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

AB-9466
File: 21-516423 Reg: 14080248

7-ELEVEN, INC.,
dba 7-Eleven Store #2112-35344
31805 Grape Street, Lake Elsinore, CA 92532,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED MARCH 24, 2015

7-Eleven, Inc., doing business as 7-Eleven Store #2112-35344 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for fifteen days because its clerk sold an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellant 7-Eleven, Inc., through its 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, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on December 8, 2011. On April 1, 2014, the

[1]The decision of the Department, dated July 30, 2014, is set forth in the appendix.

Department filed an accusation against appellant charging that, on January 11, 2014, appellant's clerk, Patterson Bradley Chandler (the clerk), sold an alcoholic beverage to seventeen-year-old Jayar Manzano. Although not noted in the accusation, Manzano was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on July 30, 2014, documentary evidence was received, and testimony concerning the sale was presented by Manzano (the decoy), and by Susan Gardner, an agent for the Department.

Testimony established that, on the date of the alleged violation, the decoy entered the licensed premises and walked to the beer coolers. He selected a 24-ounce can of Bud Light beer, walked to the sales counter, and set the beer on the counter. The clerk asked the decoy for identification, and the decoy handed the clerk his California driver's license. The license contained the decoy's correct date of birth — 04/24/1996 — and a red stripe indicating "AGE 21 IN 2017." The clerk looked at the identification for several seconds and returned it to the decoy without asking any age-related questions. The clerk rang up the sale, took the money tendered by the decoy, provided the decoy with change, and bagged the beer. The decoy then exited the premises with the beer.

After the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. The Department imposed a penalty of 15 days' suspension.

Appellant filed an appeal contending: (1) the Board must view the decoy in person in order to fulfill appellant's statutory and constitutional right to review the

Department's rule 141(b)(2)[2] findings; (2) the decoy operation violated rules 141(a) and 141(b)(2); and (3) the Department failed to consider appellant's evidence concerning the nonphysical attributes of the decoy's appearance.

DISCUSSION

I

Appellant claims the Board must view the decoy in person in order to fulfill appellant's statutory and constitutional right to a review of the Department's findings.

Appellant is 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 appellant 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 — 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 explained in *Chevron Stations*, *supra*, this argument has no merit. In our

[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.

previous decisions addressing this issue, we strongly encouraged appellants to seek a writ of appeal if they disagree. It is our understanding that counsel for appellant is presently pursuing a writ on this issue in an unrelated case. We look forward to an ultimate appellate ruling on what we strongly believe to be a ridiculous argument, one that lacks logic and legal authority.

II

Appellant contends that the decoy operation "violated the most basic minimum fairness requirements set forth" in rules 141(a) and 141(b)(2). (App.Br. at p. 8.) In sum, appellant contends that the decoy's size and law enforcement experience, when coupled with the fact that the store was allegedly busy at the time of the operation, rendered the entire operation unfair.

Rule 141(a) requires "fairness" in the use of minor decoys:

> A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors . . . and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

Meanwhile, rule 141(b)(2) provides, in pertinent part: "[t]he 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 requirements of rule 141 must be strictly obeyed: "The Department's increasing reliance on decoys demands strict adherence to the rules adopted for the protection for the licensees, the public, and the decoys themselves." (*Acapulco Restaurants, Inc. v. Alcoholic Bev. Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126].) However, non-compliance with rule 141 is an affirmative

defense, and the burden of proof is on the party alleging it. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Importantly, 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].)

It is therefore the task of the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].)

With regard to the decoy's overall appearance, the ALJ found as follows:

> 10. 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 was thirty-five pounds heavier on the day of the hearing. The decoy is a youthful looking teenager who was five feet seven inches in height and who weighed one hundred seventy-five pounds on the day of the sale. On that day, the decoy was clean shaven and his clothing consisted of gray shorts, a black T-shirt, black socks and black Nike sneakers. Exhibit 2 is a photograph of the decoy that was taken on the day of the sale before going to the

> premises and Exhibit 3 is a photograph of the decoy that was taken at the premises. Both of these photographs show how the decoy looked and what he was wearing on the day of the sale.
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> 11. The decoy testified that he had not participated in any prior decoy operations but that he was not nervous when he visited the premises. The decoy had served as an Explorer with the Riverside County Sheriff's Department since August of 2013. As an Explorer, he attended three hour meetings every Wednesday.
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> 12. 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. Even though the decoy had gained about thirty-five pounds since the date of the sale, he still looked very youthful at the time of the hearing. After considering the photographs depicted in Exhibits 2 and 3, 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, ¶¶ 10-12.)

Appellant claims that the combination of the decoy's large physical stature, his experience as an Explorer (which, at the time of the decoy operation, was a whole five months), his lack of nervousness during the decoy operation, and the fact that the purchase was made while the store was busy establish that the decoy operation was conducted unfairly. (See App.Br. at pp. 9-10.) Specifically, appellant argues that such attributes established that the decoy did not display the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk, as required by Rule 141(b)(2). The Board is unconvinced.

