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

AB-8819
File: 47-353091 Reg: 07066681

AMERICAN GOLF CORPORATION, dba Reserve at Sands Park Golf Course
6301 West Eight Mile Road, Stockton, CA 95219,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: April 1, 2010
San Francisco, CA

ISSUED JULY 20, 2010

American Golf Corporation, doing business as Reserve at Sands Park Golf Course (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its bartender 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 American Golf Corporation, appearing through its counsel, Ralph B. Saltsman and Ryan Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Sean Klein.

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[1]The decision of the Department, dated January 23, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on September 21, 2004. On August 20, 2007, the Department filed an accusation charging that appellant's bartender sold an alcoholic beverage to 18-year-old Jazmin Sanchez on June 28, 2007. Although not noted in the accusation, Sanchez was working as a minor decoy for the Department at the time.

At the administrative hearing held on November 29, 2007, documentary evidence was received, and testimony concerning the sale was presented by Sanchez (the decoy). She testified that the bartender sold her a Bud Light beer without asking her age or for identification. John Hilker, regional director for appellant, testified about the training given to employees regarding alcoholic beverage service.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no affirmative defense was established. Appellant then filed an appeal contending: (1) Department rule 141(b)(5)[2] was violated; (2) Department rule 141(b)(2) was violated; and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends that the Department did not prove compliance with rule 141(b)(5), which provides that, following a sale, the decoy should make a face-to-face identification of the person who sold the alcoholic beverages.

Appellant waived its right to raise this issue on appeal, since it did not raise it at the administrative hearing. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §400, p. 458.)

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[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.

In any case, the premise upon which appellant's argument is based is wrong. It is not, as appellant contends, that the Department must demonstrate compliance with the rule; rather, it is appellant's burden to establish the affirmative defense of rule 141 by showing that the rule was not complied with. (*7-Eleven, Inc*. (2006) AB-8444.)

Appellant's reliance on the appeal of *Le/Pham* (1999) AB-7178, is also misplaced. It is true that the Department acknowledged an obligation to demonstrate compliance with the rule in that appeal, and the Appeals Board reversed the Department's decision because it failed to show compliance with rule 141(b)(5). However, the Board has long since repudiated the idea that the Department bears the burden of making a prima facie showing of compliance with the rule and that without that showing, the licensee is entitled to the complete defense provided by subdivision (c) of rule 141. In *7-Eleven, Inc./Lo* (2006) AB-8384, the Board specifically overruled its decision in *The Southland Corporation & R.A.N., Inc*. (1998) AB-6967, the appeal in which that erroneous notion was first propounded.

Appellant asserts in its brief that "There not being any evidence, Finding or Conclusion relative to compliance with Rule 141(b)(5) it is clear that this Decision must be reversed at this point by this Appeals Board." (App. Br. at p. 6.) This is wrong on two points: There was testimony regarding the decoy's identification of the seller (see RT 23), and even if there had been no evidence on the point, the Department's decision would not be reversed. "The burden of proving an affirmative defense falls on the party asserting it. Appellants do not win by default if there is no evidence one way or the other on the issue in question." (*7-Eleven, Inc./Hipolito* (2006) AB-8444.)

II

Appellant contends that rule 141(b)(2), which requires that the decoy must present an appearance generally to be expected of a person under the age of 21, was violated because the decision made no specific finding that the decoy complied with rule 141(b)(2). This, according to appellant, was in spite of the extensive questioning and testimony about the decoy's appearance and appellant's argument concerning whether there was compliance.

It is true the decision lacks a specific finding that the decoy displayed the appearance generally to be expected of a person under the age of 21. However, even if this were error, we consider it to be "invited error"[3] because appellant's closing argument was that the decoy's appearance violated rule 141(a), not rule 141(b)(2). Rule 141(a) requires the Department to conduct decoy operations "in a fashion that promotes fairness."

