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

AB-8063
File: 20-341437 Reg: 02053658

RTDD, Inc. dba Chevron Mart Olympic & Bundy
11951 West Olympic Boulevard, Los Angeles, CA 90064,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: August 14, 2003
Los Angeles, CA

ISSUED OCTOBER 8, 2003

RTDD, Inc., doing business as Chevron Mart Olympic & Bundy (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its off-sale beer and wine license for 15 days for its clerk having sold a six-pack of Modelo beer to an 18-year-old police decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant RTDD, Inc., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 10, 1998. Thereafter, the Department instituted an accusation against appellant charging that, on

[1]The decision of the Department, dated November 21, 2002, is set forth in the appendix.

February 11, 2002, appellant's employee, Carlos Andres, sold beer to Lino Pavon who was then approximately 18 years of age.

An administrative hearing was held on October 29, 2002, at which time oral and documentary evidence was received. At that hearing, testimony disclosed that Pavon was acting as a decoy for the Los Angeles Police Department. Pavon testified he selected Modelo beer from the cooler because he did not see any Budweiser. When he came to the counter, he asked the clerk if the store had any Budweiser. The clerk said that if there was any, it would be in the cooler. Pavon decided to buy the Modelo. He was not asked his age or for identification. After making the purchase, Pavon exited the store, then returned and identified the clerk as the seller. Los Angeles police officer Marla Kiley testified that she observed the transaction while standing three or four feet behind Pavon. Andres, the clerk, testified that he became confused when Pavon said he was in a hurry, and did not have a chance to ask for identification. Pavon testified in rebuttal that he did not recall saying he was in a hurry. Both Kiley and her partner, Phu Ha, denied that Pavon said he was in a hurry.

Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged in the accusation, and that appellant had failed to establish any affirmative defense under Rule 141.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the decoy operation was conducted in an unfair manner; (2) the decision is not supported by the findings, and the findings are not supported by substantial evidence in a record replete with gross misconduct by the government; (3) appellant was denied due process by virtue of the unconstitutionality of Business and Professions Code section 24210; and (4) the penalty is excessive.

DISCUSSION

I

Appellant argues that, because the decoy asked if there was Budweiser beer in the cooler, and told the clerk he was in a hurry, the decoy operation violated the fairness requirement of Rule 141 (4 Cal. Code Regs., §141). The rule permits a decoy operation only if it is conducted in a fashion which promotes fairness.

It is apparent from the proposed decision, adopted by the Department, that the administrative law judge did not believe the testimony of the clerk. The ALJ concluded that the evidence did not support a finding that the decoy told the clerk he was in a hurry (Findings of Fact IV-B and IV-C):

> At the hearing, the decoy denied saying he was in a hurry. He also testified that he cannot recall making such a statement. Los Angeles Police Officer (now Sergeant) Kiley, who stood immediately behind the decoy at the time of the sale of the beer, testified that she does not recall the decoy saying he was in a hurry. Officer Ha, who stood next to Sergeant Kiley at the time of the sale, testified positively that the decoy did not say he was in a hurry.
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> If the decoy did say twice that he was in a hurry, it is very unlikely that neither of the two officers nor the decoy recall him doing so. Such a statement by a decoy is so unusual that surely one of them would recall it. There is no evidence that the officers and the decoy deliberately failed to recall the decoy's alleged statements. Under these circumstances, the evidence does not support a finding that the decoy said to Andres that he, the decoy, was in a hurry.

Since the clerk based his claim of confusion on his claim that the decoy had said he was in a hurry, the ALJ's rejection of the latter claim implicitly rejects the former as well.

We do not believe the decoy's question to the clerk about whether there was any Budweiser beer created an atmosphere of unfairness. Questions from customers are common. The clerk was experienced, and we cannot conceive how a simple question like the one asked by the decoy can be said to generate unfairness. Decoys may well

be instructed not to engage in conversation, if only to prevent instances like this from arising. Disregard of such instructions does not automatically violate Rule 141.

II

Appellant's contention that the decision and findings are not supported by substantial evidence, and that the police and the decoy engaged in gross misconduct, is no more than a lengthy and mostly irrelevant reiteration of its earlier argument that the decoy operation was unfair, and does not warrant discussion.[2]

III

Appellant contends that it was denied due process because the ALJ who presided over the hearing was an employee of the Department. Appellant asserts that Business and Professions Code section 24210, the code section which authorized the Department to appoint its own ALJ's, is unconstitutional. That section states:

> The department may delegate the power to hear and decide to an administrative law judge appointed by the director. Any hearing before an administrative law judge shall be pursuant to the procedures, rules, and limitations prescribed in Chapter 5 (commencing with section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

There is one predominant reason why this contention must be rejected.

The Appeals Board, as with other state agencies, lacks the power to declare a

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[2] Appellant claims there is no evidence that the "beverage" purchased by the decoy contained more than one-half percent of alcohol by volume, citing Business and Professions Code section 23004. That section identifies "beer" as an alcoholic beverage.

The contention is frivolous. First, appellant did not raise the issue at the hearing. Second, counsel himself referred to Modelo as "Modelo Beer." [RT 53.] Third, the owner of the premises included Modelo as one of the imports in the wine and beer section of the coolers. [RT 76-77.] Fourth, the clerk testified that he knew Modelo was a brand of beer. [RT 46-47, 53.]

statute unconstitutional unless an appellate court has made such a determination. (Cal. Const., art. 3, §3.5.) None has. To the contrary, two courts of appeal have rejected constitutional challenges to the Department's employment of its own ALJ's. (See *CMPB Friends, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1250 [122 Cal.Rptr.2d 914] and *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 880 [121 Cal.Rptr.2d 753].)

The Board itself has rejected numerous challenges to the Department's use of its own ALJ's that were based on grounds other than the alleged validity of section 24210. (See, e.g., *7-Eleven, Inc./Veera* (2003) AB-7890; *El Torito Restaurants, Inc.* (2003) AB-7891.)

IV

Appellant condemns the penalty - a 15-day suspension - as excessive, arguing that it constitutes cruel and unusual punishment in violation of Article 1, section 17, of the California Constitution. Appellant cites two appellate decisions in support of its position. (*Ex Parte Finley* (1905) 81 P. 1041 [1 Cal.App. 198] and *People v. Ordonez* (1991) 226 Cal.App.3d 1207 [277 Cal.Rptr. 382].) We have reviewed both decisions and find nothing in either that is of assistance to appellant.

The constitutional provision cited by appellant has not, to our knowledge, ever been held to apply to administrative proceedings.

Even if it were applicable, we do not see how it can be seriously argued that the suspension imposed in this case rises to that constitutional level. The sale of an alcoholic beverage to a minor, even though only a misdemeanor, is injurious to the

public welfare, and the suspension which was imposed is reasonable in relation to the offense. It cannot be said it is cruel and unusual when it happens to be the standard penalty imposed by the Department for first-time sale-to-minor violations.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
KAREN GETMAN, 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.