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

AB-9553
File: 21-478327; Reg: 14081724

AYMAN NAIEM SEDER and ELIAS NAIM SEDER,
dba Fame Liquor
108 East Base Line Street,
San Bernardino, CA 92410,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: June 2, 2016
San Diego, CA

ISSUED JUNE 20, 2016

Appearances: *Appellants*: Jeffrey S. Weiss, as counsel for Ayman Naiem Seder and Elias Naim Seder, doing business as Fame Liquor.
Respondent: Jacob Rambo, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Ayman Naiem Seder and Elias Naim Seder, doing business as Fame Liquor, 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, in violation of Business and Professions Code section 25658, subdivision (a).

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[1]The decision of the Department, dated November 24, 2015, made pursuant to Business and Professions Code section 11517, subdivision (c)(2)(D), is set forth in the appendix, together with the proposed decision of the administrative law judge (ALJ).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 5, 2009. On December 12, 2014, the Department filed an accusation against appellants charging that, on August 28, 2014, appellants' clerk, Hany Abdmariam Istadrow Saad (the clerk), sold an alcoholic beverage to 18-year-old Samuel Evenedward Moriyama. Although not noted in the accusation, Moriyama was working as a minor decoy for the San Bernardino Police Department at the time.

At the administrative hearing held on June 18, 2015, documentary evidence was received and testimony concerning the sale was presented by Moriyama (the decoy) and by Donald Sawyer, a San Bernardino Police officer. Appellants presented no witnesses.

Testimony established that on the day of the operation, the decoy entered the licensed premises and went to the cooler where he selected a 25-ounce can of Bud Light beer. The decoy took the beer to the register and sat it on the counter. The clerk rang up the beer on the cash register and said, “what’s up?” to the decoy. The decoy replied by saying, “what’s up?” The decoy then paid for the beer, received some change, and exited the store. The clerk did not ask for the decoy’s identification and did not ask him any age-related questions. A face-to-face identification of the clerk was done shortly thereafter by the decoy, a photo was taken of the clerk and decoy together, and the clerk was issued a citation.

The ALJ issued a proposed decision on June 24, 2015, recommending that the accusation be dismissed — because of the Minus 5 Ice Bar t-shirt worn by the decoy — stating:

6. This decoy operation was not conducted in a manner that promotes

> fairness. The wearing of the "Minus 5 Ice Bar" t-shirt is not something normally associated with an 18 year old. Decoy Moriyama knew exactly what it was. The fact that Officer Sawyer did not know what it was is not excuse. When he (Sawyer) observed the t-shirt he should have inquired from Moriyama what was the significance of the t-shirt. At that time Moriyama should have been told to put on a different shirt. The Rule requires the law enforcement agency conducting the decoy operation to conduct it in a manner that promotes fairness. Sending Moriyama to purchase beer wearing the "Minus 5 Ice Bar" t-shirt does not meet that fairness requirement. Deception, even if innocent deception, does not constitute fairness. It is not something that is expected to be seen on an 18 year old. Clearly this decoy operation was not conducted in [a] manner that promoted fairness as required by Rule 141 (a).

(Proposed Decision, Conclusions of Law, ¶ 6.)

The Department considered, but did not adopt, the ALJ proposed decision and decided the case pursuant to section 11517(c)(2)(D) which permits the Department to reject the ALJ's proposed decision — as it did here — and decide the case upon the record, including the transcript of the hearing.

Prior to issuing its decision, the Department requested written argument from the parties on the question of whether the shirt worn by the decoy rendered the minor decoy operation unfair. Letter briefs were submitted on the issue by both the appellants and counsel for the Department. Thereafter, on November 24, 2015, the Department issued its decision, finding the violation charged was proved. The Department adopted the ALJ's Findings of Fact 1 through 12, and Conclusions of Law 1 through 5, but rejected the ALJ's Conclusions of Law 6 and 7 and his finding of unfairness. It imposed a penalty of 15 days' suspension.

Appellants then filed a timely appeal contending the shirt worn by the decoy rendered the decoy operation unfair under rule 141(a).[2]

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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

Appellants contend that the t-shirt worn by the decoy, from a bar called Minus 5,[3] rendered the decoy operation unfair, in violation of rule 141(a), because the shirt displayed the words "Minus 5 Ice Bar." Appellants contend this shirt — advertising an establishment that sells alcohol — caused the decoy to appear over the age of 20. (RT at pp. 38-39.) Appellants also contend the decoy operation was not conducted in a fashion that promotes fairness, in violation of rule 141(a). (App.Br. at p. 8.)

