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

AB-8697
File: 21-375624 Reg: 06063258

GLENSHIRE GENERAL STORE, INC., dba Glenshire General Store
10095 Dorchester Drive, Suite A-1, Truckee, CA 96161,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: October 2, 2008
San Francisco, CA

ISSUED JANURY 15, 2009

Glenshire General Store, Inc., doing business as Glenshire General Store (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for its clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Glenshire General Store, Inc., appearing through its president, Christina Stull, and its counsel, Richard Warren, 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 April 6, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on December 11, 2001. On June 29, 2006, the Department filed an accusation against appellant charging that appellant's clerk, Loren Diggens (the clerk), sold an alcoholic beverage to 18-year-old Evan Black on May 19, 2006. Although not noted in the accusation, Black was working as a minor decoy for the Department at the time.

At the administrative hearing held on February 7, 2007, documentary evidence was received and testimony concerning the sale was presented by Black (the decoy) and by the clerk. Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant has filed an appeal contending the penalty is excessive and the decoy's appearance violated rule 141(b)(2).[2]

DISCUSSION

I

Appellant contends the penalty is excessive because the Department ignored the mitigating factors of positive action by the licensee to correct the problem, documented training of employees, and the apparent age of the minor decoy. In addition, the penalty should be reduced, appellant argues, because the Department did not give advance notice of the decoy operation, the decoy did not appear to be under the age of 21, the clerk asked for the decoy's identification, the premises did not sell to decoys in two subsequent decoy operations, the suspension imposed would create an economic hardship for the family dependent upon its income, and public policy does not support

[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.

putting out of business a store relied on by local residents which does card for alcoholic beverage sales.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

The administrative law judge (ALJ) found no mitigation was established by appellant at the hearing. In reviewing the record, we find no evidence of "positive action" by the licensee to correct the problem. The subsequent decoy operations to which appellant refers occurred not only after the violation at issue, but after the hearing in this case. Since the ALJ and the Department could not have considered them at the hearing, neither may this board.

In its brief, appellant also mentions "strengthen[ing] the training with employees," a written store policy regarding checking identification, and having a "Driver's License Guide" at the front counter to verify the validity of identification. (App. Br. at pp. 4-5.) However, these were matters that could, and should, have been presented to the ALJ at the hearing so they could be considered in reaching a decision.

Advance notice of a decoy operation is not required and, whether or not this Board agrees with the public policy stated by appellant, we are restricted to determining whether the Department abused its discretion in imposing the penalty it did. It is the Legislature, not the Appeals Board, that considers and makes decisions on public policy.

The penalty imposed is within the guidelines set out in title 4, California Code of Regulations, section 144 (rule 144). Rule 144 provides for penalty flexibility depending on factors in aggravation and mitigation, but appellant did not establish mitigation. We cannot say that this penalty was an abuse of the Department's discretion.

II

Appellant contends that the decoy operation was "illegal" because the decoy appeared to be over the age of 21.

Appellant brings this up as part of its argument regarding the alleged excessive penalty. However, if it had been determined that the decoy lacked the appearance of a person under the age of 21,[3] this would have been a complete defense to the accusation. (Bus. & Prof. Code, § 141, subds. (b)(2) & (c).)

The problem appellant faces on this issue is that the ALJ determined that the decoy *did* present the appearance generally to be expected of a person under the age of 21. As this Board has said many times, we will not second guess the determination of the ALJ, who had the opportunity, which this Board has not, to observe the decoy as he testified.

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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."

Appellant relies on the opinion of the clerk and the corporate president that the decoy appeared to be over 21. However, it is not the belief of the clerk (or the licensee) that is controlling, it the ALJ'S reasonable determination of the decoy's apparent age based upon the evidence and his observation of the decoy at the hearing.

> The rule, through its use of the phrase 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.

(7-Eleven, Inc. & Virk (2001) AB-7597; accord, *Kunisaki* (2005) AB-8284*; 7-Eleven, Inc. & Paul* (2002) AB-7791; *Yaghnam* (2001) AB-7758.)

Appellant has not given us any reason to question whether the ALJ's determination of the decoy's apparent age was reasonable. Therefore, rule 141(b)(2) does not provide a defense to this violation.

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.