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

AB-8113
File: 47-282586 Reg: 02053866

SAN DIEGO SHERATON CORPORATION, SHERATON CALIFORNIA CORPORATION, and SHERATON HARBOR ISLAND CORPORATION
1380 Harbor Island Drive, San Diego, CA 92101,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 19, 2003
Los Angeles, CA
ISSUED MAY 24, 2004

San Diego Sheraton Corporation, Sheraton California Corporation, and Sheraton Harbor Island Corporation (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, with five days stayed for a probationary period of one year, for their bartender selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants San Diego Sheraton Corporation, Sheraton California Corporation, and Sheraton Harbor Island Corporation, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated March 6, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public eating place license was issued on April 13, 1993. On October 18, 2002, the Department instituted a two-count accusation against appellants charging that, on April 18, 2002, their bartender, Johnny Richard Pontecorvo (the bartender), sold alcoholic beverages to 16-year-old Brooke Edwards (count 1) and 19-year-old Michael Brown (count 2). Although not noted in the accusation, Edwards and Brown were working as minor decoys for the San Diego Police Department at the time.

At the administrative hearing held on December 20, 2002, documentary evidence was received, and testimony concerning the sale was presented by Edwards (the decoy), by police detective Mike Johnson, and by the bartender. Michael Brown, the second decoy, did not appear, and count 2 of the accusation was dismissed.

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

Appellants filed a timely appeal contending that rules 141(b)(2)[2] and 141(b)(3) were violated, and the failure of the administrative law judge (ALJ) to disqualify himself violated appellants' right to equal protection.

DISCUSSION

I

Rule 141(b)(2) provides that a decoy must display an appearance that could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller at the time of the sale. Appellants contend that

[2]References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

this rule was violated because of the decoy's size, because she was able to purchase in all three of the on-sale establishments which she visited that night, and because the ALJ failed to consider the effect of a second decoy on this decoy's apparent age.

The ALJ made the following findings with regard to the decoy's appearance (Finding III):

> E. The overall appearance of the decoy including her demeanor, her poise, her mannerisms, her size and her physical appearance was consistent with that of a person under the age of twenty-one and her appearance at the time of the hearing was similar to her appearance on the day of the decoy operation. However, her hair was in braided pigtails on the day of the sale and it was in a ponytail at the time of the hearing.
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> 1. The decoy is five feet nine inches in height, she weighs approximately one hundred eighty pounds and she has an extremely youthful looking face. On the day of the sale, she was wearing a white sweatshirt which had "Point Loma Panthers" written on the front, blue jeans and white tennis shoes. The photograph depicted in Exhibit 4 was taken at the premises on the day of the sale and it depicts what the decoy was wearing and what she looked like when she entered the premises on that day.
>
> 2. The decoy appeared shy and nervous while she was testifying. She was very soft-spoken and she had to be reminded to speak up on several occasions.
>
> 3. The decoy testified that she had been a cadet with the San Diego Police Department since November of 2001.
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> 4. After considering the photograph depicted in Exhibit 4, the overall appearance of the decoy when she testified and the way she conducted herself at the hearing, a finding is made that the decoy 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.

In the last two sentences of Finding III.F. the ALJ discussed the bartender's testimony regarding the sale and his evaluation of the decoy's apparent age:

> The bartender also testified that he served beer to the decoy and to her companion, that he looked at the two decoys separately, that he asked them for identification, that he looked at the identifications, that the

> decoy's military identification was unfamiliar to him, that he looked at the date of birth on the decoy's identification, but that he miscalculated her age. The bartender did not indicate that he had been misled because of the fact that Brown was with the decoy as was alleged by Respondents' attorney during his closing argument.