Appellant's closing argument with regard to the decoy's appearance was as follows:

> The question in this case comes down to whether this decoy operation promotes fairness. That's what the Appeals Board has said

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[3] "The 'doctrine of invited error' is an 'application of the estoppel principle': 'Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal' on appeal. (9 Witkin, Cal. Procedure [(4th ed. 1997)] Appeal, § 383, p. 434, italics omitted.) . . . . At bottom, the doctrine rests on the purpose of the principle, which is to prevent a party from misleading the trial court and then profiting therefrom in the appellate court. [Citations.]"

(Munoz v. City of Union City (2007) 148 Cal.App.4th 173, 178 [55 Cal.Rptr.3d 393], quoting from *Norgart v. Upjohn Co*. (1999) 21 Cal.4th 383, 403 [87 Cal.Rptr.2d 453, 981 P.2d 79].)

> many, many times is the primary criteria [*sic*] of Rule 141, does the decoy operation promote fairness.
>
> Here we have a decoy appearance today quite a bit different as she looked in the photo, which the Court of Appeal has told us is the best evidence of how a decoy appears in the evaluation of Rule 141(b)(2). We have a photo of the decoy to my eye wearing make-up. She testified to wearing make-up. She's got streaks in her hair. Although her eyes are brown, she is wearing contacts that make them look gray.
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> We also have a decoy that had been a decoy at least once a month for three years leading up to this incident and she testified she wasn't nervous. So we've got almost a professional decoy, your Honor, working with the Stockton Police Department and the ABC whose cousin is an ABC investigator going out once a month, not nervous, very experience [*sic*] and who has taken steps, maybe not intentionally, to be subversive, but alter her appearance, highlights in the hair, make-up and colored contacts. That doesn't promote fairness. The accusation should be dismissed.

Appellant's counsel acknowledged during oral argument before the Appeals Board that the "promoting fairness" requirement of rule 141(a) "means something different from" the appearance requirement of rule 141(b)(2). It was rule 141(b)(2), counsel insisted, that appellant raised at the hearing, and that was the issue the ALJ had to decide. We believe that appellant's closing argument, quoted above, refutes its assertion made to the Appeals Board.

The ALJ did not discuss rule 141(b)(2) because appellant led him to believe it was arguing that the decoy's appearance made the decoy operation unfair, not that it violated rule 141(b)(2). If appellant meant to argue that the decoy's appearance violated rule 141(b)(2), it did not make that clear to the ALJ. We do not find the ALJ's response to appellant's argument unreasonable. The alleged deficiency in the decision was caused by appellant and does not provide a basis for reversing this decision.

III

Appellant contends that the penalty imposed was excessive because the ALJ did not consider the mitigation evidence appellant presented. The ALJ addressed the penalty in Determination of Issues III:

> The Department recommended that Respondent's license be suspended for fifteen days, the "standard" penalty for a licensee's violation of Business and Professions Code Section 25658(a). Title 4, California Code of Regulations, Section 144. Respondent's request for mitigation of its penalty is denied, as Respondent has not shown how mitigation is legally warranted.

Findings of Fact V states:

> Respondent provides its employees training regarding the laws pertaining to the sale of alcoholic beverages. The employees also take the Department's LEAD training annually. After the June 28 incident, Respondent "revisited" with its employees the subject of sale of alcoholic beverages.

The Determination, appellant argues, cannot be reconciled with the Finding because it ignores two of the mitigating factors listed in rule 144: "Positive action by licensee to correct problem" and "Documented training of licensee and employees."

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].)

Although positive action by the licensee and documented training are included in a list of mitigating factors in rule 144, appellant ignores the language preceding the list, which says that "[m]itigating factors *may* include" those items. The Department is not required to consider every positive action and documented training as mitigation.

This Board's concern is only whether the Department has abused its discretion in imposing a particular penalty. If the penalty imposed is reasonable, it is not necessary for the Board to question whether the Department could or should have considered some factor in formulating the penalty. In this case, the penalty corresponds to the standard set in rule 144 for a sale-to-minor violation when there are no prior sale-to-minor violations in the preceding 36 months. We can think of no circumstances in this appeal that would make the standard penalty unreasonable.

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
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.