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

AB-9432
File: 20-519623; Reg: 13079641

7-ELEVEN, INC. and KARAN DHILLON,
dba 7-Eleven Store #2136-34059B
6586 Van Nuys Boulevard, Van Nuys, CA 91401-1426,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED JANUARY 9, 2015

7-Eleven, Inc. and Karan Dhillon, doing business as 7-Eleven Store #2136-34059B (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 days because their clerk sold 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 Karan Dhillon, through their counsel, Stephen Allen Jamieson and Margaret Rose, 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 April 10, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 2, 2012. On December 11, 2013, the Department filed an accusation against appellants charging that, on May 31, 2013, appellants' clerk, Navaneethan Sammanthamoorthy (the clerk), sold an alcoholic beverage to 18-year-old Stephanie Galindo. Although not noted in the accusation, Galindo was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on March 4, 2014, documentary evidence was received and testimony concerning the sale was presented by Galindo (the decoy); by Russell Kumagai, an officer with the LAPD; and by Karan Dhillon, one of the licensees.

Testimony established that on May 31, 2013, Officer Kumagai entered the licensed premises and went to the coolers where he selected a Gatorade. Approximately one minute later, the decoy entered and went to the coolers where she selected a can of fruit punch flavor Four Loko, a malt beverage that is 12% alcohol by volume, which she took to the sales counter.

The clerk scanned the Four Loko and asked the decoy for her identification. The decoy gave the clerk her California Identification Card, which had a portrait orientation and contained a red stripe indicating “AGE 21 IN 2015.” The clerk looked at the ID for a few seconds, looked at the decoy, then at the ID again. He then handed the ID back to the decoy and entered something into the register before completing the sale. He did not ask the decoy her age or any age-related questions. Officer Kumagai was approximately three feet behind the decoy in line when the sale occurred. The decoy then exited the premises and met up with two LAPD officers in their car. She remained there for about three minutes.

Officer Kumagai purchased the Gatorade. Before exiting the premises he was contacted by Officer Jones, who asked him to identify the person who had sold the decoy the Four Loko. Officer Kumagai pointed out the clerk and then exited. Officer Jones and another LAPD officer asked the clerk to step outside.

The decoy and two officers who had been waiting in the car walked up to the two officers who had brought the clerk outside. Officer Kumagai asked the decoy if this was the person who sold her the alcohol. She said it was and pointed at the clerk. The two of them were standing next to each other, about a foot apart, at the time. A photo was taken of the clerk and the decoy (Exhibit 2), after which the clerk was issued a citation. The clerk was later fired.

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

Appellants then filed an appeal contending: (1) the face-to-face identification of the clerk was unduly suggestive, in violation of rule 141(b)(5),[2] and (2) the penalty determination is not supported by substantial evidence.

DISCUSSION

I

Appellants contend that the face-to-face identification of the clerk was unduly suggestive, in violation of rule 141(b)(5), because the LAPD officers' actions created a substantial possibility that the decoy misidentified the clerk by bringing only one of two clerks outside to be identified — both of whom were dark complexioned, thin, and male. (App.Br. at p. 7.) Appellants maintain that since the decoy did not recall a second clerk,

[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.

"the officers created an unduly suggestive lineup by withholding from the decoy crucial information — the presence of the second clerk." (*Id*. at p. 8.)

Rule 141(b)(5) provides:

> 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.

The rule provides an affirmative defense. The burden is therefore on the appellants to show non-compliance.

In *Chun* (1999) AB-7287, this Board observed:

> The phrase "face to face" means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id.* at p. 5.) In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board clarified application of the rule in cases where an officer initiates contact with the clerk following the sale:

> As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

(*Id.* at pp. 7-8; see also *7-Eleven, Inc./Paintal Corp.* (2013) AB-9310; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *BP West Coast Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

The court of appeal has found compliance with rule 141(b)(5) even where police escorted a clerk outside the premises — as the officers did in this case —in order to complete the identification. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev.*

Control Appeals Bd. (*Keller*) (2003) 109 Cal.App.4th 1687 [3 Cal.Rptr.3d 339].) As the court noted:

> [S]ingle person show-ups are not inherently unfair. (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 [269 Cal.Rptr. 447].) While an unduly suggestive show-up is impermissible (*ibid.*), in the context of a decoy buy operations, [*sic.*] there is no greater danger of such suggestion in conducting the show-up off, rather than on, the premises where the sale occurred.

(*Id*. at p. 1698.) The court concluded that "[t]he literal terms of [rule 141(b)(5)] leave the location of the identification to the discretion of the peace officer." (*Id.* at p. 1697.)

In *Carlos M.*, the court said:

> The burden is on the defendant to demonstrate unfairness in the manner the show-up was conducted, i.e., to demonstrate the circumstances were unduly suggestive. (*People v. Hunt* (1977) 19 Cal.3d 888, 893-894 [140 Cal.Rptr. 651, 568 P.2d 376].) Appellant must show unfairness as a demonstrable reality, not just speculation. (*People v. Perkins* (1986) 184 Cal.App.3d 583, 589 [229 Cal.Rptr. 219].)

(*In re Carlos M.*, *supra*, at p. 386.)

