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

AB-9427
File: 20-426302 Reg: 13079425

7-ELEVEN, INC. and TAHIRA SULTAN NIAZ,
dba 7-Eleven Store #27356
100 West Imperial Avenue, El Segundo, CA 90245,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED JANUARY 13, 2015

7-Eleven, Inc. and Tahira Sultan Niaz, doing business as 7-Eleven Store #27356 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 10 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 include appellants 7-Eleven, Inc. and Tahira Sultan Niaz, through their counsel, Ralph Barat Saltsman and Jennifer L. Carr of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, Jennifer M. Casey.

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[1]The decision of the Department, dated March 21, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 17, 2005. On October 28, 2013, the Department filed an accusation against appellants charging that, on March 1, 2013, appellants' clerk, Altaf Baig (the clerk), sold an alcoholic beverage to nineteen-year-old Matthew Rice. Although not noted in the accusation, Rice was working as a minor decoy for the El Segundo Police Department (ESPD) at the time.

At the administrative hearing held on January 30, 2014, documentary evidence was received and testimony concerning the sale was presented by Matthew Rice (the decoy) and by Thomas Jones, an officer for the ESPD. Appellants offered the testimony of Riaz Niaz, the husband of appellant Tahira Sultan Niaz.

Testimony established that, on the day of the operation, the decoy entered the licensed premises alone and proceeded to the beer coolers. He selected a six-pack of Bud Light beer in bottles, walked to the sales counter, and placed the beer on the counter. When the clerk, who was working behind the counter at the time, asked the decoy for identification, the decoy handed the clerk his California driver's license which contained the decoy's correct date of birth and a red stripe indicating, "AGE 21 IN 2014." The clerk swiped the driver's license two times through the computerized cash register and returned the license to the decoy without asking any questions about the identification or the decoy's age. The clerk stated the price, took the decoy's money, provided the decoy with change, and then bagged the beer. The decoy took the beer, exited the premises, and contacted some ESPD officers.

Riaz Niaz's (Riaz) testimony concerned mitigation. Riaz testified that the clerk had received appellants' computerized Coming of Age training as well as additional training provided by Tahira Niaz. Riaz further testified that the clerk signed the Age-

Restricted Products Sales Acknowledgment Form (Exhibit D) and that appellants use a secret shopper program to see if their employees are following the proper procedures. Finally, Riaz stated that the clerk was not terminated after he sold an alcoholic beverage to the decoy, nor was he disciplined; however, the clerk was retrained and advised of the penalties for selling an alcoholic beverage to a minor. In addition to Riaz's testimony, appellants also produced two letters from the ESPD indicating that appellants had been successful in *not* selling an alcoholic beverage to a minor decoy during previous operations. (Exhibit A.)

The Department's decision determined that the violation charged was proved and no defense was established. In light of appellants' mitigating evidence, the Department imposed a ten-day suspension on appellants' license.

Appellants then filed an appeal contending: (1) the administrative law judge (ALJ) improperly found that the decoy operation complied with rule 141(b)(2);[2] (2) the decoy must appear before the Appeals Board in order for the Board to conduct a meaningful review of the Department's decision; and (3) the ALJ did not properly consider appellants' mitigating evidence.

DISCUSSION

I

Appellants contend that the ALJ failed to adequately consider the entire picture of the decoy's appearance in making his determination regarding appellants' defense under rule 142(b)(2). To wit, appellants argue that the ALJ did not fully consider the decoy's experience in law enforcement and the concomitant observable effect it had on

[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.

his appearance, his imposing stature, or his clean-cut appearance. (App.Br. at p. 7.)

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." The 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 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 factual findings concerning the decoy's appearance, demeanor, and experience:

> D. The overall appearance of the decoy including his demeanor, his poise, his size, his mannerisms 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 and on the day of the decoy

operation was similar except that he was wearing braces on the day of the hearing.

1. The decoy is a youthful looking male who is five feet eleven inches in height and who weighs approximately one hundred seventy pounds. On the day of the sale, he was clean-shaven, his hair was cut in a buzz cut, he wore no jewelry and his clothing consisted of a white T-shirt, blue jeans and white sneakers.

2. Although the decoy had not participated in any prior decoy operations, he testified that he felt confident and safe when he entered the subject premises. He had worked as a cadet with the El Segundo Police Department for approximately six months prior to the date of the subject sale. As a cadet, he primarily worked in parking enforcement writing citations and he wore a uniform. He also performed office duties and ran errands for some of the police officers.

3. There was nothing remarkable about the decoy's nonphysical appearance and there was nothing about his speech, his mannerisms or his demeanor that made him look older than his actual age.

4. The decoy visited seventeen licensed locations on March 1, 2013 and he was able to purchase an alcoholic beverage at a total of three locations.

5. The photographs depicted in Exhibits 5 and 6 were taken inside the premises on the day of the sale and the photographs depicted in Exhibits 3 and 4 were taken before going out on the decoy operation. All four of these photographs depict how the decoy appeared and what he was wearing when he was at the premises. Although the decoy was approximately two and one half months from his twentieth birthday when he visited the subject premises, he has a very young face and he actually looks younger in person than he does in his photographs.

6. The clerk who sold an alcoholic beverage to the decoy did not testify at the hearing.

7. After considering the photographs depicted in Exhibits 3, 4, 5 and 6, the decoy's overall appearance when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which 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.D.1-7.) Based on these findings, the ALJ determined that there was compliance with rule 141(b)(2). (See Determination of Issues ¶ II.)

