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

AB-9392
File: 21-294657 Reg: 13078744

7-ELEVEN, INC. and DENNIS P. REJLEK,
dba 7-Eleven Store # 2174-29982
4000 East 7th Street, Long Beach, CA 90804,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 4, 2014
Los Angeles, CA

ISSUED SEPTEMBER 30, 2014

7-Eleven, Inc. and Dennis P. Rejlek, doing business as 7-Eleven Store # 2174-29982 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their off-sale general license for 10 days, all of which were conditionally stayed subject to one year of discipline-free operation, 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. and Dennis P. Rejlek, appearing through their counsel, R. Bruce Evans and Jennifer L. Carr, and the

[1]The decision of the Department, dated November 19, 2013, is set forth in the appendix.

Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on October 21, 1994. On June 21, 2013, the Department instituted an accusation against appellants charging that, on February 26, 2013, appellants' clerk, Vanessa Soeur, sold an alcoholic beverage to 19-year-old Brett Gregory Manis. Although not noted in the accusation, Manis was working as a minor decoy for the Long Beach Police Department at the time.

At the administrative hearing held on October 1, 2013, documentary evidence was received, and testimony concerning the violation charged was presented by Manis (the decoy) and Sergeant Eric Hooker of the Long Beach Police Department. Appellants presented no witnesses.

Testimony established that, on February 26, 2013, the decoy entered the licensed premises alone and proceeded to the beer coolers. He selected a six-pack of Bud Light beer in bottles, and approached the counter where Soeur was working at the register. Soeur asked the decoy for his identification, and the decoy produced his California driver's license which contained his true date of birth, June 7, 1993, and a red stripe indicating "AGE 21 IN 2014." Soeur looked at the license for approximately five seconds, handed it back to the decoy without asking any age-related questions, and completed the sale. The decoy then exited the premises.

The Department's decision determined that the violation charged had been proven and that no defense had been established.

Appellants filed a timely appeal contending that (1) the administrative law judge

(ALJ) did not properly consider evidence that rule 141(b)(2)[2] was violated; and (2) further mitigation of the penalty is warranted.

DISCUSSION

I

Appellants contend that the ALJ abused his discretion when he disregarded their arguments and supporting evidence which showed that the decoy operation was not conducted in a fashion that promotes fairness pursuant to rule 141(a).[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." This rule provides an affirmative defense, and the burden of proof lies with the appellants.

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

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[2]References to rule 141 and its subdivision are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

[3]Rule 141(a) states: "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.

> 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].)

The ALJ made the following findings of fact regarding the decoy's appearance and demeanor:

> C. The overall appearance of the decoy including his demeanor, his poise, his mannerisms, his size and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that he was an inch taller at the time of the hearing.
>
> 1. The decoy is a very youthful looking male who is six feet in height and who weighed 155 pounds on the day of the sale. On that day, his hair was relatively short, he was clean-shaven and his clothing consisted of black pants, a white T-shirt and gray sneakers. The decoy was also wearing a black watch on the day of the sale and he wore the same clothing and the same watch to the hearing. The photograph depicted in Exhibit 5 was taken at the premises and the photographs depicted in Exhibits 2 and 3 were taken prior to the decoy operation. All three of these photographs show how the decoy looked and what he was wearing on the day of the sale.
>
> 2. The decoy had not participated in any prior decoy operations and he had not served a [*sic*] police Explorer. The decoy attempted to purchase an alcoholic beverage at approximately fifteen to twenty locations on February 26, 2013 and he was able to purchase an alcoholic beverage at a total of four locations.
>
> 3. There was nothing remarkable about the decoy's nonphysical appearance and there was nothing about the decoy's speech, his mannerisms or his demeanor that made him appear older than his actual age.

> [¶ . . . ¶]
>
> 5. After considering the photographs depicted in Exhibit [*sic*] 2, 3 and 5, the overall appearance of the decoy when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance that could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

(Findings of Fact ¶¶ II.C.1 through II.C.5.)

In light of these findings, the ALJ concluded that there was compliance with rule 141. (Determination of Issues II.)

Appellants first contend that the ALJ failed to properly consider the decoy's physical stature which, they claim, made the decoy appear older. Specifically, appellants cite the decoy's height of six feet and weight of 155 pounds, and posit that his "is a considerably larger and more mature build than would be expected of someone under the age of 21." (App.Br. at p. 4.)

As this Board has stated many times, large stature is not dispositive as to whether there was compliance with rule 141. Minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys of large stature automatically violate the rule. (See, e.g., *Garfield Beach CVS, LLC* (2013) AB-9261, at p. 4.) Here, in reaching his conclusion that there was compliance with rule 141, the ALJ made extensive findings concerning the decoy's physical appearance, and why he did *not* appear to be over the age of 21. Appellants, on the other hand, have offered nothing more than a conclusory statement that the decoy's physical stature made him appear older. Without more to support appellants' claim, this Board should not and cannot substitute its judgment for that of the ALJ.

