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

AB-7833
File: 20-331218 Reg: 00049608

7-ELEVEN, INC., JALAL S. MOUSAVI, and LEYLA MOUSAVI
dba 7-Eleven #2232-14182F
2175 Aldengate Way, Hayward, CA 94545,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Robert R. Coffman

Appeals Board Hearing: February 14, 2002
San Francisco, CA

ISSUED MAY 7, 2002

7-Eleven, Inc., Jalal S. Mousavi, and Leyla Mousavi, doing business as 7-Eleven #2232-14182F (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for appellants' clerk selling 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 appellants 7-Eleven, Inc., Jalal S. Mousavi, and Leyla Mousavi, appearing through their counsel, Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

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[1]The decision of the Department, dated May 24, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 26, 1997. Thereafter, the Department instituted an accusation against appellants charging the sale-to-minor violation noted above.

An administrative hearing was held on April 18, 2001, at which time documentary evidence was received and testimony concerning the transaction was presented by Jose Gonzalez and Michelle Rippy, minor decoys for the Hayward Police Department, by Hayward Police Officer Mike Coltrell, and by co-appellant Jalal Mousavi.

Subsequent to the hearing, the Department issued its decision which determined that the violation occurred as charged in the accusation and no defense was established. Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the decoy operation was not conducted in a fashion that promotes fairness; (2) the decoy did not present the appearance of a person under the age of 21 to the seller; and (3) the decoy did not make a proper face-to-face identification of the clerk.

DISCUSSION

I

Appellants contend the decoy operation was conducted unfairly because two decoys were sent into the premises, one after another, to attempt to purchase alcoholic beverages.

The testimony showed that decoys Gonzalez and Rippy were working with officers Coltrell and Pagan on a decoy operation on the evening in question. At the four other premises in which they attempted to purchase alcoholic beverages that night, the decoys alternated, with Gonzalez going into one and then Rippy going into the next

one. At appellants' premises, Gonzalez went in, picked up a six-pack of beer from the cooler, and took it to the counter, where the clerk rang it up. The clerk did not ask Gonzalez his age or for his identification. Gonzalez paid for the beer and carried it out to the waiting officers.

After Gonzalez came out of the premises, Officer Pagan told Rippy to enter the premises and also attempt to purchase alcoholic beverages. Rippy entered, went to the cooler, picked up a six-pack of beer, and took it to the counter, where the same clerk who had sold to Gonzalez was working. The clerk asked Rippy for her identification, looked at it, and refused to sell the alcoholic beverages to her. Rippy then left the store, leaving the beer with the clerk.

After Rippy came out, Gonzalez and Coltrell entered the store, Gonzalez identified the clerk as the seller, and the clerk was issued a citation by the officer.

This is a new variation in the use of two decoys at one premises. Previously, the Board has seen cases where two decoys enter together and one of them picks up and purchases the alcoholic beverage, with the "companion decoy" standing with the purchasing decoy, but not participating in the sale. The Board has sometimes found this situation to be unfair and sometimes not. Unfairness has generally been found where the presence of the second decoy was obviously distracting or created the impression that the purchasing decoy was old enough to purchase the alcoholic beverage. The presence of two decoys, by itself, has not been enough to find a decoy operation unfair.

Here, appellants argue three basic points: there were not two separate decoy operations; the goal of the police, to have the decoys purchase alcoholic beverages, is

improper; and it is irrelevant which decoy the clerk sold to – the unfairness arises in the practice of using two decoys, not in the result.

We agree that, in the context of Rule 141, there was just one "decoy operation" here, with two transactions. In the appeals this Board has seen over the years, the meaning of "decoy operation" has been rather loose, generally meaning the collective attempts to purchase made by one or more decoys in one evening (or some other circumscribed time period, e.g., one shift) under the supervision of a particular law enforcement agency. Sometimes, particularly in testimony by law enforcement officers and decoys, it is used to refer to the events at a particular premises. In the context of Rule 141, we believe that it is not appropriate to focus simply on the one transaction in which a sale was made, certainly not in a situation like this one, where the two decoys had been working together all evening, and the second decoy's entrance into the same premises was not simply an independent, unrelated event. There was only one decoy operation being conducted here and the actions of both decoys must be examined to see if there was compliance with Rule 141.

