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

AB-9482
File: 20-527304 Reg: 14080766

IMPERIAL STATIONS INC.
dba Imperial Stations Inc. 1
8221 Garden Grove Boulevard, Stanton, CA 92644,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: June 4, 2015
Los Angeles, CA

ISSUED JUNE 19, 2015

Imperial Stations Inc., doing business as Imperial Stations Inc. 1 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 15 days for its clerk selling an alcoholic beverage to a police minor decoy in violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellant Imperial Stations Inc., through its counsel, R. Bruce Evans and Margaret Warner Rose of the law firm of Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, Jennifer M. Casey.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 27, 2012.

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[1]The decision of the Department, dated December 4, 2014, is set forth in the appendix.

On July 7, 2014, the Department filed an accusation against appellant charging that, on February 7, 2014, appellant's clerk, Juan Paulino (the clerk), sold an alcoholic beverage to nineteen-year-old Michael Tompkins. Although not noted in the accusation, Tompkins was working as a minor decoy for the Orange County Sheriff's Department (OCSD) at the time.

At the administrative hearing held on October 7, 2014, documentary evidence was received, and testimony concerning the sale was presented by Tompkins (the decoy), and by K.C. Calder, an investigator for the OCSD. Appellant presented the testimony of Tarek Wazne, the general manager of the licensed premises.

Testimony established that on the date of the alleged violation, Calder entered the licensed premises followed a few moments later by the decoy. The decoy went to the coolers, selected a six-pack of Bud Light beer, and took the beer to the sales counter. The clerk scanned the beer and asked to see the decoy's identification. The decoy handed his California driver's license to the clerk, and the clerk looked at it for a few seconds. The clerk handed the ID back to the decoy, and the decoy then paid for the beer. The clerk bagged the beer and gave the decoy some change. The clerk picked up the beer and exited the licensed premises.

After the hearing, the Department issued its decision finding that the violation charged was proved and no defense was established. Appellant's license was suspended for fifteen days.

Appellant filed an appeal contending that the Department erred in omitting consideration of key evidence in support of appellant's rule 141(b)(2)[2] defense.

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[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.

DISCUSSION

I

Appellant contends that the Department erred in omitting consideration of certain evidence in support of its rule 141(b)(2) defense in the decision. Specifically, appellant claims the ALJ failed to mention the decoy's "status as a college student, his employment, or the effect of those experiences on his apparent age." (App.Br. at p. 4.) Appellant contends that these factors, when combined, contributed to the decoy's demeanor and presence for the purposes of rule 141(b)(2), and the ALJ erred in failing to expressly consider them. (*Id.* at pp. 4-5.) Finally, appellant maintains that the "egregiousness of the ALJ's omissions is all the more clear when [the decoy's] college and work experience are added to the list of [his] characteristics which *were* included in the Proposed Decision." (*Id*. at p. 5, emphasis in original.)

Rule 141(a) requires "fairness" in the use of minor decoys:

> 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 . . . and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

Meanwhile, rule 141(b)(2) provides, in pertinent part: "[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 requirements of rule 141 must be strictly obeyed: "The Department's increasing reliance on decoys demands strict adherence to the rules adopted for the protection of the licensees, the public and the decoys themselves." (*Acapulco Restaurants, Inc. v. Alcoholic Bev. Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 581

[79 Cal.Rptr.2d 126].) However, non-compliance with rule 141 is an affirmative defense, and the burden of proof is on the party alleging it. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

This Board is bound by the factual findings in the Department's decision if 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. [Citations.] 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. [Citations.] 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].)

It is therefore the task of the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].)

With regard to the decoy's overall appearance, the ALJ found as follows:

> 5. Tompkins appeared and testified at the hearing. On February 7, 2014, he was 6 feet tall and weighed 165 pounds. He was wearing a white shirt, green jacket, blue jeans, and black tennis shoes. His hair was cut short. (Exhibits 2 & 4.) His appearance at the hearing was the same.
>
> [¶ . . . ¶]
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> 9. Tompkins was an Explorer on February 7, 2014, having joined the Explorer program when he was 15 years old. At the time of the sale, he

> held the rank of lieutenant. Accordingly, not only did he receive training, but he provided it to others. He went to 14 locations on February 7, 2014, of which seven sold alcoholic beverages to him.
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> 10. Tompkins 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 Paulino at the Licensed Premises on February 7, 2014, Tompkins displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Paulino.

(Findings of Fact, ¶¶ 5, 9-10.)

