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

AB-9452
File: 20-428020; Reg: 14079958

7-ELEVEN, INC., MUNINDERJIT SINGH DHILLON, and SHALINDER DHILLON,
dba 7-Eleven Store #2175-13832E
512 South Chapel Avenue, Alhambra, CA 91801,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: February 5, 2015
Los Angeles, CA

ISSUED FEBRUARY 25, 2015

7-Eleven, Inc., Muninderjit Singh Dhillon, and Shalinder Dhillon, doing business as 7-Eleven Store #2175-13832E (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 10 days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellants 7-Eleven, Inc., Muninderjit Singh Dhillon, and Shalinder Dhillon, through their counsel, Ralph Barat Saltsman and Margaret Warner Rose of the law firm Solomon, Saltsman & Jamieson, and the Department of Alcoholic

[1]The decision of the Department, dated June 26, 2014, is set forth in the appendix.

Beverage Control, through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 8, 2005, and they operated discipline-free until this incident. On February 18, 2014, the Department filed an accusation against appellants charging that, on October 24, 2013, appellants' clerk, Ram Bhattarai (the clerk), sold an alcoholic beverage to 19-year-old Nery Rodriguez. Although not noted in the accusation, Rodriguez was working as a minor decoy for the Alhambra Police Department at the time.

At the administrative hearing held on May 8, 2014, documentary evidence was received and testimony concerning the sale was presented by Rodriguez (the decoy) and by Jasper Kim, an Alhambra Police Department officer. Appellants presented no witnesses.

Testimony established that, on the day of the operation, the decoy entered the licensed premises and went to the coolers where he selected a six-pack of Bud Light beer. He took the beer to the register, and the clerk asked to see his identification. The decoy removed his California driver's license from his wallet and handed it to the clerk. The clerk looked at the license, handed it back to the decoy, then completed the sale without asking any age-related questions. The decoy exited the premises, then reentered with two police officers to make a face-to-face identification of the clerk. The clerk was later cited.

The Department's decision determined that the violation charged had been proven and that no defense had been established. A 10-day suspension was imposed, but, in light of appellants' nine years of discipline-free operation, all ten days were

stayed provided they complete one year of discipline-free operation.

Appellants then filed a timely appeal contending: (1) the Board must view the decoy in person in order to fulfill appellants' statutory and constitutional right to a review of the Department's decision under rule 141(b)(2);[2] and (2) the Department's findings on the decoy's appearance and apparent age are not supported by substantial evidence.

DISCUSSION

I

Appellants contend that the decoy must appear in person before the Board in order for the Board to conduct an adequate review of the Department's decision.

Appellants are simply raising the same decoy-as-evidence argument we addressed at length — and firmly rejected — in *Chevron Stations* (2015) AB-9415. (See also *7-Eleven, Inc./Niaz* (2015) AB-9427; *7-Eleven, Inc./Jamreonvit* (2015) AB-9424; *7-Eleven, Inc./Assefa* (2015) AB-9416.) We offer only a summary of our reasoning here, and refer appellants to *Chevron Stations*, *supra*, for a more comprehensive analysis.

Section 23083 limits our review to evidence included in the administrative record. (Bus. & Prof. Code § 23083; see also *7-Eleven, Inc./Grover* (2007) AB-8558, at p. 3.) Section 1038(a) of the California Code of Regulations defines the items to be included in the administrative record — none of which conceivably allows for an actual human being. (See Cal. Code Regs., tit. 1, § 1038(a).) The properly compiled record

[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.

— including testimony, arguments, photographs of the decoy, and the Department's decision containing the administrative law judge's (ALJ) firsthand impressions — is both legally and practically sufficient for the Board to determine whether the conclusions reached regarding the decoy's appearance are supported by the evidence.

As we noted in *Chevron Stations*, *supra*, this argument has no merit and wholly lacks support in either law or logic. In our previous decisions addressing this issue, we strongly encouraged appellants to seek a writ of appeal if they disagree, and counsel at oral argument indicated that such a writ is forthcoming. Until such time as a writ is granted and this matter is resolved by an appellate court, we do not wish to see this argument again.