Rule 141(a) provides:

> 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*. (Emphasis added.)

To that end, 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.

Rule 141 provides an affirmative defense, and the burden of proof lies with the party asserting it — here, appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.) The Board has stated previously,

> In order to claim an unfairness defense under rule 141(a), appellants must put forth more than their opinion that the operation was unfair. The rule

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[3]The bar's website states: "minus5° is the premium ice attraction in the United States with locations in Las Vegas, New York City, and Orlando. Everything inside minus5° is made of ice; the walls, the bar, the seats and even the glasses that you enjoy your cocktails in." (http://www.minus5experience.com - accessed on April 27, 2016.)

> requires solid, credible evidence that a reasonable person would have been influenced by certain facts to sell alcohol to a minor.

(*7-Eleven, Inc. / Red Sayegh Corp.* (2015) AB-9505.)

Appellants contend it is unfair, and that it violates both the letter and spirit of rule 141, to utilize a decoy wearing a t-shirt advertising an establishment that sells alcohol, and that the officer in charge of the decoy operation should not have allowed the decoy to wear such a shirt. (RT at pp. 38-39; App.Br. at pp. 7-8.) Such attire, they explained at oral argument, could easily lead a reasonable clerk to believe that the individual wearing the shirt is an employee or customer of the bar being advertised — thereby leading the clerk to believe the decoy is over the age of 21.

Subsection (b) of rule 141 expresses "minimum standards" that inform the meaning of "fairness" in the conduct of a minor decoy operation. Those standards include: (1) at the time of the operation, the decoy shall be less than 20 years of age; (2) 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; (3) a decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages; (4) a decoy shall answer truthfully any questions about his or her age; and (5) 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.

Rule 141, read in its entirety, exists to promote fairness and avoid deception. Both rule 141's rule-making history and the legislative history of its enabling statute, Business and Professions Code section 25658(f), reinforce these policy concerns and show that the purpose of rule 141 is to test a licensee's compliance with the law — within carefully defined limits. Decoy operations are *not* intended to trick licensees or their employees into violating the law. Among other things, a decoy operation serves as a check on the training a licensee provides for its clerks, their competence and honesty, and the degree to which they are alert in the performance of their obligations as sellers of alcohol.

As appellants note, 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 for the licensees, the public, and the decoys themselves." (App.Br at p. 8, citing *Acapulco Restaurants, Inc. v. Alcoholic Bev. Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 580 [79 Cal.Rptr.2d 126, 129].)

The Department reached the following conclusion regarding the decoy's appearance:

> 6. At hearing Respondents asserted that the minor decoy had the appearance of a person over the age of 20. Initially it should be noted that appearing over the age of 20 is not the issue under the Rule. Rather, having the general appearance of a person under the age of 21 under the actual circumstances presented to the seller is the requirement. The minor decoy here did in fact have the general appearance of a person under the age of 21 under the actual circumstances presented to the selling clerk. (Findings of Fact 5 and 9.) Thus there was compliance with Rule 141(b)(2).

(Decision, Conclusions of Law, ¶ 6.) The findings cited state the following:

> 5. Moriyama appeared and testified at the hearing. He stood about 5 feet 9 inches tall and weighed approximately 190 pounds. When he visited Respondents' store on August 28, 2014, he wore gray athletic

> shorts, a blue t-shirt and white tennis shoes. His hair was cut short. (See Exhibits 2 and 3) The t-shirt had a "Minus 5 Ice Bar" logo on the front. Moriyama's height and weight have remained about the same since the day of the operation. At Respondent's Licensed Premises on the date of the decoy operation, Samuel Moriyama looked substantially the same as he did at the hearing.
>
> [¶ . . . ¶]
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> 9. Decoy Sameil [*sic*] Moriyama appears his age, 18 years of 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/conduct in front of the clerk at the License Premises on August 28, 2014, Moriyama displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to clerk Saad. Moriyama appeared his true age.

(Proposed Decision, Findings of Fact, ¶¶ 5-9.)

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. [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].)

As we have stated many times, the ALJ is the trier of fact, and has the opportunity to observe the decoy as he testifies, and make the determination whether the decoy's appearance met the requirement of rule 141 that he possess 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. The ALJ found — and the Department adopted his findings — that the decoy displayed the appearance of a person under 21 years of age under the actual circumstances presented to the seller. The Board cannot reach a contrary conclusion on that point.

