

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

AB-9425

File: 20-370491 Reg: 13079112

7-ELEVEN, INC., RAKESH PRASHAR and SAROJ PRASHAR,
dba 7-Eleven Store #2172-24243
6501 Westminster Boulevard, Westminster, CA 92683,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 6, 2014
San Diego, CA

ISSUED DECEMBER 5, 2014

7-Eleven, Inc., Rakesh Prashar, and Saroj Prashar, doing business as 7-Eleven Store #2172-24243 (appellants), appeal from the Department of Alcoholic Beverage Control¹ (Department) decision to suspend their license for 10 days (with all 10 days conditionally stayed subject to one year of discipline-free operation) because their clerk sold an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include 7-Eleven, Inc., Rakesh Prashar, and Saroj Prashar (appellants), appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr of the law firm of Solomon Saltsman & Jamieson, and the Department

¹The decision of the Department, dated March 7, 2014, is set forth in the appendix.

of Alcoholic Beverage Control (the Department), appearing through its counsel, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 6, 2000. On August 15, 2013, the Department filed an accusation against appellants charging that, on May 22, 2013, appellants' clerk, Steven Tejada (the clerk), sold an alcoholic beverage to nineteen-year-old Paul Nguyen. Although not noted in the accusation, Nguyen was working as a minor decoy for the Department at the time.

At the administrative hearing held on January 14, 2014, documentary evidence was received, and testimony concerning the violation charged was presented by Nguyen (the decoy), and by Nicole Gomez, an agent for the Department who participated in the operation on May 22, 2013. Also, Rakesh Prashar, a co-appellant and franchisee of the licensed premises, testified regarding mitigation.

Testimony established that, on the date of the operation, the decoy entered the licensed premises and proceeded straight toward the beer coolers — Agent Gomez entered the premises approximately ten seconds later. The decoy grabbed a six-pack of Bud Light Platinum beer in bottles and approached the counter, where he stood behind one other customer. When it was the decoy's turn to be served, Tejada, who was working the register at the time, asked the decoy for identification. The decoy produced his California driver's license which contained his true date of birth, November 6, 1993, and a red stripe indicating "AGE 21 IN 2014." Tejada looked at the license for approximately three seconds, handed it back to the decoy without asking any age-related questions, and completed the sale. The decoy then exited the premises.

The Department's decision determined that the violation charged was proved

and no defense was established. However, in light of Prashar's testimony, a mitigated penalty was imposed.

Appellants filed an appeal contending that the Administrative Law Judge (ALJ) did not properly consider their evidence and arguments that rule 141 was violated.²

DISCUSSION

Appellants contend that the ALJ abused his discretion when he failed to "fully and adequately consider" appellants' arguments and supporting evidence that the decoy did not display the appearance which could generally be expected of a person under the age of 21, contrary to rule 141(b)(2). (App.Br. at p. 4.) In particular, appellants argue that the decoy's participation in four to five previous minor decoy operations, his lack of nervousness in his role as a minor decoy, and the gold necklace he was wearing on the date of the operation made him appear older than 21. (*Id.* at pp. 6-7.)

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." This rule provides an affirmative defense, and the burden of proof lies with the appellants.

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

²References to rule 141 and its subdivision are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

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, nonphysical appearance, and demeanor:

9. The decoy's overall appearance including his demeanor, his poise, his mannerisms, his maturity, his size and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that he is about fifteen pounds heavier and his hair was a little shorter on the day of the hearing. The decoy is a very youthful looking young man who was five feet five inches in height and who weighed one hundred sixty-five pounds on the day of the sale. On that day, the decoy was clean shaven and his clothing consisted of gray shorts, a white tank top and sandals. Exhibits 2 and 3 are photographs of the decoy that were taken on the day of the sale before going to the premises and Exhibit 5 is a photograph of the decoy that was taken at the premises. All three of these photographs show how the decoy looked and what he was wearing on the day of the sale.

10. The decoy testified that he had participated in four or five prior decoy operations, that he had not served as an Explorer and that he was not nervous during the subject sale.

11. There was nothing remarkable about the decoy's nonphysical appearance and there was nothing about his speech, his mannerisms or his demeanor that made him look older than his actual age. After considering the photographs depicted in Exhibits 2, 3 and 5, the decoy's overall appearance when he testified and the way he conducted himself 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.)

Upon considering all of these facts, the ALJ concluded that cause for suspension of appellants' license was established. (See Determination of Issues ¶ 4.)

This Board has time and again rejected the "experienced decoy" argument proffered by appellants. Appellants extract language out of context from *Azzam* (2001) AB-7631 to support their contention that prior minor decoy experience leads to the finding that a young person appears older. (See App.Br. at p. 6.) However, a review of the entire passage upon which appellants rely confirms that *Azzam* stands for the proposition that a decoy's prior experience is *not conclusive* as to the issue of whether there was compliance with rule 141(b)(2). As the Board stated:

Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it only the *observable effect* of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. 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 or older.

(*Azzam, supra*, at p. 5, emphasis in original.)

In this case, the ALJ expressly considered the decoy's prior experience, poise, mannerisms, and maturity, and nevertheless found that the decoy displayed an overall appearance of a person under the age of 21. Nothing in *Azzam* compels the opposite conclusion.

Appellants also take issue with the fact that the ALJ never expressly considered the fact that the decoy was wearing a gold necklace at the time of the operation, the type and style of which, appellants claim, made the decoy appear older. (App.Br. at pp. 6-7.)

Appellants have offered no facts regarding the type and style of the gold necklace to support their contention that it made the decoy appear older, and they did not attempt to make such an argument before the ALJ. The fact that the ALJ did not specifically reference the gold necklace is irrelevant — appellants did not find it worth mentioning in their argument, and the ALJ did not find it worth mentioning in his Proposed Decision. As this Board has stated many times, the ALJ is not required to provide a “laundry list” of factors that he found inconsequential. (*7-Eleven, Inc./Patel* (2013) AB-9237; accord *Circle K Stores* (1999) AB-7080.) Moreover, “[i]t is not the Appeals Board’s expectation that the Department, and the ALJ’s [*sic*], be required to recite in their written decisions an exhaustive list of indicia of appearance that have been considered.” (*Circle K Stores, supra*, at p. 4.)

The ALJ is the trier of fact and has the opportunity, which this Board does not, of observing the decoy as he testifies, and making the determination whether the decoy’s appearance met the requirement of rule 141 that he possess 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. Here, the ALJ made extensive factual findings regarding the decoy’s physical appearance, nonphysical appearance, and demeanor, and determined that the decoy’s overall appearance complied with the requirements of rule 141(b)(2).

Appellants essentially ask this Board to substitute its judgment for that of the ALJ

by considering the same facts and reaching the opposite conclusion — something the Board cannot do. Altogether, the Board sees no reason to upset the findings and conclusions below.

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
FRED HIESTAND, 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.