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

AB-7781
File: 20-179773 Reg: 00049456

STATION OPERATORS, INC. dba Mobil Oil
11898 Rancho Bernardo Road, San Diego, CA 92128,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 6, 2001
Los Angeles, CA

ISSUED FEBRUARY 21, 2002

Station Operators, Inc., doing business as Mobil Oil (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for its clerk having sold an alcoholic beverage to a minor decoy, 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 appellant Station Operators, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

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[1]The decision of the Department, dated March 1, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on March 10, 1986. Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on March 25, 2000.

An administrative hearing was held on January 10, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented by James Borg, one of several San Diego police officers participating in a decoy operation, and by Carlos Rodriguez, the police decoy who purchased the alcoholic beverage. Additionally, testimony was presented by Duris Kirby, appellant's station manager. A second decoy, who had accompanied Rodriguez, did not testify.

Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged, and which rejected appellant's claims that Rule 141 had been violated. Because this was appellant's second sale-to-minor violation within a 36-month period, the Administrative Law Judge imposed a 25-day suspension. In so doing, he rejected the Department's recommendation of a 30-day suspension.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the use of two decoys at a single location violated the plain language of Rule 141; (2) the "fairness" provisions of Rule 141 were violated because the minor's appearance on his driver's license was substantially different than his appearance while in appellant's store; (3) Rule 141(b)(2) was violated by the use of a minor who appeared older than 20 years of age; and (4) the Department failed to make proper credibility findings. Issues 2 and 3 will be discussed together.

DISCUSSION

I

Appellant contends that the use by the police of two decoys violated the plain language of Rule 141. Referring to that part of the rule that states "a law enforcement agency may only use a person under the age of 21 years," appellant asserts that the rule must be strictly construed and read to mean that the use of more than one decoy is not permitted.

Appellant misreads the intent of the rule, which, as we perceive it, is to limit the use of a decoy to someone who is under the age of 21.

According to Ballantine's Law Dictionary (3d ed. 1969), the word "a" is defined as an "indefinite article," meaning "one or anyone, depending on the context in which it appears."

Read in the context of a rule permitting the use of decoys to test and reenforce the level of compliance with the law prohibiting sales to minors, it seems to us that the real question to be asked when more than a single decoy is used is whether the second decoy engaged in some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law. The clerk did not testify, so there is no evidence or claim that the clerk was distracted.

We do not see the use of two decoys as doing anything more than replicating what is undoubtedly a common occurrence - a visit by two underage persons to the seller of alcoholic beverages hoping to buy. A clerk must be alert to such a situation,

whether it be decoys or non-decoys who are attempting to purchase alcoholic beverages.

We do not read Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App. 4th 575 [73 Cal.Rptr.2d 126] as requiring a different result. Although that case held that the Department must adhere strictly to the rule, it did not say the rule must be construed so strictly as to reach an absurd result.

II

Appellant contends the fairness provisions of Rule 141 were violated in two respects. First, it asserts that, based on his own testimony, Rodriguez's appearance was that of a person who appeared to be over 21, and, even if that is not the case, there is insufficient evidence to show that the appearance of the second decoy was that of a person under the age of 21. Second, appellant contends that, because Rodriguez's driver's license showed him with a mustache, shaved head, and earring, but on the night of the decoy operation he had no mustache, no earring, and his hair was different, he unfairly presented the clerk with an identification that may have made him seem older than he did in person.

We do not see merit in either of these contentions.

Appellant contends that Rodriguez "could not have displayed the appearance of a person under twenty-one years of age" because of his "substantial height and weight" (five feet, seven inches in height and 151 pounds) and his combined experience as a cadet with the San Diego Police Department and his previous experience as a decoy. However, it is clear from what the ALJ wrote, that he took all these things into

consideration and concluded that Rodriguez did, indeed, present the appearance which could generally be expected of a person under 21 years of age.

As this Board has said on many occasions, the Administrative Law Judge (ALJ), as the trier of fact, observes the decoy's demeanor and mannerisms as he testifies, and taking all indicia of age into account, makes the determination whether that decoy presents the appearance required by Rule 141(b)(2). Except in extraordinary circumstances, not present here, the ALJ will not be second-guessed by the Board.

Appellant's argument regarding the second decoy also misses the mark. There was no requirement for the ALJ to make any findings with respect to him because he made no purchase. Since Rule 141 affords an affirmative defense, it was incumbent upon appellant to offer evidence of that decoy's appearance if it was to claim he appeared older than 21 years. Without the testimony of the clerk, there is nothing to indicate his presence interfered with the clerk's ability to address the question of Rodriguez's status as an underage purchaser.[2]

Finally, again without the testimony of the clerk, there is no way to determine whether his decision to sell to Rodriguez was controlled or even influenced by the driver's license photo.

III

Appellant contends the decision is flawed because it does not explain why Detective Borg's testimony was credited, even though Borg "had difficulty recalling the

[2] The record indicates that of seventeen licensees visited on the night in question, Rodriguez purchased only from appellant's establishment.

most rudimentary of facts without referring to his police report," and because there were statements in the report which Borg admitted he had not made.

Appellant has not enlightened the Board as to what are the "rudimentary facts" Borg could not recall, or which statements in his report were not actually made. We are not inclined to parse Officer Borg's testimony in a search for what appellant may have in mind. Instead, we will remind appellant that the Appeals Board is not required to make an independent search of the record for error not pointed out by appellant. It was the duty of appellant to show to the Appeals Board that the claimed error existed. Without such assistance by appellant, the Appeals Board may deem the general contentions waived or abandoned. (Horowitz v. Noble (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710] and Sutter v. Gamel (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].)

In any event, the credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Holohan v. Massanari (9th Cir. 2001), the case upon which appellant places principal reliance, deals with the peculiarities of federal law relating to Social Security claims, and has no application to California administrative proceedings.

The issue in McBail & Co. v. Solano County Local Agency Formation Commission (1998) 62 Cal.App.4th 1223 [72 Cal.Rptr. 2d 923], also cited by appellant, was whether there were sufficient findings to permit a reviewing court to determine

whether the decision was supported by substantial evidence. The question of credibility was not an issue.

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 decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.