The Board can, however, consider appellants' claim of unfairness and whether the Department complied with rule 141. In *Acapulco Restaurants*, the Court observed that "[a]lthough an administrative agency's interpretation of its own rules is generally given great weight . . . the ultimate interpretation of an administrative regulation is by the courts, not the enforcing agency." (*Acapulco Restaurants*, *supra*, 67 Cal.App.4th at p. 580, fn 5.) As the constitutionally established appellate body for reviewing decisions of the department, the Board has the same jurisdictional authority as the courts to interpret an administrative regulation. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (1987) 195 Cal.App.3d 812, 819 [240 Cal.Rptr. 915]; *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].)

In the instant case, it was established that the decoy was wearing a t-shirt advertising Minus 5 Ice Bar. (Finding of Fact, ¶ 5.) The Department reached the following conclusion regarding whether the decoy's shirt made the decoy operation unfair:

> 7. Respondents further asserted that the minor decoy operation was "unfair" and thus failed to comply with the requirement of Rule 141(a). The argument is that the minor decoy wore a t-shirt with the logo "Minus 5 Ice Bar" on it, and that this was somehow improper and intended to "trick" the clerk. This defense must fail. Beyond decoy Moriyama's testimony that he purchased the t-shirt at the Minus 5 Ice Bar in Law Vegas, that it is

> a bar made out of ice, and alcohol is sold there, there is no evidence in the record that establishes exactly what the Minus 5 Ice Bar is or that it in any way restricts access to persons under the age of 21. In addition, the selling clerk did not testify. As a result, there is no evidence that the clerk was in any way impacted by the logo (or was even aware of it), or of any actual confusion or deception. There is simply no basis to support a conclusion that the mere wearing of a shirt that identifies a location that sells alcohol renders the operation unfair.

(Decision, Conclusions of Law, ¶ 7.)

> The posture of a case in which the sufficiency of the evidence is not disputed is identical to that where the facts before the administrative agency are uncontradicted. In such a case the only issue concerns the conclusions to be drawn from the pertinent facts; the trial court's determination is therefore a question of law. On appeal the court's review is not circumscribed by the substantial evidence rule, but amounts to an inquiry of law.

(*Mixon v. Fair Employ. & Hous. Comm.*) (1987) 192 Cal.App.3d 1306 [237 Cal.Rptr. 884].)

> This Board reviews questions of law de novo.
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> It is well settled that the interpretation and application of a statutory scheme to an undisputed set of facts is a question of law [citation] which is subject to de novo review on appeal. [Citation.] Accordingly, we are not bound by the trial court's interpretation. [Citation.]" (*Rudd v. California Casualty Gen. Ins. Co.* (1990) 219 Cal.App.3d 948, 951-952 [268 Cal.Rptr. 624].) An appellate court is free to draw its own conclusions of law from the undisputed facts presented on appeal.

(*Pueblos Del Rio South v. City of San Diego* (1989) 209 Cal.App.3d 893, 899 [257 Cal.Rptr. 578].) The question for the Board is whether, as a matter of law, the decoy's wearing of a t-shirt containing the logo of a bar that sells alcohol violated the fairness requirement of rule 141 because it would have influenced a reasonable person to sell alcohol to a minor.

We agree with the Department that the design or message appearing on the t-shirt worn by a minor decoy does not, in and of itself, say anything about the "age" of

the decoy. (Decision at p. 2; Dept.Br. at p. 6.) People, including many under the minimum legal drinking age of 21 years, wear t-shirts emblazoned with all kinds of messages. Some of these may bear the logos of establishments known to serve or sell alcoholic beverages, such as, “The Hard Rock Café,” “Bev-Mo” or others. Some may include express messages such as “don’t drink and drive,” or “moderate your alcohol consumption.” Absent testimony from a clerk who sold alcohol to an underage decoy, however, these types of t-shirt logos and messages cannot by themselves convey anything about the wearer’s age. Here, as mentioned, there was no testimony by the clerk or any other evidence presented beyond speculation and argument that the t-shirt per se transmitted a message or impression of the decoy’s age. (*Ibid*.)

While the Board agrees with appellants that the officer in charge would have been well advised to ask the decoy to change his shirt, we do not find his failure to do so made the decoy operation “unfair” as a matter of law. Reasonable minds can disagree, but case law establishes we are not permitted to “exercise [our] independent judgment to overturn the Department’s factual findings to reach a contrary, although perhaps equally reasonable, result.” (*Masani*, *supra* at p. 1437.) Accordingly appellants’ “unfairness” argument fails.

ORDER

The decision of the Department is affirmed.[4]

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[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.

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