The ALJ addressed this argument as follows:

> 5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(a)[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, they argued that [the] identification was overly suggestive and that Galindo was too experienced to be a decoy. The Respondent did not argue that rule 141(b)(2) or rule 141(b)(5) was violated; rather, they relied solely upon their perception that the operation was unfair under rule 141(a).
>
> This argument is rejected. There was nothing unfair about using a decoy who had participated in five prior operations, nor was there anything unfair or overly suggestive about the face-to-face identification. Case law indicates that it is perfectly acceptable for an officer to contact the clerk before asking the decoy to identify the seller, even if it means bringing the clerk outside.[fn.] Even if the Respondents had raised rules 141(b)(2) and 141(b)(5), the evidence warrants the same result—Galindo had the appearance generally expected of a person under the age of 21 (Finding of Fact ¶ 11) and the face-to-face identification was not overly suggestive.

(Conclusions of Law ¶ 5.)

Appellants misconstrue the record to support their claim of undue suggestiveness, as well as their allegation that there were two clerks behind the register at the time the decoy purchased the Four Loko — and that the officers nefariously withheld this fact from the decoy. Appellants would have the Board believe the following took place:

> The decoy did not indicate to the officers at all (prior to the single-person lineup outside the store) that Mr. Sammanthamoorthy sold her alcohol. The decoy did not participate at all. Instead, while the decoy sat in the car, the officers spoke among themselves and chose one of two clerks and then escorted that clerk outside the store. Officer Kumagai knew of the second clerk. Officer Jones knew of the second clerk. Officer Kumagai knew that the two clerks looked similar. The decoy appears to have been unaware of all these facts. Unbeknownst to her, the clerk had already been chosen for her by the officers. This is not an operation where the officers entered the store after the sale and brought outside the only clerk working. Rather, here, the officers chose for the decoy, kept from her the knowledge of the second similar-looking clerk, and presented only one person for her in a single person lineup outside the store.

(App.Br. at p. 9.)

The record reveals that Officer Kumagai testified as follows about the number of clerks present when the decoy made her purchase:

> [MS. CASEY]
>
> When Ms. Galindo stood in line, how many people were working behind the register?
>
> A. One.
>
> Q. Was it a man or woman?
>
> A. It was a man.
>
> Q. Did you later learn that gentleman's identity?
>
> A. Yes.
>
> Q. Can you say his name?

A. Sammanthamoorthy.

(RT at pp. 11-12.)

Officer Kumagai then testified to the following events taking place after the decoy's departure:

[MS. CASEY]

After Stephanie left the store, what did you do?

A. I purchased the Gatorade.

Q. After you bought the Gatorade, did other members from LAPD enter the store?

A. Yes.

Q. Who entered?

A. Officer Jones.

Q. And when Officer Jones entered, what did she do?

A. She asked me who sold the beverage to the minor and I pointed out the person who was working register at the time.

Q. And why did Officer Jones ask you who sold the beverage to the minor when she entered?

A. Because at the time she entered, there were two people behind the register counter.

(RT at pp. 14-15.) Officer Kumagai's testimony establishes that only one clerk, Mr. Sammanthamoorthy, was behind the register when the transaction with the decoy took place. Moments later, a second clerk came to work behind the register — but this individual was not seen by the decoy.

Appellants have failed to meet their burden of proving that the face-to-face identification was unduly suggestive. Nothing in the record suggests that the identification was erroneous or that the decoy was in any way pressured to misidentify

the clerk. The record confirms that the identification was conducted three minutes after the sale occurred (RT at p. 60); that Officer Kumagai witnessed the violation and confirmed that the decoy identified the correct clerk (RT at p. 45); that a videotape of the violation confirmed that Sammanthamoorthy was the clerk who sold the alcohol (RT at p. 87); and that the decoy confirmed that the person in Exhibit 2 was the person who sold her the alcohol (RT at p. 62).

Appellants have shown no unfairness, demonstrable or otherwise. We believe the face-to-face identification fully complied with rule 141(b)(5).

II

Appellants contend that the penalty determination is not supported by substantial evidence and that the ALJ failed to properly consider mitigating evidence presented at the hearing.

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:**
>
> 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].) 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].) "Trial courts need not state reasons for rejecting or minimizing a mitigating factor, particularly where no objection is raised. [Citations.] Further, unless the record affirmatively indicates otherwise, the trial court is deemed to have considered all relevant criteria, including any mitigating factors. [Citation.]" (*People v. King* (2010) 183 Cal.App.4th 1281, 1322 [108 Cal.Rptr.3d 333], internal

quotations omitted.)

In the instant case, appellants had only been licensed for eleven months when the violation occurred, and although the ALJ took note of appellants' Come of Age training and the clerk's termination for making this sale (see Finding of Fact ¶ 12), he was not required to mitigate the penalty as a result.

Appellants point out that the ALJ states: "[t]here was no evidence of aggravation presented by the Department nor was there any evidence of mitigation presented by the Respondents." (Penalty at p. 4.) They maintain that the "Department's determination of the penalty must be overturned because the Proposed Decision contains a direct conflict between Finding 12 and the penalty determination." (App.Br. at p. 12.) We disagree. The ALJ acknowledged the evidence that appellants presented, but declined to find that it mitigated the penalty.

As the Board said in *Garfield Beach*:

> Appellants appear to be operating under the mistaken notion that the Department is required to reduce a penalty if some evidence exists that can be labeled "mitigating." This is not correct. The Department's discretion, while not unfettered, is very broad, and this Board is not entitled to disturb the exercise of that discretion unless there is palpable abuse.

(*Garfield Beach CVS, LLC* (2013) AB-9236, at p. 4.)

Fifteen days' suspension is in line with rule 144 and is not an abuse of discretion simply because the Department, in its discretion, chose not to mitigate the penalty.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[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.