

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

AB-9385

File: 20-523316 Reg: 13078498

7-ELEVEN, INC. and KAHLON ENTERPRISES, LLC,
dba 7-Eleven Store # 2172-39270
12505 Beach Boulevard, Suite A1, Stanton, CA 90680,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 7, 2014
Los Angeles, CA

ISSUED AUGUST 19, 2014

7-Eleven, Inc. and Kahlon Enterprises, LLC, doing business as 7-Eleven Store # 2172-39270 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their 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 appellants 7-Eleven, Inc. and Kahlon Enterprises, LLC, appearing through their counsel, R. Bruce Evans and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J. Belvedere.

¹The decision of the Department, dated November 1, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 3, 2012. On May 10, 2013, the Department filed an accusation against appellants charging that, on November 9, 2012, appellants' clerk, Kamal Preet Singh (the clerk), sold an alcoholic beverage to 19-year-old Leticia Teran. Although not noted in the accusation, Teran was working as a minor decoy for the Orange County Sheriff's Department at the time.

At the administrative hearing held on September 11, 2013, documentary evidence was received and testimony concerning the sale was presented by Teran (the decoy) and by Larry Hahn, an Orange County Sheriff deputy. Appellants presented no witnesses.

Testimony established that on November 9, 2012, the decoy entered the licensed premises alone and proceeded to the beer coolers where she selected a six-pack of Bud Light beer in bottles. She took the beer to the register and placed it on the counter. The clerk completed the sale without asking for identification and without asking any age-related questions. Deputy Hahn observed the transaction from his vehicle with the use of binoculars. The decoy received some change and exited the premises.

The Department's decision determined that the violation charged had been proven and that no defense had been established.

Appellants then filed a timely appeal contending that rule 141(b)(2)² was violated because the decoy did not display the appearance required by the rule.

²References 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.

DISCUSSION

Appellants contend that the decoy's experience as a decoy and her training as a police Explorer made her appear confident and over the age of 21. Appellants also allege that the administrative law judge (ALJ) placed too much emphasis on the appearance of the decoy at the administrative hearing rather than relying on the photographs taken at the time of the decoy operation.

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." Appellants maintain that the decoy appeared older than 21 because of her training and experience — both of which made her confident.

The Appeals Board has rejected the "experienced decoy" argument many times before. As the Board said in *Azzam* (2001) AB-7631:

A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. . . . There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

The Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our judgment on the evidence, and we must accept as conclusive the Department's findings of fact. *CMPB Friends, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.4th 1250, 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.4th 364, 367 [3 Cal.Rptr.2d 770]; . . . We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor an appellate court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control (Lacabanne)* (1968) 261 Cal.App.2d 181, 185 [67

Cal.Rptr. 734].) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004)

118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

The ALJ's findings concerning the decoy's appearance were as follows:

9. The decoy's overall appearance including her demeanor, her poise, her mannerisms, her maturity, her size and her physical appearance were 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 except that she was not wearing bangs on the day of the hearing. The decoy is a very short and youthful looking young lady who was five feet in height and who weighed one hundred twenty-five pounds on the day of the sale. On that day, the decoy was wearing no make-up and no jewelry. Her clothing consisted of blue jeans and a gray sweater with flowers. She was wearing long bangs that covered her forehead and she was wearing Chita [*sic*] print nail polish. She was not carrying a purse or a cell phone. Exhibit 3 is a photograph of the decoy that was taken at the premises and Exhibit 2 is a photograph of the decoy that was taken on the day of the sale before going out on the decoy operation. Both of these photographs show how the decoy looked and what she was wearing on the day of the sale.

10. The decoy had served as an Explorer with the Sheriff's Department for three years prior to the date she went to the premises as a decoy. The decoy had participated in approximately fifteen prior decoy operations. She testified that she was nervous when she first started as a decoy and that she was less nervous when she was at the subject premises.

11. There was nothing remarkable about the decoy's nonphysical appearance and there was nothing about her speech, her mannerisms or her demeanor that made her look older than her actual age. In fact, she looks younger in person than she does in her photographs. After considering the photographs depicted in Exhibits 2 and 3, the decoy's overall appearance when she testified and the way she conducted himself [*sic*] 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.

(Findings of Fact, ¶¶ 9-11.)

These findings prompted the ALJ to conclude:

2. There was compliance with Rule 141(b)(2) and Rule 141(b)(5) of Chapter 1, Title 4, California Code of Regulations as well as with Rule 141 in general as set forth in Findings of Fact Paragraphs 2 through 14. Furthermore, the evidence did not establish that the decoy operation was conducted in an unfair manner.

(Determination of Issues, ¶ 2.)

Appellants maintain the ALJ failed to consider the decoy's experience and training, but this is contradicted by paragraph 11, above, in which he finds that her demeanor did *not* make her appear over the age of 21. As the Board stated in *Azzam, supra*, "it is only the *observable effect* of that experience that can be considered by the trier of fact." The ALJ observed none.

Appellants contend that Exhibits 2 and 3 — the photographs which they contend are the best evidence for determining how the decoy appeared at the time of the sale — were not given their proper weight. They allege that the ALJ "abused his discretion by assessing the decoy's physical characteristics and demeanor in person at the hearing to be more important than the photographs taken at the time of the decoy operation in determining that the decoy looked younger than age 21." (App.Br. at p. 5.) They go on to state that the photographs were "summarily dismissed" by the ALJ and that they show the decoy to appear older on the day of the decoy operation than at the hearing. (*Ibid.*) These are misstatements of the ALJ's findings. The ALJ states that he considered both the photographs taken on the date of the operation, as well as the decoy's appearance and demeanor at the hearing, and came to the conclusion that there was compliance with rule 141. Moreover, contrary to appellants' contention, the ALJ's finding that the decoy appeared younger in person than in the photographs is *not* the equivalent of finding that the decoy appeared over 21 on the day of the sale.

Appellants have provided no valid basis for the Board to question the ALJ's determination that the decoy's appearance complied with rule 141(b)(2).

As this Board has said many times, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as she testifies, and making the determination whether the decoy's appearance met the requirements of rule 141. We must decline appellants' invitation to reweigh the evidence — particularly when, as here, the ALJ has made extensive findings on the decoy's physical and nonphysical characteristics which satisfy us that there was compliance with the rule.

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.