them immunity from prosecution, but requires that "[g]uidelines with respect to the use of persons under 21 years of age as decoys shall be adopted and published by the Department in accordance with the rulemaking portion of the Administrative Procedure Act." (Bus. & Prof. Code, § 25658(f).) Notably, the legislature's direction is general, and does not require any specific provisions or limitations.[2] (See *ibid.*) While early drafts of the statute included a provision requiring decoys display the appearance of a person under the age of 21, this requirement was ultimately removed—ironically enough, because local governments and

2. The passage of this provision followed the Supreme Court's decision in *Provigo*, which approved the use of minor decoys and imposed no restrictions other than those applicable to law enforcement sting operations in general. (*Provigo Corp. v. Alcoholic Bev. Control Appeals Bd.* (1994) 7 Cal.4th 561, 569 [28 Cal.Rptr.2d 638] ["As a general rule, the use of decoys to expose illicit activity does not constitute entrapment, so long as no pressure or overbearing conduct is employed by the decoy"], citing *Reyes v. Municipal Ct.* (1981) 117 Cal.App.3d 771, 777 [173 Cal.Rptr. 48].)

law enforcement agencies questioned whether its inclusion would provoke litigation and hinder enforcement. (Sen. Amend. to Assem. Bill No. 3805 (1993-1994 Reg. Sess.) Aug. 29, 1994.) The rejected provision was nevertheless adopted as a regulation by the Department. (See Code Regs., tit. 4, § 141(b)(2).) Beyond that, however, legislative history addressing rejected provisions of an authorizing statute is of little assistance in interpreting or applying a regulation drafted and adopted by a state agency.

Most significantly, appellants give us no cause to look beyond the plain language of the regulation. With regard to statutory law, the Supreme Court has stated, "Where, as here, legislative intent is expressed in unambiguous terms, we must treat the statutory language as conclusive; 'no resort to extrinsic aids is necessary or proper.'" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61 [124 Cal.Rptr.2d 507] [acknowledging, however, that legislative history buttressed the plain-language analysis], citing *People v. Otto* (1992) 2 Cal.4th 1088, 1108 [9 Cal.Rptr.2d 596].) Courts have extended this reasoning to regulations. (See, e.g., *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2003) 109 Cal.App.4th 1687, 1695 [1 Cal.Rptr.3d 339], citing *Schmidt v. Foundation Health* (1995) 35 Cal.App.4th 1702, 1710-1711 [42 Cal.Rptr.2d 172] ["Generally, the same rules of construction and interpretation applicable to statutes are used in the interpretation of administrative regulations."].) Indeed, a regulation's plain language overrides the enacting agency's preferred interpretation[3]:

> It is true that an administrative agency's interpretation of its own regulation is entitled to consideration and respect, especially where . . . the agency has a special familiarity and expertise with the issues. [Citation.] However, an agency's

3. Even if we had cause to defer to the Department's interpretation of rule 141(b)(1)—and we do not, as the language is objectively clear—we would find it impossible to do so, as the Department has not designated any precedential administrative decisions whatsoever, let alone any articulating its interpretation of this rule. This Board is, like the public, blind to any internal Department rule interpretations that it might apply in the course of imposing disciplinary action.

> interpretation of a regulation or statute does not control if an alternative reading is compelled by the plain language of the provision. [Citations.]

(*Southern Cal. Edison Co. v. Public Utilities Com.* (2000) 85 Cal.App.4th 1086, 1105 [102 Cal.Rptr.2d 684]; see also *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (1999) 71 Cal.App.4th 1518, 1520 [84 Cal.Rptr.2d 621] ["While we give deference to an administrative [agency's] construction of its own regulation, if the language of the rule does not require administrative expertise, we simply apply it as we understand it."]; *Motion Picture Studio Teachers & Welfare Workers v. Millan* (1996) 51 Cal.App.4th 1190, 1195 [59 Cal.Rptr.2d 608] ["[T]he principle of deference is not without limit; it does not permit the agency to disregard the regulation's plain language."].)

As stated above, rule 141(b)(1) is objective and clear. We decline appellants' invitation to delve into irrelevant legislative history, artificially age the decoy, and manufacture a violation of rule 141(b)(1) where none exists.

Appellants make much of the ALJ's mention of the red-stripe reasoning in his decision. They contend that because this reasoning does not appear in the legislative history—which, as noted, is neither relevant nor helpful in interpreting a facially unambiguous regulation—his interpretation of rule 141(b)(1) was erroneous and requires reversal. (App.Br. at pp. 6-7.)

The ALJ did articulate his understanding of the purpose of rule 141(b)(1). His comment, in context, reads as follows:

> 6. With respect to rule 141(a), the Respondents argued that it was unfair to use a decoy who was only two weeks shy of his 20th birthday. There is nothing particularly significant about a person's 20th birthday; after all, they still cannot legally buy alcohol for another year. The Respondents did not explain why they believed that it was unfair to use such a decoy—they simply said that it was.
>
> The Respondents appear to be mixing and matching sections of the rule. The only reason that a decoy's 20th birthday matters is because of rule 141(b)(1). That portion of the rule is designed to address a very particular problem—the potential for confusion when a clerk examines the ID of a person who is 20 years of age. [The decoy] was born on March 10, 1995. Accordingly, his ID has a red

> stripe on it reading "Age 21 in 2016." (Exhibit 2.) But [the decoy] will not actually turn 21 until March 10, 2016. Thus, from January 1, 2016 through March 9, 2016, the red stripe implies that he has already turned 21, even though he has not. Only by checking both the red stripe and the date of birth is that apparent.
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> Hence, rule 141(b)(1). By using decoys who are under the age of 20, there can never be any confusion from the red stripe. With that in mind, there is no reason why using a decoy two weeks shy of his 20th birthday might be considered unfair. The Respondents did not offer any such explanation or reason—they merely referred to the two weeks and claimed that it was unfair. It is not.

(Conclusions of Law, ¶ 6.) The ALJ's explanation of the red stripe dilemma is dicta. The relevant conclusion appears in the final paragraph—appellants presented no explanation or reason why the decoy's impending twentieth birthday was unfair. In their closing argument, appellants stated only that "using a decoy who is two weeks shy of his 20th birthday is not promoting fairness under rule 141, especially when coupled with the various factors that Respondents contend violates [*sic*] Rule 141(B)(2)." (RT at pp. 52-53.) At no point did appellants explain *how* the decoy's age was unfair under rule 141(a). Appellants essentially asked the ALJ—and now ask this Board—to rewrite the unambiguous language of rule 141(b)(1) to include decoys who are *almost* twenty years of age.

Appellants are correct insofar as they contend the Department held that rule 141(b)(1) applies in some situations, but not in others. (App.Br. at p. 8.) The Department's ruling was, in that respect, correct: rule 141(b)(1) provides an affirmative defense *only* when the decoy is twenty years old. It offers no relief where, as here, the decoy is "less than 20 years of age." Moreover, appellants failed to establish a general fairness violation under rule 141(a). The appeal is therefore meritless.

ORDER

The decision of the Department is affirmed.[1]

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

1. 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.