

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

AB-9495

File: 20-506158 Reg: 14080958

7-ELEVEN, INC., SURINDER GHOTRA, and ABNINDER SINGH,
dba 7-Eleven #2174-13786
19752 Yorba Linda Boulevard, Yorba Linda, CA 92886-2801,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 3, 2015
Los Angeles, CA

ISSUED SEPTEMBER 29, 2015

Appearances: Stephen Warren Solomon, of the law firm Solomon Saltsman & Jamieson, for appellants 7-Eleven, Inc., Surinder Ghotra, and Abninder Singh, and Jennifer M. Casey for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Surinder Ghotra, and Abninder Singh, doing business as 7-Eleven #2174-13786, appeal from a decision of the Department of Alcoholic Beverage Control¹ 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

¹The decision of the Department, dated February 19, 2015, is set forth in the appendix.

25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 13, 2011. On August 11, 2014, the Department filed an accusation against appellants charging that, on June 13, 2014, appellants' clerk, Parvinder Kaur (the clerk), sold an alcoholic beverage to 18-year-old Jolene Pham. Although not noted in the accusation, Pham was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on December 23, 2014, documentary evidence was received and testimony concerning the sale was presented by Pham (the decoy) and by Agent Vic Duong of the Department of Alcoholic Beverage Control. Appellants presented no witnesses.

Testimony established that on the date of the operation, Agent Duong entered the licensed premises, and the decoy followed shortly thereafter. The decoy selected a six-pack of Bud Light Lime beer and stood in line. When it was the decoy's turn, the clerk scanned the beer and asked to see the decoy's ID. The decoy handed the clerk her California driver's license. The clerk looked at the ID for two or three seconds, and asked if the decoy turned eighteen in February. The decoy replied that she did. The clerk handed the ID back to the decoy, and the decoy paid for the beer. The clerk returned some change to the decoy and bagged the beer. The decoy exited with the beer, followed by Agent Duong.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed an appeal contending: (1) the well-endowed decoy's clothing, which included a spaghetti-strap tank top and shorts cut above mid-thigh, was

distracting and therefore violated rule 141(a), and (2) the ALJ failed to conduct an analysis of the decoy's non-physical appearance — in particular, the smiling, cheerful demeanor presented in the Department's photographic exhibits.

DISCUSSION

I

Appellants contend that the decoy's choice of clothing — which included a spaghetti-strap tank top, a long-sleeve black cardigan, and shorts cut above mid-thigh — was too revealing and therefore violated rule 141's requirement that the operation be conducted in a fashion that promotes fairness. At oral argument, appellants emphasized that this particular decoy was “drop-dead gorgeous,” and that the decision to use her at all — coupled with her choice of clothing — necessarily rendered the operation unfair.

Rule 141, subdivision (a), states:

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 (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

Rule 141 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.)

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.]

(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].)

Appellants argue that the decoy's clothing was so distracting, it necessarily rendered the operation unfair:

[S]hort shorts and a low-cut spaghetti-strap tank top, especially on a decoy who is well-endowed like the decoy in this operation, can draw sales clerks to focus solely on her manner of dress or body, rather than any other indicia of age. This is in no way limited to clerks who may be sexually enticed by the manner of dress of such a decoy, as clerks with a disapproving attitude toward such manner of dress could be every bit as distracted.

(App.Br. at p. 4.) Moreover, appellants take issue with Agent Duong's failure to advise the decoy to choose more conservative clothing. (*Ibid.*)

The ALJ addressed the decoy's choice of clothing in his findings of fact:

Pham appeared and testified at the hearing. On June 13, 2014, she was 5'4" tall and weighed 130 pounds. She wore a black long-sleeved cardigan with a lavender tank top beneath it, black shorts, and sneakers. Her waist-length hair was straight and parted slightly to the left of the center of her head. She did not wear any make-up or jewelry. (Exhibits 2, 5 & 6.) Her appearance at the hearing was similar, although her hair was slightly longer and she weighed approximately nine pounds more.

(Findings of Fact ¶ 5.) Based on these findings, he reached the following conclusions of law:

The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rules 141(a) and 141(b)(2)^[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued Pham's shorts were too short and her tank top was too revealing. This argument is rejected. It is hardly unusual for a teenage girl to wear shorts and a tank top in June in Southern California. Nothing about her clothes was unusual or particularly revealing. In fact, Pham even covered up with a sweater during the operation.

(Conclusion of Law ¶ 5.)