Appellants argue that, in relying on the decoy's "soft-spoken nature" and apparent nervousness while testifying, the ALJ considered factors that were not part of the circumstances presented to the seller at the time of the sale. However, the ALJ relied on the decoy's overall appearance, including her demeanor, poise, mannerisms, size, and physical appearance. At least some of these physical and nonphysical aspects of appearance would have been present at the time of the sale, whether or not the bartender observed them. The ALJ specifically considered the decoy's size and found that, despite being 5 feet 9 inches tall and weighing 180 pounds, the decoy's overall appearance was that of a person under the age of 21.

An ALJ must make an independent judgment about the decoy's apparent age, based on the evidence presented in testimony, documentary evidence, and his own observations of the decoy. He or she is not limited to the aspects of the decoy's appearance that were actually observed by the seller or by the seller's misperception:

> 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])

In the present case, the ALJ specifically found that the decoy's appearance at the hearing was similar to her appearance at the time of the sale, and that her appearance was that which could generally be expected of a person under 21 years of

age. Appellants simply assert that the decoy's appearance was not that which one would generally expect to see in a person under the age of 21 because she was 5 feet 9 inches tall, weighed 180 pounds, and carried a military identification card. As this Board has said on many occasions, the ALJ, as the trier of fact, observes the decoy's demeanor and mannerisms as he or she 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.

Appellants point out that the decoy was able to purchase in all three of the on-sale establishments she went to that night, and liken this circumstance to that in *7-Eleven/Dianne* (2002) AB-7835. There the Board found that the decoy's ability to purchase, without being asked for identification, in eight of the ten premises he went to, was a "highly suggestive 'success rate'" that contributed to the Board's conclusion that the decoy's appearance did not comply with rule 141(b)(2). However, in the present case we do not know the total number of premises visited by the decoy, so we nothing about her "success rate"; this decoy was sold to after being asked for, and showing, her identification to the bartender; and the "success rate" of the decoy in *7-Eleven/Dianne* was only one factor in the Board's determination that he did not comply with the rule. The Board's decision in *7-Eleven/Dianne* has no application to this case.

Appellants also argue that the ALJ disregarded the "impact" that "the presence of the second decoy would necessarily have . . . on the apparent age of the first decoy." (App. Br. at p. 8.) They assert that the ALJ should have required the Department to produce Brown, because it was necessary for the ALJ to observe Brown to determine what impact he had on the seller's ability to ascertain the apparent age of the first decoy.

It is true that this Board has stated that the presence of a second decoy may have an impact on the seller's ability to accurately assess the apparent age of a purchasing decoy, particularly where the second decoy actively participates in the purchase. (See, e.g., *7-Eleven, Inc./Smith* (2001) AB-7740.) Appellants, however, have missed or ignored the key word "may."

The presence of Brown would not necessarily have an impact on the seller's ability to assess Edwards' apparent age. The Board has said this about the use of two decoys:

> [I]t 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.
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> 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.

(*Prestige Stations, Inc.* (2002) AB-7760.)

In the present case, although the bartender did testify, there was no evidence or claim that he was distracted or that his ability to comply with the law was impaired by the presence of Brown. There is no evidence at all that Brown's presence had any impact on the bartender's evaluation of the minor's age. On the contrary, the bartender testified that he "didn't make a correlation" between the two decoys, that he considered each one individually [RT 63], and that he miscalculated Edwards' age after looking at the birth date on her identification card [72]. As the ALJ accurately observed, "The bartender did not indicate that he had been misled because of the fact that Brown was with the decoy." (Finding III.F.)

The cases appellants cite are inapposite. In *Hurtado* (2000) AB-7246, the decoy shared a table with a 27-year-old undercover police officer and both the officer and the decoy ordered beers. In *7-Eleven, Inc./Smith*, *supra*, besides the second decoy's active involvement in the transaction, her appearance as a person under the age of 21 was in serious question.

The ALJ correctly determined that the decoy complied with rule 141(b)(2).

II

Rule 141(b)(3) provides that a decoy carrying identification must present it upon request to a seller of alcoholic beverages. Appellants contend this rule was violated because, although the decoy presented her military identification card, she was told by the officer directing the decoy operation not to carry her high school identification.