First, with regard to the crowded store, appellant did not raise the argument that the number of people present in the licensed premises somehow affected the fairness of the operation during the administrative hearing. (See RT at pp. 44-46.) It is settled

law that the failure to raise an issue or assert a defense at the administrative hearing bars its consideration when raised or asserted for the first time on appeal." (*7-Eleven, Inc./Cavazos* (2013) AB-9324 at p. 3, citing *Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Bd. of Med. Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rtpr. 23]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].) While counsel for appellant did generally question the decoy regarding the level of activity in the store (see RT at pp. 19-21), it is unreasonable to expect the ALJ to infer a legal argument from passing factual references alone. (*Garfield Beach* (2014) AB-9368 at pp. 4-5.) As such, we consider this issue waived, but for future guidance underscore the very narrow set of circumstances in which the level of patron activity in a licensed premises *could* suggest that a decoy operation was conducted unfairly:

> It is conceivable that in a situation which involved an unusual level of patron activity that truly interjected itself into a decoy operation *to such an extent that a seller was legitimately distracted or confused, and the law enforcement officials sought to take advantage of such distraction or confusion*, relief would be appropriate.

(*Tang* (2000) AB-7454, at p. 5, emphasis added; see also *Equilon Enterprises* (2001) AB-7765, at p. 4.) There is no evidence in the record to suggest that these circumstances were present here, however. The clerk did not testify at the administrative hearing, and at no point did appellant argue or elicit testimony to suggest that the level of activity caused legitimate distraction or confusion, or that the Department agents acted improperly or took advantage of the situation.

Moreover, the Board has on countless occasions rejected the "experienced decoy" argument proffered here by appellant:

> 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. 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* (2001) AB-7631 at p. 5, emphasis in original.) While appellant claims such an effect existed here, it fails to explain *how* the decoy's experience and lack of nervousness had an observable effect on his overall appearance. Again, the clerk did not testify at the hearing, so any claim that he was somehow lulled into making the sale by the decoy's experience and lack of nerves is mere conjecture.

As to the decoy's physical stature, the Board has repeatedly declined to substitute its judgment for that of the ALJ on this particular question of fact, and we must do so here as well. Minors come in all shapes and sizes, and we are reluctant to suggest, without more, that a minor decoy who is 5'7" tall and weighs 175 pounds automatically violates the rule. (See, e.g., *Garfield Beach* (2014) AB-9382; *7-Eleven Inc./Lobana* (2012) AB-9164.)

On a final note, the Board has previously observed that, in cases such as this:

> [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; see also *Younan* (2012) AB-9198, *7-Eleven, Inc./Cacy* (2012) AB-9193, and *7-Eleven, Inc./Lobana* (2012) AB-9164 [each applying the *O'Brien* reasoning to an isolated rule 141(b)(2) defense].) The ALJ here expressly considered the decoy's size, but nevertheless found that he 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 clerk on the day of the operation. (See Findings of Fact ¶¶ 10-12.) Ultimately, appellant's argument boils down to a mere difference in opinion with that of the ALJ as to the conclusion that the evidence supports. Without more, the Board cannot upset that determination here.

III

Appellant finally contends the Department failed to consider its evidence concerning the nonphysical attributes of the decoy's appearance. Appellant argues that the decoy's "comfort while purchasing alcohol . . . in conjunction with his weight of 175 pounds and his law enforcement training, should necessarily have been considered . . . in order to fairly present a complete, accurate picture of the decoy at the time of the alleged sale." (App.Br. at pp. 11-12.)

Appellant's contentions are baseless. The ALJ is not required to provide a "laundry list" of factors he deems inconsequential. (See, e.g., *Lee* (2014) AB-9359; *7-Eleven/Patel* (2013) AB-9237; *Circle K Stores* (1999) AB-7080.) Moreover, "as the Board has said many times, there is no requirement that the ALJ explain his reasoning. Simply because the ALJ does not explain his analytical process does not invalidate his determination, or constitute an abuse of discretion." (*Garfield Beach* (2015) AB-9430, at p. 5.)

Appellant directs the Board to its decisions in *Azzam*, *supra*, and *Prestige*

Stations, Inc./Arco Stations (2001) AB-7624, both of which cited the language quoted above (Section II, *supra*, at p. 8) concerning the "experienced decoy" argument. These decisions are unavailing to appellant's case as they merely define the limited relevance of "experience" evidence. Neither opinion establishes a requirement that the ALJ address a claim that a minor decoy was insufficiently nervous or overly experienced during the course of an operation, nor do they suggest that a confident, experienced minor automatically violates the rule.

As discussed above (see Section II, *supra*), the ALJ made extensive findings concerning the decoy's physical and nonphysical appearance, including his speech, poise, mannerisms, and demeanor, as well as his lack of nervousness and law enforcement experience. This is simply not a case where reversal is warranted because the ALJ failed to make any findings of fact whatsoever (see *Circle K Stores, Inc*. (2010) AB-8919), or provided only minimal findings, none of which related to nonphysical appearance. (See *Circle K Stores* (1999) AB-7122.)

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 when, as here, the ALJ's judgement is supported by substantial evidence. We must do so here as well.

ORDER

The decision of the Department is affirmed.[3]

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

[3]This final decision 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 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.