Appellants further maintain that the ALJ failed to properly consider certain non-

physical characteristics of the decoy, such as his age, demeanor, and previous experience, in reaching his conclusion. (App.Br. at p. 5.) Once again, this Board is not in the position to second-guess the judgment of the ALJ. The ALJ is the trier of fact and has the opportunity, which this Board does not, to observe the decoy as he testifies, and to make the determination of whether the decoy's overall appearance, including his demeanor and confidence, meets the requirements of rule 141. The ALJ determined that the requirements of rule 141 were met in this matter, and the Board finds no reason to disturb this determination.

Last, appellants' argument that the ALJ failed to properly consider the decoy's previous experience is unconvincing. It is worth noting that the instant operation was the decoy's first minor decoy operation, and that he had neither previous law enforcement training nor experience as a police Explorer. (RT at p. 14.) Additionally, this Board has rejected the "experienced decoy" argument many times before:

> 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 . . . . 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.

(*Azzam* (2001) AB-7631, at p. 5.) Appellants presented no evidence that the decoy's "experience" caused him to display the appearance of a person 21 years old or older. Their argument must therefore be rejected.

Altogether, appellants have provided no valid basis for the Board to question the ALJ's determination that the decoy's appearance complied with rule 141. This Board has on innumerable occasions rejected invitations to substitute its judgment for that of the ALJ on a question of fact, and it must do so here as well.

II

Appellants contend that the ALJ failed to properly consider the mitigating evidence that they presented at the administrative hearing. (App.Br. at p. 6.) To wit, appellants argue their extensive discipline-free history constituted sufficient evidence to warrant *further* mitigation of the penalty. (*Ibid*., emphasis added.) They also claim that the ALJ did not consider the "long-term burden of penalty [*sic*] which will remain with [a]ppellants in years to come should the 10-day suspension be sustained" because, even though the suspension would be stayed, a 10-day suspension suggests that appellants' actions were more severe than was the case. (*Ibid*.)

The Board may examine the issue of excessive 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 Bd. & 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].)

Rule 144 sets forth the Department's penalty guidelines and provides that higher or lower penalties from the schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances. (Cal. Code Regs., tit. 4, § 144.)

Rule 144 itself addresses the discretion necessarily involved in an ALJ's

recognition of aggravating or mitigating evidence:

> **Penalty Policy Guidelines:**
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> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

An administrative agency's decision need not include findings regarding mitigation absent a statute to the contrary. (*Vienna v. Cal. Horse Racing Bd.* (1982) 133 Cal.App.3d 387, 400 [184 Cal.Rptr. 64]; *Otash v. Bur. of Private Investigators* (1964) 230 Cal.App.2d 568, 574-575 [41 Cal.Rptr. 263].) Appellants have not identified any statute with such requirements. Findings regarding the penalty imposed are not necessary as long as specific findings are made that support the decision to impose disciplinary action. (*Williamson v. Bd. of Med. Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-47 [266 Cal.Rptr. 520].)

In the instant matter, the ALJ made the following findings with regard to mitigation:

> The Department's attorney recommended a mitigated penalty consisting of a ten day suspension with all ten days stayed in light of the Respondents' lengthy history without any disciplinary action. After considering all the evidence presented at the hearing, a determination has been made that the recommended penalty is an appropriate penalty in this matter.

(Findings of Fact ¶ II.D.)

Thus, contrary to appellants' contention that the ALJ failed to properly consider their unblemished disciplinary record, consideration of that record clearly prompted the recommendation to conditionally stay the suspension in its entirety. Moreover, should appellants wish for the stay to remain in effect permanently, all they would have to do is remain discipline-free for one year once the Board's decision becomes final. Therefore, this Board finds no abuse of discretion in this regard.

Finally, although appellants request a 5-day suspension because they are concerned with the stigma attached to a longer suspension appearing on their record, there is nothing here to suggest that a 10-day suspension is unreasonable. Indeed, even disregarding the fact that this suspension is entirely (albeit conditionally) stayed, ten days is less than the default 15-day suspension proposed by the penalty schedule referenced in rule 144 for a first-time violation of section 25658(a). Hence, the penalty in this case has already been adequately and substantially mitigated.

In short, without more, appellants' discontent with the ALJ's proposed penalty and the extent to which it has or has not been mitigated does not render that penalty an abuse of discretion.

ORDER

The decision of the Department is affirmed.[4]

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

[4]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.