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

AB-9463
File: 20-463419; Reg: 14079982

7-ELEVEN, INC. and SANDHU BUSINESS INVESTMENTS, INC.,
dba 7-Eleven Store #2133-25132C
2543 Royal Avenue, Simi Valley, CA 93065-4763,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED MARCH 24, 2015

7-Eleven, Inc. and Sandhu Business Investments, Inc., doing business as 7-Eleven Store #2133-25132C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 5 days, all stayed, because their clerk sold an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellants 7-Eleven, Inc. and Sandhu Business Investments, Inc., through their counsel, Ralph Barat Saltsman and Margaret Warner Rose of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, Jennifer M. Casey.

---

[1]The decision of the Department, dated July 24, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 19, 2008. On February 20, 2014, the Department filed an accusation against appellants charging that, on January 15, 2014, appellants' clerk, Sakthivel Muthuraj (the clerk), sold an alcoholic beverage to 19-year-old Brian Schooler. Although not noted in the accusation, Schooler was working at the time as a minor decoy for the Department of Alcoholic Beverage Control.

At the administrative hearing held on June 19, 2014, documentary evidence was received and testimony concerning the sale was presented by Schooler (the decoy) and by Solvantana Tan, a Department agent. Appellants presented no witnesses.

Testimony established that on the day of the operation, the decoy entered the licensed premises, followed by Agent Tan. The decoy went to the coolers, selected a six-pack of Bud Light beer, and took it to the counter. The clerk scanned the beer and asked to see the decoy's identification. The decoy handed the clerk his California driver's license, which bore his correct date of birth showing him to be 19 years old, and a red stripe indicating "AGE 21 IN 2015." The clerk looked at it for a few seconds, handed it back to the decoy, and completed the sale without asking any age-related questions.

The Department's decision determined that the violation charged had been proven and no defense had been established. In light of appellants' 24 years of discipline-free history under two licenses, a penalty of 5 days' suspension, all stayed, was imposed.

Appellants then filed an appeal contending: (1) the decoy must appear in person before the Appeals Board, and (2) the decoy operation did not comply with rule

141(b)(2).[2]

DISCUSSION

I

Appellants contend that 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, and numerous subsequent cases. We offer only a summary of our reasoning here, and refer appellants to *Chevron Stations* 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 — 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. During oral argument in a series of unrelated cases, counsel for appellant indicated that such a writ

[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.

has been sought. We anxiously await a final appellate determination resolving what we feel, for reasons we have stated, a ridiculous argument.

II

Appellants contend that the decoy operation violated rule 141(b)(2) because of the decoy's height, his law enforcement training, his decoy experience, and his lack of nervousness. Appellants maintain the Department did not proceed in the manner required by law when it failed to make findings on the decoy's demeanor and non-physical attributes.

This Board is bound by the factual findings in the Department's decision if 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. [Citations.] 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. [Citations.] 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 1439, 1437 [13 Cal.Rptr.3d 826].)

Rule 141, subdivision (b)(2), restricts the use of decoys based on appearance:

> 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 the appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006)

AB-8384.)

The ALJ made the following findings of fact regarding the decoy's appearance, experience, training, and demeanor:

> 5. Schooler appeared and testified at the hearing. On January 15, 2014, he was 6 feet tall and weighed 138 pounds. He wore a white t-shirt, black sweater, jeans, sneakers, and a watch. The sweater had a hood which he kept down at all times. His hair as [*sic*] short, having been cut with a 2 or 3 blade. (Exhibits 2 & 5.) His appearance at the hearing was the same, except that he was one inch taller and eight pounds heavier.
>
> [¶ . . . ¶]
>
> 8. Schooler had been a decoy approximately three times before January 15, 2014. He visited approximately 10 locations each time. He learned of the decoy program through his involvement in the Explorer program. As an Explorer, he attended meetings, trained for competitions, received some tactical training, and volunteered to help out at dances and football games. On January 15, 2014, three of eleven locations sold alcoholic beverages to him (including the Licensed Premises).
>
> 9. Schooler 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 Muthuraj at the Licensed Premises on January 15, 2014, Schooler displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Muthuraj.

(Findings of Fact ¶¶ 5, 8-9.) Based on these findings, the ALJ reached the following conclusion:

> 5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Schooler was an experienced decoy whose height and manner gave him the appearance of person [*sic*] over the age of 21. This argument is without merit. Schooler's appearance was consistent with his actual age; as such, he had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 9.)

(Conclusions of Law ¶ 5.)

This Board has rejected the "experienced decoy" argument many times. As we

noted in *Azzam* (2001) AB-7631:

> 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 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.

(*Id.* at p. 5, emphasis in original.)

Appellants suggest that the decoy's experience made him appear less nervous at the sale. Notably, appellants presented no witnesses; their assertion that the decoy did not appear nervous at the time of the sale is therefore mere speculation. In any event, as this Board has observed,

> [i]t is difficult to understand how, other than, perhaps, to eliminate nervousness, experience changes the appearance that is presented to the seller. Nervousness, or lack thereof, is only one consideration, to be balanced against such other considerations as overall appearance, demeanor, manner of dress, manner of speaking, physical movements, and the like.

(*7-Eleven Inc./Kaur* (2012) AB-9202, at p. 4a.)

With regard to the decoy's physical stature, we have repeatedly declined to substitute our judgment for that of the ALJ on this particular question of fact. Minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys of large stature automatically violate the rule. (See, e.g., *Garfield Beach* (2014) AB-9382; *7-Eleven Inc./Lobana* (2012) AB-9164.) This Board has noted that

> [a]n ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJ's are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.)

The ALJ made ample findings regarding the decoy's apparent age, physical appearance, and non-physical characteristics to support a conclusion that there was compliance with rule 141(b)(2). This Board cannot interfere with the ALJ's factual determinations in the absence of a clear showing of an abuse of discretion; no such showing was made in this case.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity to observe the decoy as he testifies, and make 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.

We see no flaw in the ALJ's findings or determinations. Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. This the Board cannot do.

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.