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

AB-8764
File: 20-364488 Reg: 07065353

SYLMAR OIL, INC., dba Sylmar Chevron
13153 Foothill Boulevard, Sylmar, CA 91342,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: November 6, 2008
Los Angeles, CA

ISSUED FEBRUARY 23, 2009

Sylmar Oil, Inc., doing business as Sylmar Chevron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Sylmar Oil, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Lori W. Brogin, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Cottrell.

---

[1]The decision of the Department, dated October 22, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on May 19, 2000. The Department filed an accusation against appellant charging that, on October 26, 2006, appellant's clerk sold an alcoholic beverage to 19-year-old Mariana Olvera. Although not noted in the accusation, Olvera was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on August 3, 2007, documentary evidence was received, and testimony concerning the sale was presented by Olvera (the decoy) and by Los Angeles police officers Roger Morales and Melissa Sanchez. The licensee presented no evidence.

The testimony established that the decoy was able to purchase beer after the clerk examined her valid California driver's license that showed her true date of birth. Later, the decoy identified the clerk as the person who sold the beer to her. The clerk was facing the decoy, standing three to five feet away from her, when she identified him.

Following the hearing, the Department issued its decision that determined the violation charged was proved and no defense was established. Appellant then filed an appeal contending: (1) The Department engaged in improper ex parte communications; (2) the Department did not have effective procedures in place to prevent any of its attorneys from acting as both prosecutor and advisor to the decision maker or to prevent ex parte communication with the decision maker; (3) Department rule 141(b)(5) was violated; and (4) Department rule 141(b)(2) was violated. Appellant has also moved to augment the record with various documents, including any report of hearing and General Order No. 2007-09. The first two issues are related and will be discussed together.

DISCUSSION

I and II

Appellant contends the Department violated the Administrative Procedure Act (Gov. Code, §§ 11340-11529) and due process by engaging in ex parte communication with the Department's decision maker, and by its failure to maintain effective screening procedures within the legal staff to prohibit its prosecutors from engaging in ex parte communications with the decision maker or his advisors. The Department denies that an ex parte communication was made. A declaration by the staff attorney who represented the Department at the administrative hearing asserts that at no time did the attorney prepare a report of hearing or other document, or speak to any person, regarding this case.

In a number of appeals recently, this Board has addressed the same arguments made by the parties here. In those appeals, the Board noted that several recent court decisions had described the Department's practice of ex parte communication with its decision maker or the decision maker's advisors as "standard practice" in that agency. The Board concluded that, "without evidence of an agency-wide change of policy and practice [by the Department], we would be exceedingly reluctant to affirm or reverse on the basis of a single declaration, especially where there has been no opportunity for cross-examination." Since a factual question still exists in this case, as it did in the earlier appeals just mentioned, we believe the only appropriate resolution is to remand the matter to the Department for an evidentiary hearing.

As did the California Supreme Court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [145 P.3d

462, 50 Cal.Rptr.3d 585] at page 17, footnote 13, we decline to address appellant's due process argument:

> Because limited internal separation of functions is required as a statutory matter, we need not consider whether it is also required by due process. As a prudential matter, we routinely decline to address constitutional questions when it is unnecessary to reach them. [Citations.] Consequently, we express no opinion concerning how the requirements of due process might apply here.

In light of our decision to remand this matter, augmenting the record is not necessary.

III

Rule 141(b)(5) requires, after a sale to a minor decoy, "but no later than the time a citation, if any, is issued," that a reasonable attempt be made to "have the minor decoy . . . make a face to face identification of the alleged seller of the alcoholic beverages." Appellant contends that this decoy operation did not strictly comply with rule 141(b)(5) as required by *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd*. (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126], because the clerk was looking down as he was being identified as the seller.

In reviewing a Department decision, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925];

Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

The Board has addressed similar contentions before and concluded that a face-to-face identification is *not* "limited to a situation in which the two people involved are squarely facing each other, looking directly at each other, and intent on, and fully aware of, each others' actions and words." (*7-Eleven, Inc. & Lo* (2006) AB-8384.) Such a "restrictive interpretation of the phrase does not constitute its usual and ordinary meaning, nor does it reflect the context or core objective of the regulation." (*Ibid*.)

We said in *Chun* (1999) AB-7287, that a face-to-face identification will comply with the rule when "the seller is, *or reasonably ought to be*, knowledgeable that he or she is being accused and pointed out as the seller." (Italics added.) In *7-Eleven, Inc. & Lo*, *supra*, the Board explained:

> The core objective of rule 141 is fairness to licensees when decoys are used to test their compliance with the law. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* [2003] 109 Cal.App.4th [1687,] 1698 [1 Cal.Rptr.3d 339].) Rule 141(b)(5) is concerned with both identifying the seller and providing an opportunity for the seller to look at the decoy again, soon after the sale. (*Ibid*.) It does not require a direct "face off" to accomplish these purposes. Regardless of whether the clerk heard what the decoy said to the officer, he had the opportunity to look at the decoy again. The opportunity is all that needs to be provided; if the opportunity is provided, but the clerk does not take advantage of the opportunity, the rule is not violated.

If a defense could be created simply by the clerk, inadvertently or purposefully, looking down or turning his head away from the decoy's face, the requirement of rule 141(b)(5) would be just a sham, and would serve neither fairness to the licensees nor the welfare of the public.

IV

Appellant contends that the decoy, because of her prior experience in decoy operations[2] and experience derived from her participation in the Los Angeles Police Department Explorer program, did not display the appearance required by Department rule 141(b)(2), i.e., "that 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."

The administrative law judge (ALJ) addressed the decoy's appearance in Finding of Fact 7:

> The minor is physically small and has a baby face. She stands at 5'1" tall and weighs 130 pounds. Her hair falls straight below her shoulders. She wears light mascara with no nail polish and she had on a long black pearl-like necklace. She wore a navy blue over-shirt over a black muscle shirt; had on blue jeans and casual black shoes. This description fits her appearance at the hearing as well as at the decoy operation.
>
> Ms. Olvera had been part of the minor decoy program for LAPD for approximately 1 year prior to October 2006. She is also a police explorer where her duties include basic policing such as answering 911 calls and ride-alongs. Taking this background into account, it is still found that the minor displayed the demeanor[,] maturity and physical appearance of a teenager younger than her years at the time the violation took place.

It is readily apparent from appellant's brief that it simply disagrees with the ALJ's factual assessment of the decoy's appearance. Its argument that some of the elements of her appearance support a reasonable inference that she exhibited a comfort level and demeanor of a person over the age of 21 is nothing more than a partisan

---

[2] Appellant tells us in its brief (App. Br. p. 15) that the decoy had participated in 240 minor decoy operations. This is an exaggeration. Actually, the decoy testified she had participated in ten decoy operations prior to the one in this case. Appellant is referring to the total number of stores the decoy visited in those ten operations, based on the decoy's estimates of the average number of stores visited in each decoy operation.

reweighing of the evidence. Appellant has not pointed to any procedural error on the ALJ's part.

As we have often said, the ALJ's factual determinations, if supported by substantial evidence, may not be set aside. The ALJ had the opportunity to view the decoy throughout her testimony, and was in a far better position than is this Board to appraise the decoy's appearance. (See, e.g., *7-Eleven, Inc./Gonser* (2001) AB-7750.) He made a factual finding, there was evidence to support it, and we have no reason to question it.

ORDER

The decision of the Department is affirmed as to all issues other than that regarding allegations of ex parte communication, and the matter is remanded to the Department for further proceedings in accordance with the foregoing discussion.[3]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[3]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.