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

AB-7717
File: 20-215277 Reg: 00048588

7-ELEVEN, INC., HARNEK S. THIARA, and TALWINDER K. THIARA
dba 7-Eleven Food Store #16114
10834 Santa Monica Boulevard, West Los Angeles, CA 90025,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: August 16, 2001
Los Angeles, CA

ISSUED OCTOBER 18, 2001

7-Eleven, Inc., Harnek S. Thiara, and Talwinder K. Thiara, doing business as 7-Eleven Food Store #16114 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for appellants' clerk selling an alcoholic beverage to a person under the age of 21, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Hamek S. Thiara, and Talwinder K. Thiara, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated October 5, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. Thereafter, the Department instituted an accusation against appellants charging that, on January 14, 2000, appellants' clerk, Sat Paul ("the clerk"), sold a can of Budweiser beer to 18-year-old Byanca Barajas. Barajas was working as a decoy for the Los Angeles Police Department (LAPD) at the time of the sale.

An administrative hearing was held on August 10, 2000, at which time documentary evidence was received, and testimony was presented by Barajas ("the decoy"), LAPD officer Rachel Agnew, co-appellant Harnek Thiara, and store manager Swinder Multani.

Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged in the accusation and no defenses had been established. Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the Department failed to make proper findings regarding the credibility of witnesses, and (2) Rule 141(b)(2) was violated.

DISCUSSION

I

Appellants contend that the Administrative Law Judge (ALJ), in making a credibility determination, is obligated to make specific findings which explain why one witness's testimony is deemed credible and that of another not. They cite a federal court of appeals case involving a claim for Social Security benefits, where the appellate court so held.[2]

[2] Holohan v. Massanari (2001) 246 F.3d 1195 (9th Cir.).

The Board considered this question recently in 7-Eleven, Inc. and Huh (8/16/01) AB-7680, and rejected it, saying:

> "We have reviewed the decision in that case, and the court decisions cited in support of that portion of the court's holding, and are satisfied that the view expressed by the court is peculiarly related to federal Social Security disability claims, and does not reflect the law of the State of California. While it may be true that a statement of the factors behind a credibility determination may be of considerable assistance to a reviewing court, and is welcomed by this Board, we are not prepared to say that a decision which does not set forth such considerations is fatally flawed."

Additionally, to say, as appellants do here, that "the ALJ has made a credibility determination in favor of the Department" in this case is not accurate; since no percipient witness (e.g., the clerk) testified for the appellants, appellants did not present any evidence contradicting the testimony of the officer and the decoy. The discrepancies in the testimony of the officer and the decoy are not of such significance that they required any credibility determination to be made. The ALJ needed only to determine which recollections appeared to be most accurate or definite, not who told the truth and who did not.

II

Appellants contend that Rule 141(b)(2) was violated by the ALJ's failure to allow their counsel to ask the decoy what type of watch she wore and by the decoy failing to display the appearance generally to be expected of a person under the age of 21.

Appellants' counsel asked the decoy if she wore a necklace or earrings during the decoy operation, and she answered "no" to both. Appellants' counsel then asked the decoy if she wore a watch during the decoy operation. The ALJ interrupted counsel, saying he didn't "need to know about watches," and asked counsel to proceed, which he did. [RT 29-31.]

On appeal, appellants argue that the style of watch, if one was worn, is an important indication of age, because in the process of the decoy putting the beer on the counter, a watch would have been in plain view for the clerk to see, and "an individual wearing a Rolex or adult-styled [watch] will certainly lead someone to believe they are older and more mature than someone wearing a Mickey Mouse or youth-oriented watch." Appellants argue that the ALJ prevented their counsel from bringing to light important facts bearing on compliance with Rule 141(b)(2) and, therefore, the decision should be reversed.

While there may be some merit to appellants' contention, we fail to see how a watch, if the decoy wore one, could have anything more than a minimal impact on any reasonable person's impression of a decoy's age. "Adult-styled" watches are worn by a great many people under 21, including those between 18 and 20 who are, for all purposes other than alcoholic beverage law, adults. Likewise, while it is not unreasonable to assume that someone wearing a watch with a cartoon character may be rather immature, that does not mean that they are younger than 21.

A watch, no matter what kind, is only one item among many that may be considered when judging the apparent age of a person. Absent extremely unusual circumstances, which are not present here, we cannot say that its importance is so great that the failure to permit questioning about it is reversible error.

Appellants also argue that the decoy did not display the appearance required by Rule 141(b)(2) – "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" – because she did not wear youthful

clothes, she had altered her hair and her height, and she had extensive experience as an "Explorer" with the LAPD.

On the night of the decoy operation, the decoy was wearing a gray t-shirt, a vest, and black jeans. The decoy testified that the vest and t-shirt were both Adidas brand, with three stripes (the Adidas logo) on the sleeve of the t-shirt. Appellants state that "[the decoy] testified of no insignia or illustrations on her clothing to indicate that she was under the age of 21." Appellants do not say what insignia on clothing indicates one is under 21. However, a visit to any junior high or high school campus in California will reveal a substantial percentage of teenagers wearing clothing with the Adidas logo.

The decoy's naturally dark brown hair was "altered" at the time of the decoy operation by being dyed black. At the hearing, it was brown with added blond highlights. [RT 27.] Appellants do not explain how black hair might have made the decoy look older. Dyed hair is not limited to perennial 39-year-olds trying to look younger. Many teenaged girls (and boys) dye their hair these days, and they frequently neither intend nor accomplish looking older.

The decoy wore boots that added about one to one and one-half inches to her height, making her about 5'9" during the decoy operation. Again, appellants have not said why they think this made her look older. Her height with the boots on is well within the range that one would generally expect to see in persons under the age of 21.

The Board has previously addressed appellant's contention that the decoy's experience made her look older. In 7-Eleven and Azzam (4/26/01) AB-7631, we said:

> "Nothing in Rule 141(b)(2) prohibits using an experienced decoy. 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. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. 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."

(See also Kim (6/21/01) AB-7523; 7-Eleven and Virk (4/12/01) AB-7597.)

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as she or he testifies, and is in a much better position of making the determination whether the decoy's appearance met the requirement of Rule 141(b)(2). Under these circumstances, this Board is not in a position to second-guess the trier of fact. That is especially true in the present case, where the record does not contain even a photograph of the decoy.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.