The decoy carried only her United States Uniformed Services Identification and Privilege card, issued to her as the child of a person in the military. (Exhibit 3.) This card bore her photograph, name, correct date of birth, dates of issuance and expiration, and description. When the bartender asked to see her identification, she showed the military identification card to him. The decoy complied fully with rule 141(b)(3).

It appears that appellants are asserting a violation of the fairness requirement of rule 141(a) rather than a violation of rule 141(b)(3). The unfairness results, according to appellants, from the officer instructing the decoy not to carry her high school identification card. They speculate that the decoy's high school identification card would have provided the appropriate information and, if she had carried that card and shown it to the bartender, the bartender would not have sold to her. Appellants consider the instruction not to bring her high school identification "[t]he important feature in this circumstance."

It is certainly possible, and perhaps likely, that the bartender would not have sold to this 16-year-old had she shown him her high school identification card. However, we see no unfairness in the officer's instruction not to bring the high school identification. The high school identification card was not produced at the hearing, but from the testimony it appears that it lacked a description of the decoy [RT 30], one of the characteristics required by section 25660.[3] (See *Loresco* (2000) AB-7310.)

Regardless of the information on the high school identification card or the motivation of the officer in giving this instruction, the decoy's use of her military identification was not unfair. The bartender testified that he was familiar with military identification cards, although he had not seen a red one like the one the decoy presented. We do not think use of a military identification card can be said to be unfair in a location like San Diego, where military personnel, and their dependants, are numerous.

There is no requirement that the decoy use an identification card likely to prevent a sale to her of alcoholic beverages. Rule 141` requires that decoy operations be conducted in a fashion that promotes fairness, not that law enforcement must conduct decoy operations in a fashion that is most conducive to the sale being denied.

III

Before the administrative hearing, appellants filed with the Department's Administrative Hearing Office (AHO) a "Notice of Peremptory Challenge" (Exhibit A), seeking the disqualification of ALJ Echeverria, who was assigned to hear this case.

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[3]Section 25660 provides a defense to a sale to a minor, if the seller acted in reasonable reliance on "[b]ona fide evidence of majority and identity," which is "a document issued by a [governmental agency] . . . , which contains the name, date of birth, description, and picture of the person."

The notice states that "Pursuant to section 11425.40(d) of the Business and Professions Code [sic; should be "Government Code"], and section 1034 of the California Code of Regulations, Respondent is entitled to one disqualification without cause of the assigned ALJ which will be granted in any APA hearing." Attached is a declaration of appellants' counsel setting out the matters required by the California Code of Regulations, title 1, section 1034 (rule 1034).

The Department filed an objection to the peremptory challenge, arguing that rule 1034 applies only in the case of a hearing before an ALJ from the Office of Administrative Hearings (OAH). Government Code section 11425.40, subdivision (d), provides that "An agency that conducts an adjudicative proceeding may provide by regulation for peremptory challenge of the presiding officer." The Department's AHO has not adopted such a regulation. OAH adopted rule 1034, allowing a peremptory challenge, or disqualification without cause, of an ALJ assigned "in any OAH Hearing." Rule 1034 applies only to OAH judges, the Department argues, and because the Department does not have a regulation allowing for peremptory challenge of an ALJ, appellants' challenge has no legal basis.

At the hearing, appellants' counsel argued that the Department's interpretation "creates an impossible equal protection problem for the Department to have one case where 1034 applies next door to a case where 1034 doesn't apply. I think they have to have one rule for all cases." [RT 8.]

The ALJ, in his comments to the peremptory challenge, said,

> I think, for the record, we should just indicate that because the Department's administrative law office is short-handed and because of the hiring freeze, it was necessary for our chief judge and I guess the Director of ABC to ask the Office of Administrative Hearings to help out with some cases.

He agreed with the Department's reasoning, denying the peremptory challenge because OAH rule 1034 does not apply in the present case and the Department has not adopted a provision allowing for a peremptory challenge to a Department ALJ.

