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

AB-7847
File: 20-336035 Reg: 00050153

7-ELEVEN INC., ERZSEBET I. RYBERG, and RICKEY J. RYBERG
dba 7-Eleven #13628
13835 Mango Drive, San Diego, CA 92014,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 9, 2002
Los Angeles, CA

ISSUED JULY 26, 2002

7-Eleven Inc., Erzsebet I. Ryberg, and Rickey J. Ryberg, doing business as 7-Eleven #13628 (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 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., Erzsebet I. Ryberg, and Rickey J. Ryberg, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated June 14, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 19, 1998. Thereafter, the Department instituted an accusation against appellants charging that, on September 23, 2000, appellants' clerk, Shannon K. Corley[2] ("the clerk"), sold an alcoholic beverage to 17-year-old Jason M. Darwent. Darwent was acting as a decoy for the San Diego State University Police Department at the time of the sale.

An administrative hearing was held on May 4, 2001, at which time documentary evidence was received and testimony concerning the transaction was presented.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and determined that no defense had been established.

Appellants thereafter filed a timely notice of appeal in which they raise the following issues: (1) The ALJ erred in not allowing appellants' counsel to videotape the testimony of the decoy, and (2) the decoy appeared to be older than 21 years of age, in violation of Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)).

DISCUSSION

I

Appellants contend the ALJ should have granted counsel's request to videotape the decoy's testimony because the ALJ relied on the decoy's appearance at the hearing in making his finding regarding the decoy's apparent age at the time of the sale and the videotape would assist the Appeals Board in reviewing the ALJ's finding.

This Board has acknowledged that the decoy's appearance at the hearing will play a part in the ALJ's determination of the appearance displayed by the decoy at the

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[2]Although appellants refer to the clerk throughout their brief as "Ms. Corley," the clerk is, in fact, a male, Shannon Keith Corley [RT 69], and was identified as such in the Department's decision (Finding II-B).

time of the violation. In Circle K Stores, Inc. (2000) AB-7265, we said:

> "We are well aware that the rule requires the ALJ to undertake the difficult task of assessing [the] appearance [of a decoy] many months after the fact. However, in the absence of evidence of any discernible change in the appearance or conduct of the minor decoy between the time of the transaction and the time of the hearing, it would be reasonable to conclude that the ALJ's impression of the apparent age of the minor at the time of the hearing would also have been the case had he viewed the minor at the earlier date."

This Board has repeated many times that it is not in a position to second-guess the finding of the ALJ, who has the opportunity, which this Board does not, of observing the decoy in person, and we have deferred to the judgment and discretion of the ALJ's in most instances. Occasionally there have been cases where circumstances compel us to re-examine the ALJ's finding. Those instances, however, have not been the result of the Board's disagreement based upon looking at a photograph of the decoy, but upon some indication that the ALJ has taken into consideration (or omitted from consideration) some factor that may have unfairly or improperly affected the ALJ's determination of the decoy's apparent age.

There is nothing in this decision or record that causes us to question the fairness or propriety of the ALJ's finding as to the apparent age of the decoy, and a videotape of the decoy's testimony is neither necessary nor desirable for our limited review.

The ALJ has great discretion in the conduct of the hearing, and it would have been no abuse of discretion for the ALJ in this instance to deny the videotaping on simply practical grounds, such as the time it would take. Indeed, the ALJ gave a perfectly acceptable and sufficient reason for prohibiting the videotaping when he said that he believed that videotaping would be likely to intimidate witnesses and prevent them from acting naturally.

II

Appellants contend that "The overwhelming weight of the evidence presented at the hearing indicates that [the decoy] had the looks and demeanor of an individual who appeared over 21 years of age at the time of the sale, in violation of Rule 141(b)(2)."

Appellants recite the same physical and non-physical features of the decoy that the ALJ did in Findings II-E and II-F, where he found that the decoy displayed an appearance that complied with Rule 141(b)(2). Appellants have presented nothing indicating that we should reject the ALJ's finding in favor of their opinion.

Appellants also refer to the testimony of the clerk that he believed the decoy to be 22 at the time of the sale based on the decoy's physical appearance and behavior. However, it is not the belief of the clerk that is controlling, it is the ALJ's reasonable determination of the decoy's apparent age based upon the evidence and his observation of the decoy at the hearing. (7-Eleven, Inc. / Paul (2002) AB-7791.) As this Board has said before, Rule 141(b)(2),

> "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 a person under 21 years of age."

(7-Eleven, Inc. & Grewal (2001) AB-7602.)

In another case, the Board expressed the same idea:

> "The decoy must only present an appearance which could generally be expected of a person under the age of 21 years. If the clerk, observing a decoy who presents such appearance generally, perceives the decoy to be older than 21, he does so at his peril. A licensee cannot escape liability by employing clerks unable to make a reasonable judgment as to a buyer's age."

(Prestige Stations, Inc. (2000) AB-7248 [ftnt.2].)

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.