The ALJ's conclusions on this point are perfectly reasonable. Anyone who has visited Southern California on any given summer day in the last fifty years would agree that the decoy's clothing, as illustrated by the photographic evidence, is absolutely typical for women in that region — particularly women under the age of 21. The rule does not prohibit the use of physically attractive decoys, nor would there be any rational reason for such a rule; physical attractiveness is, after all, subjective. A clerk's uncontrolled sexual proclivities or peculiarly stringent sartorial mores in no way alter his or her duty to ensure that a customer is of legal age to purchase alcohol. Indeed, if a clerk finds a customer so subjectively attractive (or otherwise distracting) that it legitimately impairs her ability to accurately evaluate that customer's age, then it is *imperative* that the clerk request identification.

II

Appellants contend that the decision below fails to fully consider non-physical aspects of the decoy's appearance on the date of the operation. (App.Br. at pp. 5-7.) Appellants take issue with what they characterize as "impermissibly conclusory" language referring to the decoy's "poise, demeanor, maturity, and mannerisms shown at the hearing." (*Id.* at p. 5.) Moreover, appellants challenge the ALJ's failure to include factual findings regarding the decoy's apparent demeanor in the photographic evidence, which they contend was "smiling, pleasant, and casual" both before and after the transaction at issue. (*Id.* at p. 7.)

Rule 141, subdivision (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.

Again, the rule provides an affirmative defense, and the burden of proof lies with the appellants. (*Chevron Stations, supra*; *Lo, supra*.)

This Board has indeed held that an ALJ should not focus his analysis solely on a decoy's *physical* appearance and thereby give insufficient consideration to relevant *non-physical* attributes such as poise, demeanor, maturity, and mannerisms. (See, e.g., *Circle K Stores, Inc.* (2004) AB-8169; *7-Eleven, Inc./Sahni Enterprises* (2004) AB-8083; *Circle K Stores* (1999) AB-7080.) This should not, however, be interpreted to require that the ALJ provide a "laundry list" of factors he or she found inconsequential. (*7-Eleven, Inc./Patel* (2013) AB-9237; *Circle K Stores* (1999) AB-7080.)

Moreover, it is settled law that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*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]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

At the administrative hearing, appellants presented no evidence, testimonial or otherwise, to establish the decoy's non-physical attributes on the date of the operation. While it is true that the decoy is smiling throughout the photographic exhibits, appellants made no reference to her expression during the course of the administrative hearing, nor did they argue that her smile made her appear over 21. Even if the ALJ did independently notice the decoy's smile, appellants failed to show how that smile could do anything other than make the decoy appear friendly. Appellants cannot object to the omission of an issue they failed to raise below, particularly where they bear the burden

of proof.

As required by this Board's previous decisions, the ALJ did make minimum findings regarding the decoy's non-physical appearance based on her presence at the hearing:

9. Pham appeared her 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 Kaur at the Licensed Premises on June 13, 2014, Pham displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Kaur.

(Findings of Fact ¶ 9.) We find no error. The ALJ's findings reflect what is routinely used as the basis for evaluating a decoy's non-physical appearance where the licensee fails to present any other relevant evidence. The language is not, as appellants argue, conclusory; it is, in fact, boilerplate, is supported by the ALJ's firsthand observations of the decoy at hearing, and is typically employed only where, as here, the licensee has supplied no evidence whatsoever of the decoy's non-physical appearance as presented to the clerk.²

In closing, appellants have fundamentally misconstrued the language of rule 141(b)(2). They argue, "A minor attempting to purchase alcoholic beverages would not act cheerful or wear a bright lavender tank top with short shorts while trying to purchase alcohol; rather, he or she would generally be expected to act surreptitiously and avoid

²Appellants also refer, in passing, to what they characterize as a discrepancy in the decoy's testimony regarding the clerk's question about her age. (App.Br. at p. 7.) They do not, however, challenge the ALJ's decision to credit the decoy's initial testimony and make findings based on it, nor do they mention that her initial testimony was supported by Agent Duong's administrative hearsay testimony. (See App.Br. at pp. 4-7.) Most significantly, appellants entirely fail to explain how this discrepancy has any bearing whatsoever on the decoy's non-physical appearance during the transaction in question. (See *ibid.*) Because this issue is tangential and irrelevant to appellants' argument, we will omit discussion of it here.

doing anything that would draw attention to him- or herself.” (App.Br. at p. 6.) In reality, the rule requires only that the decoy “display the appearance which could generally be expected of a person under 21 years of age — *not* the appearance “generally expected of a person under 21 years of age attempting to purchase beer in the middle of the day.” (App.Br. at p. 7.) A decoy need not appear sullen and avoidant in order to comply with the rule; she need not adopt the guilty air of a hardened juvenile delinquent. She may appear “smiling, pleasant, and casual.” (See *ibid.*) Indeed, there is nothing in the rule forbidding her from radiating unadulterated joy as she attempts to purchase alcoholic beverages — provided she still displays the appearance generally expected of a person under the age of 21.

ORDER

The decision of the Department is affirmed.³

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