Altogether, contrary to appellants' contention, the ALJ did indeed consider the "complete picture" surrounding the decoy's appearance — including his age, stature, clean-cut appearance, experience with law enforcement, and confidence — and simply found that it was not sufficient to establish non-compliance with rule 141(b)(2).

Appellants have provided no basis for reconsideration of the ALJ's determination other than a mere difference of opinion. They are essentially asking this Board to substitute its judgment for that of the ALJ by considering the same set of facts and reaching the opposite conclusion — something this Board cannot and should not do.

II

Appellants contend that the Board must permit the decoy to appear before it because appellants have a right to meaningful review of the Department's decision on rule 141(b)(2). (App.Br. at p. 8.) Absent observation of the decoy in person, appellants contend, the Board cannot know whether the ALJ's findings concerning rule 141(b)(2) determination were supported by substantial evidence in light of the testimony and record. (*Ibid*.) The instant case is one of four raising this same issue of law. (See *Chevron Stations, Inc.* (2014) AB-9415; *7-Eleven, Inc./Assefah* (2014) AB-9416; *7-Eleven, Inc./Jamreonvit* (2014) AB-9424.)

This Board has addressed this argument at length in *Chevron Stations, Inc.*, *supra*. We offer only a summary of our reasoning here, and refer appellants to that case for a more comprehensive analysis.

Business and Professions Code section 23083 limits our review to evidence included in the administrative record. (See also *7-Eleven, Inc*. (2007) AB-8558, at p. 3.) Section 1038(a) of the California Code of Regulations defines the terms to be included in the administrative record — none of which conceivably allows for an actual human

being. (See Cal. Code Regs., tit. 1, § 1038(a).) The properly compiled record — including testimony, arguments, photographs of the decoy, and the Department's decision containing the ALJ's firsthand impressions — is both legally and practically sufficient for the Board to determine whether the conclusions reached regarding the decoy's appearance are supported by the evidence.

As we observed in *Chevron Stations, Inc.*, appellants' argument that the decoy must appear before the Board has no merit; it lacks support in both law and logic. We encourage appellants to seek a writ of appeal if they disagree. In the meanwhile, we do not wish to see this argument again, and will enforce that expectation with appropriate sanctions.

III

Appellants contend the ALJ abused his discretion by arbitrarily considering only a fraction of the evidence appellants presented in support of a more mitigated penalty. Further, appellants contend the ALJ diminished the importance of appellants' own internal compliance procedures in proposing the penalty.

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.

The ALJ made the following factual findings concerning mitigation:

> E. The husband of Respondent Tahira Niaz, Riaz Niaz, testified that [the clerk] had received 7-Eleven's computerized Come of Age training, that [the clerk] received additional training by his wife, that [the clerk] signed the Age-Restricted Products Sales Acknowledgement [*sic*] Form (Exhibit D) and that the Respondents also used a Mystery Shopper program to check to see if employees were following proper procedures. The Respondent also produced two letters dated September 30, 2013 and August 27, 2010 from the El Segundo Police Department indicating that the Respondents had been successful in not selling an alcoholic beverage to a minor decoy. [The clerk] was not terminated after he sold an alcoholic beverage to the subject minor decoy and he was not disciplined.

> However, [the clerk] was retrained and advised of the penalties of selling an alcoholic beverage to a minor.
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> F. The Department's attorney recommended a fifteen day suspension in this matter. Based upon all the evidence presented at the hearing including the mitigation testimony provided by Mr. Niaz and the disciplinary history, a determination has been made that a penalty consisting of a ten day suspension is an appropriate penalty in this matter.

(Findings of Fact ¶¶ II.E-F.) The ALJ also noted appellants' discipline-free history dating back to the issuance of the license on May 17, 2005. (See Findings of Fact ¶ I.) As a result, the ALJ proposed a penalty of ten days' suspension. (Order.)

Appellants take issue with the findings, or lack thereof, concerning mitigation. First, appellants do not agree with the weight the ALJ gave appellants' success with ESPD decoy operations as opposed to their own "Mystery Shopper" program which, appellants claim, shows "a documented 14 times in six years where the employees successfully repelled the sale of age-restricted products to minors and no record of a single sale to a minor." (App.Br. at pp. 10-11.) Next, appellants are unhappy with the ALJ's failure to reference the letters to appellants from the ESPD describing appellants' success in quelling sales of tobacco to underage persons. (*Id*. at p. 11.) The techniques and procedures for compliance with alcohol and tobacco sales laws are the same, appellants argue, and therefore those letters were relevant for mitigation. (*Id.*)

Appellants' arguments, while spirited, ignore one crucial point: 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].) Appellants have not identified any statute with such requirements, and 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].) Additionally, "unless the record affirmatively indicates otherwise, the trial court is deemed to have considered all relevant criteria, including any mitigating factors." (*People v. King* (2010) 183 Cal.App.4th 1281, 1322 [108 Cal.Rptr.3d 333], citations omitted.)

Here, while the ALJ could have considered the above-described factors as mitigating evidence, he was not required to do so. His failure to expressly list all of the factors he took into consideration does not render his proposed penalty an abuse of discretion. Rule 144 explicitly states that higher or lower penalties may be imposed by the Department than those recommended in rule 144. Moreover, the penalty was indeed mitigated in this case; appellants received a ten-day suspension, which is five days less than the default penalty proposed by rule 144 for a first-time violation of section 25658. Appellants' mere discontent with the ALJ's proposed penalty and the extent to which it has or has not been mitigated is simply irrelevant.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, 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.