Appellants allege that the main purpose of the Hayward police in conducting the decoy operation was having the decoys purchase alcoholic beverages, while the correct purpose is "to reasonably test the willingness of a clerk to sell to minors." (App. Br. at 6.) The clerk, appellants argue, showed he was not willing to sell to minors when he refused to sell to decoy Rippy. He only sold to decoy Gonzalez, they assert, because he thought Gonzalez looked old enough.

Even if the police purpose was not the proper one, that by itself does not make the decoy operation unfair. And even if appellants' clerk might pass the test of being

unwilling to sell to a minor in the second transaction, this by itself does not excuse the sale in the first one. In any case, a decoy operation is not designed simply to test whether a person is "willing to sell to a minor."

In the appeal of Thrifty Payless, Inc. (1998) AB-7050, the Board explained its view of the proper objective of a decoy operation:

> "A decoy's objective is not simply to make a purchase. His or her objective is to test whether a seller is willing to sell an alcoholic beverage *in circumstances where a reasonably prudent seller should question whether the purchaser was of legal age*. If a decoy acts in a misleading manner, and the seller is misled, then the test can be said to be unfair." (Emphasis added.)

Appellants' clerk was "willing to sell an alcoholic beverage in circumstances where a reasonably prudent seller should question whether the purchaser was of legal age." The ALJ found that decoy Gonzalez presented the appearance that could generally be expected of a person under the age of 21. The clerk may have thought Gonzalez looked old enough to purchase alcoholic beverages, but in doing so without questioning Gonzalez about his age or asking for identification, the clerk was not acting as a reasonably prudent seller. The test is not simply whether a person is intentionally willing to sell to a minor, but also whether a person is competent and careful enough not to sell to a minor.

Appellants' third point, that it is irrelevant which decoy the clerk sold to, is in response to Finding 8(a), where the ALJ explained why he rejected appellants' contention that the decoy operation was conducted unfairly:

> "In this case the first decoy who attempted to purchase an alcoholic beverage was sold one. The Accusation in this matter involves that sale only. If the first decoy had been refused, then the use of a second decoy may have been excessive. But that did not happen in this matter.
> "This is not a case where the Department is attempting to discipline a licensee

> for two separate sales to different minors, both sales occurring during the same decoy operation. Whether such conduct would constitute an improper 'piling on' need not be decided under the facts in this case. However, even in a case where two back to back sales occur, it would not appear that that would invalidate the first sale, but only the second one."

Appellants object to the implication that the fairness of the decoy operation depended on the *clerk's* actions, rather than the actions of the decoys or the police. In this assertion, appellants are right. If the police conduct a decoy operation in an unfair manner, that is a complete defense to the charge. It does not matter then if the clerk sold to the first decoy, the second decoy, or both decoys.

The Department does not seem to understand this concept. In the present case, the basic position taken in the brief filed by the Department is that there was a sale to the first decoy and all other events are irrelevant. The brief also takes the position that, in adopting the ALJ's proposed decision, the Department "conducted an independent review of the facts and the analysis of the ALJ," and the adoption of the decision constituted the Department's "interpretation of fairness – i.e.: sale to first decoy is proper but sale to second may be improper." (Resp. Br. at 4.) The brief then states that "this interpretation must be granted great respect and only rejected if the interpretation is clearly erroneous," which, it concludes "is impossible."

The Department concludes that "great respect" must be accorded this "interpretation" based on a well-established rule of *statutory* interpretation, which it quotes from Cohon v. Department of Alcoholic Beverage Control (1963) 218 Cal.App.2d 332, 339 [32 Cal.Rptr. 723]: "the administrative interpretation of a statute made by an administrative agency charged with carrying out a particular statute will be accorded great respect by the courts and will be followed if not clearly erroneous." The

problem with applying this rule of interpretation in the present case is that we are not dealing with the administrative interpretation of a statute, but an administrative adjudicatory decision. Such a decision is entitled to no special deference on a matter of law. Appellants ignore the earlier statement in Cohon, supra, which instructs that, where, as in the present case, "there is no factual issue or substantial conflict in the evidence, the question presented is one of law and the conclusions of law of the Department are not necessarily binding upon the appellate court." (Cohon, supra, 218 Cal.App.2d at 338.)

