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

AB-9479
File: 20-512691 Reg: 14080646

7-ELEVEN, INC. and KBHULLAR ENTERPRISE,
dba 7-Eleven #2175-20295
400 West Foothill Boulevard, Monrovia, CA 91016-2026,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 7, 2015
Los Angeles, CA

ISSUED MAY 19, 2015

7-Eleven, Inc. and Kbhullar Enterprise, doing business as 7-Eleven #2175-20295 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 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. and Kbhullar Enterprises, 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, Kerry Winters.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on September 8, 2011.

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

On June 10, 2014, the Department filed an accusation against appellants charging that, on January 9, 2014, appellants' clerk, Paramjit Singh (the clerk), sold an alcoholic beverage to 18-year-old Bridget Taylor. Although not noted in the accusation, Taylor was working as a minor decoy for the Monrovia Police Department at the time.

At the administrative hearing held on September 16, 2014, documentary evidence was received and testimony concerning the sale was presented by Taylor (the decoy) and by Damien Bartholomy, a Monrovia Police officer. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises, followed by Agent Nicole Gomez. 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 her California driver's license. The clerk swiped the driver's license through a machine, which beeped. He swiped it a second time; it beeped again. He entered something in the register. The decoy paid for the beer, and the clerk gave her some change. The decoy then exited with the beer.

The Department's decision determined that the violation charged was proved and no defense was established. The decision imposed a penalty of fifteen days' suspension.

Appellants then filed this appeal contending (1) the decoy operation violated rules 141(a) and (b)(2) because the decoy had two years of law enforcement training and wore makeup and expensive jewelry; and (2) the Board must view the decoy in person, because the decoy herself is the evidence the ALJ relied on in making his rule 141(b)(2) determination.

DISCUSSION

I

Appellants contend that the operation violated rule 141, subdivisions (a) and (b)(2). Appellants claim the decoy was "professionally trained" because she had been an Explorer for two and a half years, had been on two or three previous decoy operations, had received law enforcement training, and had used that training in national Explorer competitions. (App.Br. at pp. 2-4.) Appellants argue that the decoy's level of experience does not reflect what would generally be expected of a person under 21. (App.Br. at p. 5.) Appellants also point out that the decoy was "made up" with blush, foundation, and mascara. (App.Br. at p. 4.)

Rule 141 states, in relevant part:

> (a) 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.
>
> (b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage:
>
> [¶ . . . ¶]
>
> (2) 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 Board is bound by the factual findings in the Department's decision as long as they 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. [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.]

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; see also *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged."].)

The ALJ made the following findings of fact relevant to appellants' rule 141 defense:

> 9. Taylor was an Explorer with the Monrovia P.D. at the time of this operation, having joined in June 2011. As an Explorer she attended meetings, trained for competitions, received some basic training, and volunteered at community events. She had volunteered as a decoy one or two times in the past and had also participated in a couple of shoulder tap programs. Of the three locations she visited on June 9, 2014, this was the only one which sold an alcoholic beverage to her.
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> 10. Taylor appeared younger than her actual age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of Singh at the Licensed Premises on January 9, 2014, Taylor displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Singh.

(Findings of Fact ¶¶ 9-10.) Based on these findings, he rejected appellants' rule 141(b)(2) defense:

> 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 Taylor was an experienced decoy whose calm, confident demeanor gave her the appearance of [a] person over the age of 21. This argument is without merit. Taylor appeared young for her age, even with the minimal make-up she was wearing. Phrased another

> way, she had the appearance generally expected of a person under the age of 21.

(Conclusions of Law ¶ 5.)

With regard to the decoy's law enforcement experience, appellants have failed to show how that experience is relevant. In their brief, appellants do not explain — let alone show with testimony or other evidence — how the decoy's law enforcement experience would have any perceivable impact on her apparent age. As we have observed dozens of times over:

> 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; see also *7-Eleven, Inc./Said* (2011) AB-9118, at p. 6 ["The assertion that a decoy looked over the age of 21 simply because of prior experience as a decoy or a police Explorer has been rejected by this Board *ad nauseum*."].) The ALJ expressly acknowledged the decoy's law enforcement experience and held that she nevertheless looked "young for her age." (Conclusions of Law ¶ 5.) We see no reason to doubt his conclusion.

Alternatively, appellants contend that using a decoy with previous law enforcement training or decoy experience creates an "artificial scenario" that amounts to cheating the licensee and is therefore unfair under rule 141, subdivision (a). (App.Br.

at pp. 5-6.) On the contrary, law enforcement training and experience is much more likely to *ensure* fairness. For example, without training or experience, how would a decoy know to provide her identification upon request, or to truthfully answer age-related questions? How would she know to remember, for purposes of face-to-face identification, which specific clerk sold her the alcohol? If anything, training and experience guarantee that decoy operations are predictable and therefore more easily regulated. Moreover, decoy experience and training helps guarantee the safety of the decoy herself, the officers or agents, and the patrons and employees within the premises. To require law enforcement to rely only on the most naive and untrained individuals would be absurd and dangerous.

With regard to the decoy's makeup, appellants appear to argue that individuals under the age of 21 do not ordinarily wear foundation, mascara, or blush. This Board wonders if appellants have ever actually met a teenager. (See, e.g., *7-Eleven, Inc./Said*, *supra*, at p. 6 ["Anyone who has walked around with eyes open would know that the use of makeup is not restricted to women over 21 years of age."].) Regardless, this Board wrote, in a similar case,

> Appellant appears to assert that a decoy violates the rule by the mere fact of wearing make-up during a decoy operation. Make-up only has significance in this context, however, if it makes the decoy appear to be older, specifically, over the age of 21. Whether it is light or heavy is really irrelevant. It is the impact on a decoy's apparent age that matters. Appellant has made no showing that this decoy's make-up made her appear older than 21.

(*Circle K Stores, Inc.* (2001) AB-7677.) The same reasoning applies here.

In sum, appellants merely ask this Board — perhaps in order to delay implementation of the Department's decision — to consider the very same evidence offered at the administrative hearing and reach an opposite conclusion of law. We

decline, yet again, to do so.

II

Appellants contend that in order for the Board to correctly review the sufficiency of the ALJ's rule 141(b)(2) findings, the Board must view the decoy in person. (App.Br. at pp. 7-8.)

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. On or about February 9, 2015, counsel for appellants petitioned the Second District Court of Appeal for a writ of review of our decision in *Chevron* specifically as it pertained to this issue. On April 2, 2015, following a brief stay, the court entered a final order summarily denying the petition.

Since the Court's April 2, 2015 order, counsel for appellants has filed four additional petitions for writ of review on this issue— two in the Fourth District Court of Appeal, and two more in the Second District. Both petitions for writ in the Fourth District were summarily denied by the Court on April 30, 2015. One of the two petitions for writ in the Second District was summarily denied on May 12, 2015, and we are confident that the second will soon suffer the same fate. As such, we are convinced that this argument is without merit, and counsel for appellants' repeated insistence on raising it on appeal is nothing more than a frivolous delay tactic and an all-out assault on already strained public resources. We therefore strongly urge counsel for appellants to cease this fruitless and wasteful venture.

ORDER

The decision of the Department is affirmed.[2]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, 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.