The ALJ then considered appellant's rule 141(b)(2) defense and rejected it:

> 5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that Tompkins' height, coupled with his extensive experience as an Explorer, made him appear to be unusually mature. In support of this argument, the Respondent noted that Tompkins was able to purchase alcohol at 50% of the locations he visited on February 7, 2014.
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> This argument is rejected. Although Tompkins had more experience as an Explorer than most, there was nothing about this experience which made him appear to be older. Indeed, his appearance at the hearing, including his demeanor on the stand, was consistent with his actual age. [Citation.]

(Conclusions of Law, ¶ 5.)

Appellant is unhappy with the fact that the ALJ expressly considered certain facets of appellant's rule 141(b)(2) defense in his proposed decision while omitting reference to others. The Board is not convinced that any omission made by the ALJ in this case amounts to error. As we have stated time and again, the ALJ need not provide a "laundry list" of factors that he deemed inconsequential in making his assessment concerning the decoy's overall appearance. (See, e.g., *Lee* (2014) AB-9359 at p. 8; *7-Eleven, Inc./Patel* (2013) AB-9237; accord *Circle K Stores* (1999) AB-7080.) The proposed decision reflects that the ALJ considered several indicia of age — including

the decoy's law enforcement experience, his "success rate" as a minor decoy, and his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing — and nevertheless found that the decoy's appearance satisfied the requirements of rule 141. We find no reason to upset that determination. As the Board has observed in the past:

> An ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as [rule 141(b)(2)] provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJ's [*sic*] are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.) There is nothing in the record here to suggest the ALJ's determination was unreasonable, arbitrary, or capricious.

Finally, appellant has cited no authority to support its contention that the decoy's education and work and life experience necessarily made him appear older on the date of the sale, and the Board is aware of none. The clerk did not testify at the administrative hearing, so any contention that he believed the decoy was over 21 at the time of the sale is wholly speculative. This case boils down to a mere difference of opinion — appellant's versus that of the ALJ — as to whether the decoy's appearance complied with the requirements of rules 141(b)(2). Without more, there are simply insufficient grounds to disturb the ALJ's decision.

As we have stated many times, the ALJ is the trier of fact, and has the opportunity to view the decoy as he testifies, which the Board does not. By this appeal, appellant is simply asking the Board to reweigh the evidence by considering the same set of facts as the ALJ and reaching the opposite conclusion. This the Board cannot do.

II

On a final note, the Board is concerned with what we perceive to be a growing trend of appellants opting to forego oral argument before the Board and simply submit the matter on the briefs alone. As one former California appellate court attorney — and now superior court judge — has observed:

> [W]hy wouldn't you want to argue your case? Courts are famous for allowing "one bite at the apple." The court already gave you a chance to state your position in the briefs. Now it's giving you a second chance. And this time, you get to speak directly to the justices deciding your case, explain to them why you should win, and clear up any concerns they may have. You can hammer home a win, or even turn a loser into a winner by resolving any lingering doubts. On the other hand, there is little chance of turning a winner into a loser at oral argument. If your position was strong enough to merit an appellate brief, it's strong enough to merit oral argument. This is a rare but sweet second bite at the apple, with almost no downside. Take it!

(Nathan R. Scott, *Oral Argument at the California Court of Appeal* (2007) 49 Orange County Lawyer 10.)

The Board echoes Judge Scott's sentiments, and we strongly encourage all parties to argue their respective positions before us. In this case, for instance, the Department had the last word since the appellant filed no reply brief. Accordingly, there was no response whatsoever to the Department's arguments. We are left to speculate what, if anything, appellant may have had to say about the Department's contention that for the Board to agree with appellant, we would have "to re-weigh all the evidence bearing on the decoy's appearance, which is . . . beyond [our] . . . scope of review." (Dept.Br. at p. 7.) Oral argument would have permitted us to question the parties further about the correctness of this assertion. As another authority on appellate advocacy has written about the ill-advised habit of waiving oral argument:

> Appellate counsel is generally permitted to submit a case for

> consideration . . . without benefit of oral argument. The practice, however, is rarely advisable. There is remarkable unanimity among appellate advocates that anyone who has the opportunity to present oral argument but simply submits on the briefs has not taken full advantage of the appellate process.

(Pollack, *The Civil Appeal*, in *Counsel on Appeal* 45 (A. Charpentier ed. 1968).) The passage of time has not diminished the wisdom of that advice, with which the Board agrees.

ORDER

The decision of the Department is affirmed.[3]

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

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[3]This final decision 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 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.