The Department argues that it is impossible to find that the use of two decoys in this manner was unfair because it had no "nexus to the Accusation." The Department again fails to comprehend what the issue is here. Any lack of "nexus to the Accusation" in this case is entirely due to the actions of the Department. The Department put no mention of the second decoy in the Accusation; indeed, the Department does not even mention in the Accusation that the first minor, the purchaser of alcohol, was a decoy. But the second decoy's nexus or lack of nexus to the Accusation is not at issue here. The issue is compliance with Rule 141, and the only nexus required of the second decoy is with the decoy operation. The second decoy was clearly involved in the decoy operation, even if not involved in the transaction with the first decoy.

The question still remains, was the decoy operation conducted unfairly? We believe there are several reasons for concluding that the decoy operation was conducted unfairly.

> A. This was the only premises, of the five visited that night, that was subjected to two decoys. Appellants' premises was the last one of the evening and the decoys took turns going into the other four premises. None of the witnesses

gave a reason for sending in the second decoy here. While the reason could be entirely innocent, the simple fact that only one out of five was done this way immediately raises questions about unfairness or targeting, and no explanation has been given that would answer such questions.

B. After failing the "test" the first time, the clerk was immediately "tested" again. He did not sell to the second decoy, so the Department simply disregarded the second test. If he had failed again, he could have been charged with two sale-to-minor violations, with the potential for an enhanced penalty. In addition, the two violations would be two "strikes" under §25658.1, leaving appellants vulnerable for revocation should another sale-to-minor violation occur within three years. Thus, the second test provided no chance of improving his "score" even if he did not fail again, but, if he failed again, the repercussions for two failures could be magnified. Also, the first failure had no "educational value," because the clerk did not know of his failure and its cause at the time the second decoy tested him. A clear "no-win" situation for the clerk and appellants.

C. In the Department's decision, the ALJ saw unfairness in the use of a second decoy if the first decoy had been refused. (This is the situation that the Department contends is its "interpretation" of unfairness.) He also speculated that if sales had been made to both decoys, that would "invalidate" the second sale. (Finding 8(a).) Unfortunately, he did not explain his reasoning in reaching the latter conclusion. However, that conclusion cannot be reached under Rule 141, since violation of any of its provisions results in a complete defense. If a second sale were "invalid" because it was unfair, the decoy operation as a whole would be unfair, and both sales would be "invalid." If the use of two decoys, one after another, is unfair in the two situations posited by the ALJ, why is it fair in the present case, where the only purpose for sending the second decoy in was the possibility of an increased penalty? The answer is that it is not fair.

Appellants are correct that it is how the decoy operation is conducted, not its result, that must be judged in determining fairness. This decoy operation was not conducted fairly. This violates Rule 141(a) and is a complete defense to the accusation.

II

Appellants contend that Rule 141(b)(2) was violated because the decoy did not present the appearance which could generally be expected of a person under the age of 21 under the actual circumstances presented to the seller, and because the ALJ, in

finding compliance with the rule, failed to consider more than the physical appearance of the decoy at the time of the sale.

Appellants argue that the ALJ erroneously "relied on the decoy's demeanor and behavior at the hearing, rather than his actual conduct at the time of the sale . . . ." They base this contention on these sentences from Finding 6:

> "On May 30, [2000,] Gonzalez weighed 140 pounds and was 5 feet 10 inches tall. He had no facial hair, was not wearing any jewelry and was dressed casually in accordance with the [officer's] instructions. His hair was black.
>
> "Based on his appearance at the instant hearing, including his general physical appearance, his facial appearance, his dress, his height and weight, and his manner and demeanor, including his mien, bearing, poise, maturity and sophistication, he appears to be a person under the age of 21."