On appeal, appellants urge that the Department violates the equal protection clauses of the state and federal Constitutions by allowing peremptory challenges to ALJ's in some cases before it and not in others.

The equal protection provisions of the California and United States Constitutions "in general assure that persons in like circumstances be given equal protection and security in the enjoyment of their rights." (*Whittaker v. Superior Court* (1968) 68 Cal.2d 357, 367 [66 Cal.Rptr. 710].)

Appellants contend that the practice of the Department (through AHO) of employing ALJ's from OAH to hear some Department cases causes a denial of equal protection. They assert that this practice results in some licensees having the opportunity to peremptorily challenge an ALJ while others do not have that opportunity. Because of this difference, appellants argue, two licensees, one appearing before an ALJ from AHO and the other appearing before an ALJ from OAH, "would be treated significantly differently in their administrative hearings with the only underlying difference being the source of their judges."

The usual equal protection challenge is to an act of the Legislature creating classifications that cause similarly situated persons to be treated differently. However, the acts of state officials in administering the laws may also be found to violate equal protection, where a statute is applied in a discriminatory manner.

Appellants are objecting to the Department's use of two groups of ALJ's, some of whom are subject to peremptory challenge and some of whom are not. In some sense,

this is a statutorily created classification. However, the statutes and regulation involved – Government Code section 11525.40, OAH rule 1034, and Business and Professions Code section 24210 – are neutral on their faces. Where a statute is fair and nondiscriminatory on its face, and the contention is that it is applied in a discriminatory manner, an equal protection violation will be found only if the objector can show an *intentional and arbitrary discrimination* by the state in applying the statute.

> Unequal application of a statute or rule to persons entitled to be treated alike is not a denial of equal protection "unless there is shown to be present in it an element of intentional or purposeful discrimination." (*Snowden v. Hughes* (1944) 321 U.S. 1, 8 [64 S. Ct. 397, 401, 88 L. Ed. 497].) What the equal protection guarantee prohibits is state officials "purposefully and intentionally singling out individuals for disparate treatment on an invidiously discriminatory basis." (*Murgia v. Municipal Court* (1975) 15 Cal. 3d 286, 297 [124 Cal. Rptr. 204, 540 P.2d 44].)

(Cilderman v. Los Angeles (1998) 67 Cal.App.4th 1466, 1470 [80 Cal.Rptr.2d 20].)

Appellants do not allege any intentional and arbitrary discrimination by the Department in its practice of employing ALJ's from OAH. They do not even allege a "classification" created by legislation or the Department's practice. They merely allege that, "[a]t random, two precisely similarly situated licensees could receive significantly different treatment based upon simply whether their judge is from the OAH or from the AHO."

ALJ Echeverria stated during the hearing that OAH ALJ's were used by AHO because AHO was "short-handed and because of the hiring freeze." Appellants do not dispute this explanation. Under these circumstances, appellants have not shown "intentional or arbitrary discrimination" in the Department's action. Therefore, the action does not violate equal protection guarantees.

Even if we were to approach appellants' contention using the standard applicable in challenging a legislatively created classification, appellants' contention would fail. The right to a peremptory challenge is not constitutionally protected, but has been created by statute. Since the challenge does not involve a suspect classification or a fundamental right, the "rational relationship" standard is used. (*People v. Leung* (1992) 5 Cal.App.4th 482, 494 [7 Cal.Rptr.2d 290].) This means that a statutory classification will be found valid if it bears a rational relationship to a legitimate governmental purpose. (*Board of Supervisors v. Local Agency Formation Com.*, 3 Cal. 4th 903, 913 [13 Cal.Rptr.2d 245].)

The need to provide timely hearings is clearly a legitimate governmental purpose, and the Department's temporary use of additional ALJ's from OAH, the agency created with the purpose of providing ALJ's for other state agencies, is rationally related to that purpose. The Department's practice of using ALJ's from OAH would satisfy the rational relationship test if it were used here.

ORDER

The decision of the Department is affirmed.[4]

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.