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

AB-9168
File: 47-241540 Reg: 10073586

FUN TO SPARE, INC., dba Bel Mateo Bowl
4330 Olympic Avenue, San Mateo, CA 94403,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: April 5, 2012
San Francisco, CA

ISSUED MAY 1, 2012

Fun To Spare, Inc., doing business as Bel Mateo Bowl (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 20 days for appellant's 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 appellant Fun To Spare, Inc., appearing through its counsel, Ralph B. Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on February 7, 1990. On October 11, 2010, the Department filed an accusation against appellant charging

[1]The decision of the Department, dated April 21, 2011, is set forth in the appendix.

that, on March 18, 2010, appellant's clerk (the clerk), sold an alcoholic beverage to 19-year-old Christopher Sigmund. Although not noted in the accusation, Sigmund was working as a minor decoy for the San Mateo Police Department at the time.

At the administrative hearing held on March 1, 2011, documentary evidence was received, and testimony concerning the sale was presented by Sigmund, the decoy. Appellant presented no witnesses.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no affirmative defense had been established.

Appellant has filed an appeal making the following contentions: (1) Rule 141(b)(2) was violated, and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends that the use by the San Mateo Police Department of a six-feet tall, 200-pound, 19-year-old minor decoy with three years experience as a police cadet and one prior experience as a decoy, who was able to purchase alcoholic beverages in five of the eight premises he visited, was "outrageous and inappropriate," and violative of Rule 141(a)[2] and Rule 141(b)(2).[3]

The administrative law judge (ALJ) considered these and other aspects of the

---

[2] Rule 141(a) provides that law enforcement agencies may only use persons under the age of 21 to attempt to purchase alcoholic beverages "in a fashion that promotes fairness."

[3] 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.

decoy's appearance and experience and concluded that the decoy possessed the appearance required by Rule 141(b)(2). (Findings of Fact II and IV; Determination of Issues II-V.)

As the Department reminds us, this Board has heard many cases where it has been asked to substitute its judgment for that of the ALJ in determining whether there has been compliance with the rule in question. This is another such case, and once again we will not. We do not view the decoy's height and weight as atypical of a 19-year-old male, and we have explained that one's personal experience is not, by itself, relevant to a determination of the decoy's apparent age.

> [I]t 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.

(*7-Eleven, Inc./Azzam (*2001) AB-7631.)

As the quoted excerpt from *Azzam*, *supra*, suggests, our view is less dogmatic than that presented to us in the Department's brief, where it contends that "[e]ven when coupled with other facts, the following are never evidence of [apparent] age: 1) the size of the minor, 2) illegal sales to same minor by other clerks at other premises during one operation, and 3) the experiences and or training." (Dept. Brief, p.2.)

It is probably no secret that most of the cases where a rule 141(b)(2) defense has been asserted involve a single law firm, perhaps unwilling to accept the direction the Board's cases have gone with respect to arguments based on size, weight, Explorer

experience or other personal characteristics of a decoy. The Department's display of impatience is at least understood, if not entirely warranted.

We have said time and again that the ALJ is the person who observes the decoy as he or she testifies and is cross-examined. The ALJ, unlike any member of this Board, observes the demeanor, mannerisms and behavior of the minor decoy and makes the determination called for by the rule. The Board is not equipped to do this, and, of course, does not have that right. Although we have at other times indicated that extraordinary circumstances might warrant our faulting an ALJ's decision on this issue, we have rarely done so, as the Department correctly points out, and we are unwilling to do so here. That said, we are equally unwilling to go so far as the Department would have us go, that is, to say that the combination of a decoy's size, weight and experience *in combination with other factors* could never present an appearance of a person older than 21 years of age.[4]

The Department contends that, without the seller's testimony, a licensee cannot establish its burden of proof under rule 141(b)(2) "because the effect of the minor's

---

[4] See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2002) 103 Cal.App.4th 1084, 1093-1094 [127 Cal.Rptr.2d 652] (*The Southland Corporation*), where the court said, with respect to the finding that the decoy displayed both the physical and non-physical appearance which could generally be expected of a person under 21 years of age:

> [T]he licensees rely on isolated items of evidence, *many of which we acknowledge could have supported a contrary finding*. For example, the Southland Corporation emphasizes that the decoy testified he was not nervous on the night in question and that he had considerable experience as an explorer with the Los Angeles Police Department, rising to the level of captain and working in other decoy operations. [Emphasis supplied.]

It is precisely this kind of evidence sought to be elicited in the present case in the questioning the Department has characterized (Dept. Br., p. 8) as irrelevant.

appearance on the seller drives the rule. This is so because only the clerk can tell why the illegal sale occurred. The minor will not know. The ALJ will not know and the Board cannot know." (Dept. Br., p. 3.)

We reject the Department's argument. If factors such as height, weight, and worldly experience would never result in a minor having the appearance of a person over the age of 21, then why would 141(b)(2) even be a necessary part of Rule 141? Could not the Department have drafted the rule simply to require that the decoy be under 20 years of age? We know that it did not, so it must have thought the additional language was needed, perhaps to contribute to the element of fairness. And, since the ALJ will necessarily view the decoy at the hearing (see Bus. & Prof. Code, §25666), he or she could hardly refuse to consider whether the decoy possessed the requisite appearance, whether the clerk testified or not.

The Board has said as much in several early decisions involving 141(b)(2): "Where there is no evidence that the decoy's appearance changed substantially between the time of the sale and the hearing, the ALJ's observation of the decoy at the hearing provides sufficient evidence on which to base a finding." (*GMRI, Inc.* (2004) AB-7336c); "We simply do not agree that an administrative law judge who must determine the apparent age of the decoy, and actually sees the decoy in person, lacks substantial evidence to make such a determination." (*The Southland Corporation/Amir* (2001) AB-7464a, fn. 2); "Nor is the Board in a position to say that there was not substantial evidence to support this finding. The decoy himself provides the evidence of his appearance." (*Circle K Stores, Inc*. (2001) AB-7751.)

We also know that the Department considers a licensee's failure to terminate the employment of the person who sold an alcoholic beverage to a minor as a negative

factor in connection with penalty mitigation or aggravation issues, and the Department's position in this case offers licensees a dilemma - terminate the employee and convert her or him into a critical but hostile witness (if she or he can be located and brought to a hearing) or retain the employee for his or her testimony and risk an enhanced penalty in the event of an adverse result. Our result in this case moots that likelihood.

II

Appellant argues that the ALJ abused his discretion by imposing a penalty without taking into consideration proper mitigating circumstances. Specifically, appellant asserts that the ALJ should have given weight to the fact that, prior to its first violation of section 25658, appellant had an 18-year discipline-free history. Additionally, appellant asserts that the prior violation was for conduct not involving a sale to a minor. Appellant states that the 20-day suspension imposed by the ALJ did not reflect mitigation, but was simply the adoption of the Department's recommendation.

Addressing the last point first, it is, of course, possible that the ALJ did simply adopt the Department's recommendation without mitigation in mind. However, that requires us to guess what was in Judge Lo's mind, and we choose not to guess.

Appellant's extensive discipline-free history served it well in the prior violation, which resulted in a 10-day, all stayed, suspension, even though the violation involved four minors in possession of an alcoholic beverage, and one who had consumed an alcoholic beverage.

The instant violation took place only two years later. Under Department Rule 144, which does not distinguish between subdivisions of section 25658, the standard penalty could have been 25 days. A 20-day suspension, albeit recommended by the Department, in fact reflects mitigation.

We cannot say such a suspension was unreasonable.

ORDER

The decision of the Department is affirmed.[5]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, 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.