Somehow, appellants seem to have overlooked the sentence following those just quoted, which says: "Based on all the evidence regarding Gonzalez's appearance, on May 30, 2000 he presented the appearance which could generally be expected of a person under the age of 21, under the actual circumstances presented to the seller."

The ALJ, not being present at the decoy operation, cannot use the decoy's "actual conduct at the time of the sale" in determining the decoy's apparent age. As is usual in these cases, the ALJ had to use his observations of the decoy's behavior and demeanor at the hearing to judge what the decoy's behavior and demeanor would likely have been at the time of the sale. That he did so is evident in the words "Based on all the evidence regarding Gonzalez's appearance . . . ." Appellants' contention is groundless.

Appellants also contend the evidence shows that the decoy did not display the required appearance because of his experience in the police Explorer program and as

a decoy, and because the clerk thought he looked "old enough."

Appellants are asking this Board to look at the same evidence the ALJ did and then reach a contrary decision. They have presented nothing, however, indicating that we should reject the ALJ's finding in favor of that of theirs.

What this Board said in Azzam (2001) AB-7631, in response to a similar argument about experienced decoys, applies here:

> "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." (Emphasis in original.)

In Spirit Enterprises, Inc. (2001) AB-7604, the Board addressed a contention similar to appellants', that the clerk's purported belief is evidence that the decoy looked over 21, as follows:

> "The rule, through its use of the phrase 'could generally be expected' implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of that of a person under 21 years of age. We have no doubt that it is the recognition of this possibility that impels many if not most sellers of alcoholic beverages to pursue a policy of demanding identification from any prospective buyer who appears to be under 30 years of age, or even older."

Appellants' contentions regarding the decoy's appearance are rejected.

III

Appellants contend there is not evidence that a proper face-to-face identification

occurred because there is no evidence the clerk was aware of the identification when it was made. Their contention is that the clerk could not hear the decoy identify him, and even though he was looking at the decoy and the officer at the time, there is no evidence that he was aware of what they were doing.

The ALJ discussed this issue at length in Finding 8(d):

"This contention is without merit. As set forth in Finding 4, the evidence established that a face to face identification took place within the meaning of Rule 141. The face to face identification occurred when the clerk and the decoy were in close proximity and were looking at one another. Both the clerk and the officer testified that the decoy identified the clerk as the seller.

"The police officer also told the clerk that he had sold beer to a minor, pointing to Gonzalez who was then in close proximity to the clerk. While this by itself does not constitute compliance with Rule 141, when considered in conjunction with the evidence that a face to face identification took place, it reinforces the factual basis for the finding that the clerk was aware, or reasonably ought to have been, that the decoy was pointing him out as the person who sold him the beer. The clerk did not testify in this proceeding, but the clerk made a statement to one of the co-licensees regarding the sale to the decoy. Respondents offered no evidence that the clerk made a statement denying that a face to face identification occurred.

"Respondents cite Acapulco Restaurants, Inc. vs ABC Appeals Board (1998) 67 Cal.App.4th 575 and the following Appeals Board decisions in support of their contention: Circle K. Stores, Inc., AB-7018; Prestige Stations, Inc., AB-7110, and Kyung Ok Chun, AB-7287.

"Circle K and Prestige Stations involved factual situations similar to the Acapulco case. In those matters the decoy did not identify the seller. Only the police officer confronted the seller. In Prestige the Department admitted the absence of a face to face identification and did not contest the appeal. In this matter, the decoy did identify the seller.

"In the Kyung Ok Chun case, AB-7287, the Appeals Board held that '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.'

> "The evidence in this case amply demonstrates that the decoy's identification of the clerk falls within the Appeals Board's determination in the Kyung case of what constitutes compliance with the requirement of a face to face identification."

This Board agrees with the ALJ's analysis and has nothing to add to it.

ORDER

The decision of the Department is reversed on the basis that the decoy operation did not comply with the fairness requirement of Rule 141(a).[2]

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

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[2]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.