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

AB-9415
File: 20-457445 Reg: 13078462

CHEVRON STATIONS, INC.,
dba Chevron 91717
151 North Santa Rosa Street, San Luis Obispo, CA 93405-1322,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: December 4, 2014
Los Angeles, CA

ISSUED JANUARY 9, 2015

Chevron Stations, Inc., doing business as Chevron 91717 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 10 days because its clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellant Chevron Stations, Inc., through its counsel, Ralph Barat Saltsman and Jennifer L. Carr, of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control through its counsel, Kimberly J. Belvedere.

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[1]The decision of the Department, dated February 14, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on March 11, 2008. On May 7, 2013, the Department filed an accusation charging that appellant's clerk, Christopher Carrillo (the clerk), sold an alcoholic beverage to 18-year-old Renae Ann Boggs on October 18, 2012. Although not noted in the accusation, Boggs was working as a minor decoy for a joint operation between the San Luis Obispo Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on December 10, 2013, documentary evidence was received, and testimony concerning the sale was presented by Boggs (the decoy) and by Vic Duong, a Department agent. Appellant presented no witnesses.

Testimony established that on the date of the operation, Officer Chitty of the San Luis Obispo Police Department entered the licensed premises, followed shortly thereafter by the decoy. The decoy went to the coolers and retrieved a six-pack of Bud Light beer. She took the beer to the cash register area and placed it on the counter. The clerk requested the decoy's identification. The decoy produced her California driver's license, which showed she was under the age of 21. The clerk took possession of the driver's license and input something into the register, but did not swipe the decoy's driver's license through the register.

There was no conversation between the decoy and clerk except for the request for identification. The clerk did not ask any age-related questions.

The decoy paid the clerk for the beer and exited the premises.

After the hearing, the Department issued its decision that the violation charged was proved and no defense was established. In light of appellant's discipline-free history, the Department imposed a mitigated penalty of 10 days' suspension.

Appellant then filed this appeal contending (1) the ALJ ignored evidence in support of appellants' rule 141(b)(2) defense, and (2) proper appellate review of the ALJ's findings mandates that the decoy appear in person before the Appeals Board.

DISCUSSION

I

Appellant contends that the ALJ ignored evidence in support of its rule 141(b)(2) defense. Specifically, appellant directs this Board to the decoy's "tall height" of 5 feet, 7 inches (App.Br. at p. 6); the presence of a small silver band with diamonds on her left ring finger, which suggests marriage and is a "talisman of adulthood" (*ibid.*); her clothing, which "in no way showed the immaturity and indiscretion of a teenager" and even "evidenced a bust, but not in the exaggerated manner attributable to teenagers" (*Id.* at p. 5); and, finally, her "clean-cut make up" and "conservatively cut, long brown hair." (*Ibid.*) The use of this particular decoy, they argue, rises to the level of "trickery" in violation of rule 141 generally. (App.Br. at p. 7.) Furthermore, appellant objects to the Board's failure to develop a list of elements of appearance for women that evidence a violation of rule 141(b)(2).

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." The rule provides an affirmative defense, and the burden of proof lies with appellant.

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

> We cannot interpose our independent 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.App.4th 1250, 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; . . .) 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. 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 made the following findings of fact regarding the decoy's physical appearance and demeanor:

> 1. On the day of the sale, the decoy weighed around 140 pounds and was 5 feet 7 inches tall. At hearing, she was the same height, but had gained about 5 pounds. Boggs wore a black shirt with a red jacket, blue jeans, and flip-flops during the decoy operation. (See State's Exhibits 3 & 4) She wears her brunette hair pulled back from her forehead, and it falls well below her shoulders. Boggs's fingernails were painted black on October 18, 2012. She also wore a necklace on the date of the incident, but not at the hearing. The decoy wore a thin silver band with very small diamonds on her left ring finger at hearing and on October 18, 2012.[fn.]
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> 2. Boggs wore mascara with light brown eye shadow during the decoy operation. She did not apply any eyeliner. She did have foundation and powder, but no blush on her face. She also applied Chap Stick [*sic*] to her lips. She had applied mascara, dark purple eye shadow, foundation, and blush, as well. Boggs looked substantially the same at hearing as she does in the photographs taken on October 18, 2012. At hearing Boggs's face appeared quite smooth, with no evidence of wrinkles or blemishes.
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> 3. The decoy testified quietly and politely at hearing. Boggs stated she was a "little nervous" testifying. The ALJ observed Ms. Boggs wringing her fingers during her testimony and she appeared a bit tense at times.[fn] Ms. Boggs testified she was less nervous testifying than she was during

> the decoy operation. This was Ms. Boggs [*sic*] first decoy operation. Overall, there was nothing remarkable about the decoy's speech, mannerisms, or her demeanor that made her appear to be 21 years of age or older.
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> 4. After viewing the decoy's overall appearance when she testified, the photographs contained in State's Exhibits 2, 3, & 4, 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 the age of twenty-one years under the actual circumstances presented to the seller at the time of the sale.