II

Appellants contend that the Department's findings on the decoy's appearance and apparent age are not supported by substantial evidence because the decision omits facts which support appellants' position and inadequately considers the record as a whole.

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 party asserting it.

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].)

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the ALJ's findings on the issue of whether there was compliance with rule 141(b)(2).

Here, the ALJ made the following findings regarding the decoy's physical and nonphysical appearance, including his demeanor, physique, and experience in law enforcement:

> 5. Rodriguez appeared and testified at the hearing. On October 24, 2013, he was 5' 2" tall and weighed 130 pounds. He wore a blue and white t-shirt, khaki jeans, black tennis shoes, and a dark-colored jacket. His hair was short and parted on the side. He had a black watch on one wrist and a black and blue bracelet on the other. (Exhibits 3 & 4.) His appearance at the hearing was the same, except that he was five pounds heavier.
>
> [¶ . . . ¶]
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> 8. October 24, 2013 was the second time that Rodriguez volunteered as a decoy. He visited eight locations, of which two sold alcoholic beverages

> to him. He learned of the decoy program through his involvement in the Explorer program. He had been an Explorer for approximately one year as of the [*sic*] October 24, 2013. As an Explorer, he helped out in the community and at the station. He went to an Explorer academy for four months, during which time he learned the penal code, learned radio codes, and underwent physical training.
>
> 9. Rodriguez appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of Bhattarai at the Licensed Premises on October 24, 2013, Rodriguez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Bhattarai.

(Findings of Fact, ¶¶ 5, 8-9.) The ALJ ultimately concluded that there was compliance with rule 141(b)(2). (Conclusions of Law ¶ 7.)

Appellants take issue with the ALJ's failure to address the *effect* the decoy's experience as a police Explorer had on his overall appearance. Appellants' contentions on this point have no merit. This Board has on countless occasions rejected the "experienced decoy" argument. As we have previously observed:

> 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.

(*Azzam* (2001) AB-7631, at p. 5.) Appellants have presented no *evidence* that the decoy's experience *actually resulted* in him displaying an appearance of a person 21 years old or older on the date of the operation in this case. Rather, they simply rely on a difference of opinion — theirs versus that of the ALJ — as to what conclusion the evidence in the record supports. Absent an evidentiary showing, appellants' argument must fail.

Appellants contend that the clerk's statement to Officer Kim — that the clerk believed the decoy was of age (RT at p. 59) — supports their argument that the decoy's experience had an "observable effect" on his apparent age. (App.Br. at p. 12.) First, we note that the clerk did not testify, so we don't know what prompted this belief. And second, as the Board explained in *Crestview Consolidated* (2012) AB-9253:

> The clerk's belief, in any case, is not controlling. As this Board has said before about rule 141(b)(2):
>
> > The rule, through its use of the phrase "could generally be expected" implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of that of a person under 21 years of age.

(*Id.* at p. 5, quoting *7-Eleven, Inc. & Grewal* (2001) AB-7602.)

Finally, appellants claim that the ALJ improperly disregarded the decoy's intensive physical workout regimen in making his determination. This contention is likewise without merit. For one, the ALJ *did* mention it:

> 7. With respect to rule 141(b)(2), the Respondents argued that Rodriguez's physique, his calm, confident manner, and his training and experience made him appear to be over the age of 21. They did not. Contrary to the Respondents' claim, Rodriguez was not calm and confident while inside the Licensed Premises. In reality, he testified that he was nervous. Although Rodriguez worked out, there was nothing unusual about his physique—he simply looked like he was in shape. As already noted, Rodriguez had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 9.)

(Conclusions of Law ¶ 7.) Secondly, the ALJ is not required to detail all the factors of the decoy's appearance that he found inconsequential, nor is he required to recite an exhaustive list of indicia that he took into consideration in making his determination

regarding the decoy's overall appearance. (*7-Eleven, Inc./Niaz* (2014) AB-9352, at p. 5; *Circle K Stores* (1999) AB-7080, at p. 4.)

We find no error or abuse of discretion in this matter, and must therefore decline the invitation to reweigh the evidence and reach a different result than that reached by the Department.

ORDER

The decision of the Department is affirmed.[3]

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

[3]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.