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

AB-7862
File: 20-243772 Reg: 00049819

7-ELEVEN, INC., and IRSHAD A. SAULAT dba 7- Eleven Store No. 13886
26815 Seco Canyon Road, Santa Clarita, CA 91350,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 15, 2002
Los Angeles, CA

ISSUED OCTOBER 9, 2002

7-Eleven, Inc., and Irshad A. Saulat, doing business as 7-Eleven Store No. 13886 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for their clerk having sold an alcoholic beverage (a six-pack of Budweiser beer) to a minor, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, section 22, arising from a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Irshad A. Saulat, appearing through their counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and James S. Eicher, Jr., 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 July 12, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 12, 1990. Thereafter, on the Department instituted an accusation against appellants charging that their employee, Sajjad Hussain, sold an alcoholic beverage (beer) to Celia Chavez ("Chavez"), a minor. Chavez was acting as a decoy for the Los Angeles County Sheriff's Department. Hussain ("the clerk") was a clerk at appellants' store.

An administrative hearing was held on May 23, 2001, at which time oral and documentary evidence was received. At that hearing, testimony concerning the transaction was presented by Chavez and by Sergeant Bruce Sonnenblick, a Los Angeles County deputy sheriff.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged in the accusation had been established, and no defense was established.

Appellants thereafter filed a timely appeal in which they raise the following contentions: (1) the Department has not met its burden to show the decoy operation was conducted in good faith; (2) the Department failed to prove that the presence of a second decoy did not taint the decoy operation and render it unfair; and (3) the decoys did not present the appearance required by Rule 141(b)(2). We shall discuss these issues together.

There is no dispute with the ALJ's findings that Chavez selected the beer from the cooler, carried it to the counter, paid for it, was given the change, and carried the beer from the store. Neither counsel attempted to elicit a description of the second decoy, other than that she was a "young woman."

DISCUSSION

We preface our discussion of the specific issues with the basic legal standards that guide our resolution of appeals from decisions of the Department. The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals. The Appeals Board's review of Department decisions is limited by the California Constitution, by statute, and by case law. The Board may not exercise its independent judgment on the effect or weight of the evidence, but must determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and

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[2]The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

the license applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control* (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Appellants contend the Department erred in its determination that Chavez presented the appearance required by Rule 141(b)(2),[3] and in failing to make a finding that the second decoy presented the requisite appearance under the rule. As a consequence, say appellants, the Department failed to prove the decoy operation was conducted fairly.

This Board has said many times that it is unwilling to substitute its judgment in place of that of the Administrative Law Judge (ALJ) on the question whether the decoy displayed the appearance which could generally be expected of a person under 21 years of age.

As in many, if not most, of the decoy cases which come to this Board, the ALJ was confronted with competing contentions regarding the decoy's appearance. Appellants' counsel argued that "when one gets past the decoy's face, she has a very mature aspect to her. She has a mature build that I believe does not comply with Rule 141(b)(2)." [RT 51.] In contrast, Department counsel described Chavez as "small, rather quiet, and to my eye at least her actions, the way she behaved, her physical appearance, are all consistent with that of a person in her late teens." [RT 54.]

The ALJ found, regarding the decoy's appearance (Findings of Fact II-D):

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[3] 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."

"D. The overall appearance of Chavez including her demeanor, her poise, her mannerisms, her size and physical appearance were consistent with that of an eighteen year old and her appearance at the time of the hearing was substantially the same as her appearance on the day of the decoy operation except that she was five pounds lighter and she was wearing glasses at the hearing.[1]

1 Since Chavez was wearing contacts on the date of the sale, she was asked to take her glasses off at the hearing so that everyone could observe her without her glasses.

"1. On the day of the sale, Chavez was five feet one inch in height, she weighed one hundred thirty pounds, she was wearing blue jeans, a Calvin Klein shirt and tennis shoes. The only makeup that Chavez was using on the day of the sale was mascara and lip gloss and she had her hair in a ponytail.

"2. Chavez testified that she had not participated in any prior decoy operations.

"3. Exhibit 3-A was taken at the premises on the night of the sale and the photograph depicts what Chavez looked like on the night of the sale. Exhibit 3-B was taken on the night of the sale before going out on the decoy operation. After considering the photograph depicted in (Exhibit 3-A), the overall appearance of Chavez when she testified and the way she conducted herself at the hearing, a finding is made that Chavez displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

"4. The attorney for the Respondents argued that the Department did not establish compliance with Rule 141(b)(2) of Chapter 1, Title 4, California Code of Regulations because no evidence was presented regarding the appearance of the other decoy who was with Chavez at the premises on the date of the sale. However, no evidence was presented by the Respondents indicating that the presence of the second decoy in any way misled the Respondents' clerk or that the presence of the second decoy rendered the decoy operation unfair. Therefore, that argument is rejected."

Appellants have not persuaded us that the ALJ's assessment of the decoy's appearance was faulty. Nor are we persuaded that the presence of the second decoy rendered the decoy operation unfair. Appellants have offered no evidence of any conduct by the second decoy that may have confused or misled the clerk into believing Chavez was older than 21 years of age.

Appellants assert, in substance, that the Department must, at the outset, demonstrate that there is substantial evidence to conclude that the decoy operation

was conducted in a fair manner, before appellant is required to present any evidence that the decoy operation was conducted unfairly. Appellant misunderstands the differing natures of the various burden-of-proof standards. The requirement of "substantial evidence" to support a Department decision is the standard used by this Board, and the appellate courts, when reviewing a decision. The ultimate burden of persuasion at the administrative hearing is the preponderance of the evidence. The Department's initial burden of producing evidence, however, is merely to make a prima facie case, that is, to produce sufficient evidence to support a finding in its favor in the absence of rebutting evidence.

In *7-Eleven and Azzam* (2001) AB-7631, appellants argued that the Department had not met its burden of proving that Rule 141(b)(5) had been complied with because no specific evidence was presented of the sequence of events to show that the face-to-face identification had been made before the citation was issued to the clerk who sold the alcoholic beverage to the decoy. They cited the Board's decision in *The Southland Corporation/R.A.N.* (1998) AB-6967 as the basis for their contention. We disagreed, saying,

> "In our view, once there has been affirmative testimony that the face to face identification occurred, the burden shifts to appellants to demonstrate why it did not comply with the rule, i.e., that the normal procedure, for the issuance of a citation following the identification of the accused, was not followed. We are unwilling to read our decision in The Southland Corporation/R.A.N. as expanding the affirmative defense created by Rule 141 to the point where appellants need produce no evidence whatsoever to support a contention that there was a violation of that rule."

The evidence presented by the Department in the present case was clearly sufficient to allow the ALJ to conclude that the violation had occurred and that the decoy operation was conducted fairly; it was appellants' burden at that point to present

evidence rebutting that evidence. If appellants chose not to present any evidence, but to rely solely on their mistaken belief that the Department had not met its initial burden of producing evidence, they have no basis for complaint on appeal.

ORDER

The decision of the Department is affirmed.[4]

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

[4] 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.