(Findings of Fact ¶¶ II.D.1 through 4.) Based on these findings, the ALJ reached the following conclusions of law:

> Respondent contends that Rule 141(b)(2) was violated because the decoy wore some make-up, a necklace, and a silver ring with diamonds on her left finger. According to Respondent's counsel, the diamond ring on the decoy's left finger signifies marriage or engagement. Presumably, this inexorably leads to a conclusion that Ms. Boggs was 21 years of age or older. Further, Respondent argues the decoy displayed no visible signs of nervousness while testifying, and therefore she must have presented a confident, mature appearance to the clerk. These arguments lack merit.
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> First, the Court had the opportunity to observe the decoy at hearing, along with the photographs contained in State's Exhibits 2, 3, & 4, and concluded Renae Boggs displayed an overall appearance which could generally be expected of a person under the age of twenty-one years under the actual circumstances presented to the seller at the time of the sale. (Findings of Fact II.)
>
> Second, Respondent's arguments are merely conjecture since the selling clerk did not testify and no evidence was presented by the Respondent on the issue. The lack of evidence to support the Respondent's contentions is a material failure of proof and no affirmative defense was established.

(Determination of Issues II.)

Contrary to appellant's assertion, the ALJ did in fact consider the decoy's height, her makeup, her hair length, her clothing, the presence of a small silver band on her left ring finger, and her relative nervousness, as well as other elements of her appearance on the date of the operation — such as black nail polish or flip-flops — which appellant

strategically omits from its brief. To say that he ignored this evidence is patently false; in reality, he considered the evidence and found appellant's position unpersuasive.

Altogether, appellant has provided no valid basis for the Board to question the ALJ's determination that the decoy's appearance complied with rule 141. This Board has on innumerable occasions rejected invitations to substitute its judgment for that of the ALJ on a question of fact, and it must do so here as well.

We turn, then, to appellant's objection that this Board has "inexplicably" failed to delineate elements of appearance that, when present on a female decoy, indicate a violation of rule 141(b)(2). (App.Br. at p. 5.) Appellant draws the parallel of facial hair on a male decoy, and claims that "the Board recognizes that there are physical attributes particular to men that, if present, necessarily may give the decoy the appearance of a person over 21 years of age and thus violate Rule 141(b)(2) and the Rule 141 fairness requirement." (App.Br. at p. 4.)

Appellant employs intentionally weak language — "necessarily may" — in its contention precisely because the Board has *never* held that a single element of appearance necessarily establishes that a decoy's appearance violates the rule. (See, e.g., *Southland Corp* (2000) AB-7320, at p. 4 [reversing for lack of finding that decoy's appearance complied with rule]; *Assaedi* (1999) AB-7320, at pp. 3-4 [reversing for ambiguity of appearance findings].) It is true that some prominent features may be more persuasive than others when presented as part of a well-articulated defense, but even these do not constitute a categorical violation. Moreover, while an appellant may indeed prove that some element of a *specific decoy's* appearance made him or her appear over the age of 21, that single successful fact-based proof does not create a *per se* rule of law for all minor decoy cases. As we have expressly noted in many recent

cases, "minors come in all shapes and sizes." (See, e.g., *7-Eleven, Inc./Johal Stores, Inc.* (2013) AB-9403, at p. 5; *7-Eleven, Inc./Rejlek* (2014) AB-9392, at p. 5; *Lee* (2013) AB-9359, at p. 8; *Garfield Beach CVS, LLC* (2013) AB-9261, at p. 4.)

We emphasize, once again, that the question of whether a decoy presents the appearance reasonably expected of a person under the age of 21 is one of fact, and the burden of proof lies solely with the appellant. This Board has not, cannot, and will not shift that burden of proof by declaring that certain physical features constitute a presumptive violation of rule 141.

II

Appellant contends that in order for this Board to conduct a meaningful review of the Department's decision, it must assess the decoy in person — that is, the decoy must appear at oral argument before this Board. According to appellant, the decoy herself is "evidence" included in the record on appeal, and the Board cannot assess whether the ALJ's findings regarding the decoy's appearance are supported by substantial evidence without examining the relevant evidence.

