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

AB-9030
File: 20-214374 Reg: 08069682

7-ELEVEN, INC., JACK L. FULLER AND KATHLEEN J. FULLER,
dba 7-Eleven #2237 - 14113
3040 West Benjamin Holt Drive, Stockton, CA 95219,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: October 7, 2010
San Francisco, CA

ISSUED NOVEMBER 22, 2010

7-Eleven, Inc., Jack L. Fuller and Kathleen J. Fuller, doing business as 7-Eleven 2237 - 14113 (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., Jack L. Fuller and Kathleen J. Fuller, appearing through their counsel, Ralph Barat Saltsman, and the Department of

[1]The decision of the Department, dated April 16, 2009, is set forth in the appendix.

Alcoholic Beverage Control, appearing through its counsel, Heather Hoganson.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. On August 25, 2008, the Department filed an accusation against appellants charging that, on August 18, 2008, appellants' clerk sold an alcoholic beverage to 19-year-old Patrick Krebbs. Although not noted in the accusation, Krebbs was working as a minor decoy for the Stockton Police Department at the time.

At the administrative hearing held on March 17, 2009, documentary evidence was received and testimony concerning the sale was presented by Krebbs (the decoy).

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

Appellants then filed a timely appeal contending: (1) The decoy operation was not conducted in a manner which promotes fairness, and 2) no face-to-face identification took place.

DISCUSSION

I

Appellants contend that the decoy did not display the appearance required by Rule 141(b)(2), and therefore his use as a decoy by the police violated the “fairness” requirement of Rule 141(a).[2]

Appellants maintain that the decoy operation was not conducted in a manner which

[2] Title 4, California Code of Regulations, Section 141, subdivision (b)(2) provides that a 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.” Title 4, California Code of Regulations, Section 141, subdivision (a) provides that a law enforcement agency may only use minors as decoys “in a fashion that promotes fairness.”

promotes fairness based on several points: the decoy had a receding hairline, he had experience as both a police cadet and pizza parlor manager, and he was close to the age of 20. It is appellants' position that each of these factors contributed to the decoy having the appearance and demeanor of a person over the age of 21 in violation of rule 141.

Appellants cite *Southland/Te and Yuong* (2001) AB-7430 for the proposition that decoys with receding hairlines cannot be used with fairness. In that decision the Board stated: "use of a decoy with a prematurely receding hairline is unacceptable and should not have been condoned." However, this case was later distinguished by *Chevron* (2003) AB-8078 which stated:

> We do not consider *Southland/Te and Yuong* to stand for the proposition attributed to it by appellant, that a decoy with a receding hairline cannot, per se, display the appearance which could generally be expected of a person under the age of 21. In hindsight, we believe the language used was too strong, and to the extent that the language implies a per se rule that decoys with receding hairlines violate rule 141(b)(2), we disavow it. Nor do we believe that a receding hairline on a decoy is a per se violation of the rule 141(a) requirement that the decoy operation be conducted in a fashion that promotes fairness.

The administrative law judge (ALJ) makes note of the decoy's receding hairline in Findings of Fact III, and Determination of Issues II, but rejects appellants' fairness argument. While it would have been helpful if the ALJ had stated affirmatively that the decoy displayed the appearance which could generally be expected of a person under 21 years of age, despite his receding hairline, the fact that he did not say so in so many words is not fatal to his decision. Rather, we believe he has done so by implication in Determination of Issues II:

> Respondents referred, but [did] not give the citation, to an Alcoholic Beverage Control Appeals Board decision which held that a decoy operation was unfair, and therefore violated the Department's Rule 141(a), if the decoy had receding hair. However, the Appeals Board has since repudiated that holding. See 7-Eleven/Kaur and Singh (2006) Alcoholic Beverage Control Appeals Board Case Number AB-8456, page 9.

In other words, the ALJ rejects appellants' legal argument here, and finds that merely pointing

out the decoy's receding hairline is insufficient to meet their burden of proof.

Appellants next contend that the decoy's experience as a pizza parlor manager and as a police cadet cause him to appear older than 21 years of age. This Board has previously rejected the contention that a decoy's experience necessarily makes a decoy appear to be over the age of 21. In *Azzam* (2001) AB-7631, the Board said:

> 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. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. *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.* [Emphasis added to last sentence.]

The ALJ in this matter encapsulates his findings in regards to the decoy's experience in his Determination of Issues III:

> Respondents argued that the decoy's experience as a student at a police academy made him appear at least twenty-one years old, in violation of the Department's Rule 141(b)(2). This argument is rejected. Respondents did not show how the decoy's experience made him appear at least twenty-one years old. Moreover, as there was no testimony from Respondents' clerk, there is no evidence that the decoy appeared at least twenty-one years old to the clerk "under the actual circumstances presented to (him)."

In short, the ALJ rejected the argument that the requirements of rule 141(b)(2) were not met, and found that appellants failed to carry their burden of proof to show that this decoy's experience somehow made him appear older than 21 to this particular clerk.

Finally, appellants argue that using a decoy who is one month shy of his 20th birthday is somehow unfair. Appellants misread the requirements of rule 141. The rule simply requires the decoy to be less than 20 years of age, and to display the appearance which could

generally be expected of a person under 21 years of age. The decoy in this case met these requirements.

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 or she testifies, and making a determination whether the decoy's appearance met the requirement of Rule 141. Under the circumstances, we are not in a position to second-guess the trier of fact. In any case, appellants have not presented us with evidence or a compelling argument that causes us to question the ALJ's findings.

II

Appellants also contend that rule 141(b)(5) was violated because no face-to-face identification took place.

Title 4, California Code of Regulations, Section 141, subdivision (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.

Appellants maintain that the record fails to show that a peace officer entered the premises to have the decoy make a face-to-face identification of the clerk who sold him the alcoholic beverage, although exhibit 2 does show a photograph of the decoy with the clerk who sold the beverage to him, as confirmed by the decoy's testimony [RT 9].

Appellants' counsel did not raise the issue of no face-to-face identification at the hearing. The Board is entitled to consider it waived. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §400, p. 458.)

The general rule in this regard is stated in *In re Aaron B.* (1996) 46 Cal.App.4th 843, 846 [54 Cal.Rptr.2d 27]:

> "[A] party is precluded from urging on appeal any point not raised in the trial court. [Citation.] Any other rule would ' " 'permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not.' " [Citations.]' [Citation.]" (*In re Riva M.* (1991) 235 Cal.App.3d 403, 411-412 [286 Cal.Rptr. 592].)

Numerous other cases have held that the 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. (*E.g., Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical 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]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

We decline to address this issue.

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.