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

AB-9110
File: 20-398326 Reg: 09071653

UNITED EL SEGUNDO, INC., dba United Oil 78
9819 National Boulevard, Los Angeles, CA 90034,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: March 3, 2011
Los Angeles, CA

ISSUED APRIL 26, 2011

United El Segundo, Inc., doing business as United Oil 78 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk, Edgar Rivera, selling a six-pack of Corona beer, an alcoholic beverage, to Salvador Sanchez, an 18-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant United El Segundo, Inc., appearing through its counsel, Autumn Renshaw, 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 April 21, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on March 1, 2004. On August 6, 2009, the Department instituted an accusation against appellant charging the unlawful sale of an alcoholic beverage to a minor. An administrative hearing was held on March 10, 2010, at which time documentary evidence was received and testimony concerning the violation charged was presented by Thomas Datro, a Los Angeles police officer; Salvador Sanchez, the minor; and Edgar Rivera, the clerk.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been proved, and appellant had failed to establish any affirmative defense.

Appellant filed a timely notice of appeal in which it raises the following issues: (1) Appellant was prevented from introducing evidence that would have proved the penalty was based on an underground regulation; (2) there was no compliance with Rule 141(b)(2)[2]; and (3) the Department failed to consider all evidence of mitigation.

DISCUSSION

I

Appellant contends that it was prevented from introducing evidence that would have proved the penalty was based on an underground regulation when the administrative law judge (ALJ) granted the Department's motion to quash the subpoena served on the District Administrator.

The issue raised by appellant is no stranger to this Board. In fact, since it was raised in embryonic form in 2009 (see *Cirrus Investments* (2009) AB-8766), it has been

[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.

addressed by the Board at least 16 times,[3] and rejected each time.

There is nothing said in appellants' brief that has not been said in one form or another in the matters cited in the footnote. Indeed, the brief filed by appellant in this case is little more than a cut and paste copy of the briefs in the cases cited in the footnote. This appeal is equally lacking in merit.

Even if the District Administrator testified as the offer of proof said she would, that testimony would not establish that an underground regulation existed.

II

Appellant contends secondly that there was no compliance with Rule 141(b)(2) which dictates: "[t]he 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 ALJ made the following finding of fact about the decoy's appearance (FF-9):

> Sanchez 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 Rivera at the Licensed Premises on June 24, 2009, Sanchez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Rivera.

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[3] *Cirrus Investments* (March 12, 2009) AB-8766; *Randhawa* (May 19, 2010) AB-8973; *Yummy Foods LLC* (July 22, 2010) AB-8950; *7-Eleven, Inc./Del Rosario* (August 4, 2010) AB-8786; *7-Eleven, Inc./Raqba, Inc.* (August 5, 2010) AB-8988; *Chevron Stations, Inc.* (August 9, 2010) AB-8996*; 7-Eleven, Inc./Solanki* (August 9, 2010) AB-9019; *Murshed (August 9, 2010) AB-9073; Wong* (August 18, 2010) AB-8991; *7-Eleven, Inc./Triplett* (September 15, 2010) AB-8864; *7-Eleven, Inc./Salem Enterprises* (September 21, 2010) AB-8965; *Sharmeens Enterprises, Inc*. (October 25, 2010) AB-8782 (review denied November 5, 2010); *7-Eleven, Inc./Malldiv Associates* (December 7, 2010) AB-8951; *7-Eleven, Inc./Aziz* (December 9, 2010) AB-8980; *7-Eleven, Inc./Ghuman & Sons, Inc. (*December 9, 2010) AB-8910*; Sharmeens Enterprises, Inc.* (December 9, 2010) AB-8781.

In addition, the ALJ specifically rejected appellant's argument that the decoy's appearance was that of a person in his mid-20's. (Conclusion of Law 5).

Appellant's case is not made any stronger by arguing facts from a completely different case (AOB at p. 15),[4] with a decoy of a different name and the opposite gender, who was accompanied by five police officers, rather than two as in the instant case.

Appellant maintains that the decoy's physical appearance, coupled with his experience as a decoy, caused him to appear older than 21 to the clerk, and to display a confident demeanor, uncharacteristic of a person under the age of 21. Further, appellant contends that no substantial evidence supports the Department's decision. (AOB at p. 3.)

We can dispose of this latter point quickly. We simply do not agree that an administrative law judge who must determine the apparent age of a decoy, and actually sees the decoy in person, lacks substantial evidence to make such a determination. The Board's concern throughout has been whether, in doing so, the administrative law judge has applied the correct standard under the rule.

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 possessed 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. The ALJ has made that finding here, and we are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan

[4] An example of an inappropriate cut and paste from some other brief.

appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that he did not.

We do feel compelled to address specifically, however, the contention that the decoy's experience should disqualify him on the basis of having too confident a demeanor. As we said 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. 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.

We see no evidence that this decoy's experience as a decoy resulted in him displaying the appearance of a person 21 years old or older.

III

Appellant contends that the penalty imposed, a 15-day suspension, is excessive because it did does not reflect all the factors it presented in mitigation. Appellant asserts that an all-stayed penalty would be more appropriate.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage 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 Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].)

Appellant's disagreement with the penalty imposed does not mean the Department abused its discretion. Whether or not the decision includes a discussion of *all* possible mitigating factors presented is irrelevant. We are not aware of anything in the law that requires such a discussion, nor do appellants refer us to any such authority. This Board's review of a penalty looks only to see whether it can be considered reasonable, not what considerations or reasons led to it. If it is reasonable, our inquiry ends there.

In the portion of the Proposed Decision entitled "Penalty" the ALJ addresses the issue of mitigation:

> The Department requested a 15-day suspension. The Respondent argued that, if the accusation were sustained, a mitigated penalty should be imposed based on its four years of discipline-free operation and the mandatory training it provides to its employees. Four years is a relatively short period of time and not worthy of mitigation. While the Respondent's policy regarding the sales of alcoholic beverages is commendable, it is not worthy of mitigation in a case such as this where the clerk opts to ignore it. The penalty recommended herein complies with rule 144.

The 15-day suspension imposed is not clearly unreasonable and the Board has no authority in such a case to interfere with the Department's exercise of its discretion. Appellant makes much of the ALJ's statement that "four years is a relatively short period of time and not worthy of mitigation," describing this as a major mistake. Appellant argues that it had five, not four, years of discipline- free operation, and that, had the ALJ realized this, his penalty recommendation might well have been more lenient.

We cannot speculate that an additional year might have made a difference in the ALJ's mind, nor can we say that the standard Rule 144 penalty for a first-strike sale-to-minor violation is clearly unreasonable.

ORDER

The decision of the Department is affirmed.[5]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
MICHAEL A. PROSIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[5] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.