This is a bizarre argument, appearing at first blush to be frivolous and, upon further reflection, to be ridiculous. Assuming *arguendo* that the decoy herself is "evidence," it does not follow that she may — let alone *must* — appear before this Board. Section 23083 of the Business and Professions Code states, in relevant part:

> (a) The board shall determine the appeal upon the record of the department and upon any briefs which may be filed by the parties. If any party to the appeal requests the right to appear before the board, the board shall fix a time and place for argument. *The board shall not receive any evidence other than that contained in the record of the proceedings of the department.*

(Emphasis added.) This provision of law expressly *prohibits* this Board from examining

any evidence that is not included in the administrative record. Carried to the limits of its logic, appellant's argument would similarly require appellate courts to have before it on oral argument witnesses who testified and appeared before the trial courts whenever there is a dispute about that witnesses' appearance.

In *7-Eleven, Inc.* (2007) AB-8558, this Board held that section 25666 does not apply to appeals before this Board, and that 23083, which *does* apply to the Appeals Board, absolutely precludes the appearance of the decoy at oral argument:

> Section 25666 requires the presence of the minor in *any hearing on an accusation* charging a violation of section 25658, 25663, and 25665, unless the minor is then dead or unable to attend because of physical or mental illness or infirmity.
>
> The oral argument which takes place before the Appeals Board is not a hearing on an accusation. The hearing that section 25666 speaks to takes place at the Department level. The oral argument before the Appeals Board is for the presentation of substantive and procedural arguments directed at the decision of the Department, and not for the taking of evidence. The Board is neither permitted or equipped to do so. The Board's jurisdictional mandate provides that the Board shall not receive any evidence other than that contained in the record of the proceedings of the Department. (Bus. & Prof. Code §23083.)

(*Id.* at p. 3, emphasis in original.) It does not matter whether the decoy's physical person is "evidence," because this Board is not permitted to take evidence.

Appellant protests that the ruling in *7-Eleven, Inc.*, *supra*, was limited to applicability of section 25666, which it does not raise here. (App.Cl.Br. at p. 2.) We find that reading unjustifiably narrow. Regardless, the scope of the decision is ultimately irrelevant. It is section 23083 itself that precludes the appearance of the decoy as "evidence" before this Board. No reliance on prior cases is necessary.

Alternatively, appellant argues that the decoy herself is part of the record on appeal. Section 1038(a) of the California Code of Regulations lists the items that

constitute the administrative record and mandates its public availability:

> Any person may request a copy of all or a portion of the record, subject to any protective order or provisions of law prohibiting disclosure. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an ALJ, the final decision, a transcript of all proceedings, all exhibits whether admitted or rejected, the written evidence and any other paper in the case, except as provided by law.

(Cal. Code Regs., tit. 1, § 1038(a).) Apart from the significant logistical barriers to physically duplicating a teenager in response to administrative record requests, none of the categories in this list conceivably includes a human being. Put simply, the decoy herself cannot possibly be part of the record on appeal.

What *is* properly included in the record — and indeed, appears in this case — is a transcript of the hearing, including the testimony of the decoy and other witnesses; persuasive descriptions of the decoy's appearance presented by appellant's counsel and by the Department in the course of opening and closing arguments; the ALJ's firsthand impressions of the decoy, contained in the decision below; and, finally, photographs of the decoy, admitted here as Exhibits 3 and 4. That is sufficient, both legally and practically, for this Board determine whether the findings below are supported by substantial evidence.

At oral argument, counsel for appellant conceded that this argument is "unusual." It is, in fact, as we stated upon first contemplating it, ridiculous and totally lacking any support in law or logic. Nevertheless, counsel has presented this argument on behalf of no less than three other appellants thus far. (See *7-Eleven, Inc./Niaz* (2014) AB-9427; *7-Eleven, Inc./Jamreonvit* (2014) AB-9424; *7-Eleven, Inc./Assefa* (2014) AB-9416.) While we find the argument wholly unsupportable, we strongly encourage appellant's counsel, if they disagree, to seek a writ of appeal, assuming its insistence is backed by

conviction. One man's trash is, after all, another man's treasure; if a higher court unearths merit from this detritus, we will dutifully abide by that guidance.

Until then, we do not wish to see this argument again, and will enforce that expectation with appropriate sanctions should counsel ignore our opinion on this issue.

ORDER

The decision of the Department is affirmed.[2]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[2]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.