

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

AB-9497

File: 21-369451; Reg:14080975

APRO, LLC,
dba United Oil #15
8505 Katella Avenue, Stanton, CA 90680,
Appellant/Licensee

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: Jennifer L. Oden, of Solomon Saltsman & Jamieson, for appellant Apro, LLC, and Brian Roberts, for the Department of Alcoholic Beverage Control.

OPINION

Apro, LLC, doing business as United Oil #15 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days (with all 10 days stayed provided appellant completes one year of discipline-free operation) because its clerk sold an alcoholic beverage to a police minor decoy, a

¹The decision of the Department, dated February 25, 2015, is set forth in the appendix.

violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 6, 2000. On August 13, 2014, the Department filed an accusation charging that appellant's clerk sold an alcoholic beverage to 18-year-old German Osuna-Gonzalez on February 7, 2014. Although not noted in the accusation, Osuna-Gonzalez was working as a minor decoy for the Orange County Sheriff's Department at the time.

At the administrative hearing held on January 28, 2015, documentary evidence was received, and testimony concerning the sale was presented by Osuna-Gonzalez (the decoy). Appellant presented no witnesses.

Testimony established that on the day of the operation, the decoy entered the licensed premises, followed a short time later by Deputy Wilder. The decoy selected a 12-pack of Bud Light beer which he took to the counter. The clerk asked to see his identification, and the decoy handed him his California driver's license which contained his true date of birth and a red stripe indicating "AGE 21 IN 2016." The clerk swiped the ID and completed the sale without asking any age-related questions.

After the hearing, the Department issued its decision which determined that the violation charged had been proved and no defense had been established.

Appellant then filed a timely appeal contending: (1) the decoy's manner of dress violated rule 141(a)² by being impermissibly distracting, and (2) the ALJ failed to make findings addressing issues with the decoy's apparent age raised by the photograph taken at the time of the operation.

²References 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.

DISCUSSION

I

Appellant contends that the decoy's manner of dress violated rule 141(a) by being impermissibly distracting. In particular, appellant maintains that the hoodie sweatshirt worn by the decoy, which contained the words "Give 'em Hell!" embellished with flames, and an illustration of a woman in an "evocative" pose (App.Br. at p. 3), was unfair "due to the distraction posed by the mature content and attention-grabbing nature of the illustration on the decoy's shirt and the likelihood that the decoy's manner of dress would pull the clerk's attention away from any other indicia of age." (App.Br. at p. 2.) This issue was not raised at the administrative hearing.

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. (*Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1126-1127 [116 Cal.Rptr.3d 315]; *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].)

Rule 141(a) provides:

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*.

(Emphasis added.) The rule provides an affirmative defense. The burden is therefore on the appellant to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; 7-

Eleven, Inc./Lo (2006) AB-8384.)

The distraction argument is a variation of the “busy premises” defense. This Board has acknowledged in those cases that, under truly rare circumstances,

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.) Thus, the level of activity in a premises is *only* relevant to a rule 141 defense if the licensee can show first that the seller was “legitimately distracted or confused,” and second, that law enforcement “sought to take advantage of such distraction or confusion.” (*Ibid.*) Anything less and appellant has failed to uphold its burden of proving the affirmative defense. Similar to the “busy” defense, in order to successfully argue that a clerk was unfairly distracted by some activity, in violation of rule 141(a), appellant must prove that the clerk was legitimately distracted by the activity *and* that law enforcement sought to take advantage of that distraction.

Appellant presented no evidence or argument that officers acted improperly or took advantage of the circumstances, or, for that matter, that the decoy did so. In addition, appellant presented no evidence to prove that the clerk was “legitimately confused or distracted” by the decoy’s attire. Indeed, this would be impossible without the clerk’s testimony, so argument to that effect is merely speculation. The record, however, does not reflect a situation in which the clerk was distracted. There were no other customers in the store, and the clerk was focused enough to ask for identification and to swipe it through the machine. This argument must fail.

II

Appellant contends that the ALJ failed to make findings addressing issues with the decoy's apparent age raised by the photograph taken at the time of the operation. Appellant maintains that this omission merits reversal because the ALJ failed to draw a distinction between the decoy's appearance in the photograph and his appearance on the day of the hearing and because "[n]othing specific about the decoy's mannerisms or maturity was used to demonstrate why the photograph failed to capture the decoy's apparent age." (App.Br. at p. 6.) This issue was likewise not raised at the administrative hearing, and the Board is entitled to consider it waived. (See Part I, *supra*.)

The 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 1429, 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 appellant. (*Chevron Stations, Inc., supra*; *7-Eleven, Inc./Lo, supra*.)

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

5. Osuna-Gonzalez appeared and testified at the hearing. On February 7, 2014, he was 5'8" tall and weighed 210 pounds. He wore green cargo pants and a gray sweatshirt. The sweatshirt had a drawing of a woman on it and bore the words "Give em Hell!" His hair was cut short and he was clean shaven. (Exhibit 3.) At the hearing his appearance was the same, except that he was 10 pounds heavier.

¶ ... ¶

8. February 7, 2014 was Osuna-Gonzalez[']s first time acting as a decoy, although he had participated in one shoulder-tap program before that date. He visited 14 locations on February 7, 2014, three of which sold alcoholic beverages to him (including the Licensed Premises). Osuna-Gonzalez learned of the decoy program through his participation in the Explorer program. He had been an Explorer since October 2012 and held the rank of corporal at the time of the sale.

9. Osuna-Gonzalez 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 the clerk at the Licensed Premises on February 7, 2014, Osuna-Gonzalez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk.

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

5. The Respondent 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 Respondent argued that Osuna-Gonzalez's physical stature, experience as an Explorer, and demeanor gave him the appearance of a person over the age of 21. This argument is rejected. Although Osuna-Gonzalez appeared to be older than his actual age (18 years old at the time of the transaction at issue), he did not appear to be old enough to purchase alcohol. Phrased another way, Osuna-Gonzalez's appearance was that generally expected of a person under the age of 21. (Finding of Fact ¶ 9.)

(Conclusions of Law ¶ 5.)

The ALJ made sufficient 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.

Appellant makes much of the ALJ's failure to discuss the photograph of the decoy (Exhibit 3). With regard to the importance of photographs of the decoy, the Board has said previously:

While an appellate court has said that a photograph taken immediately following an illegal sale is "arguably the most important piece of evidence in considering whether the decoy displayed the physical appearance of someone under 21 years of age" (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (The Southland Corporation)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652]), no court has said that such a photograph must be the only evidence to be considered.

(*7-Eleven/Cacy* (2012) AB-9193, at p. 4.) Nor has any court, or this Board, set forth a requirement that photographs of the decoy be discussed in the findings. 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.) Nor, as the Board has said many times, is there a requirement that the ALJ explain his reasoning. Simply because the ALJ does not explain all of his reasons for a decision does not invalidate his determination or constitute an abuse of discretion. (See *Garfield Beach* (2014) AB-9430, at p. 5.)

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. The decoy's appearance in person, in addition to any photographs in the record, supplies the ALJ with the evidence needed to make this factual determination. Conclusion of Law paragraph 5, *supra*, makes clear that the ALJ considered both the in-person and photographic evidence, even though he did not make detailed findings in that regard or explain his reasoning.

We see no flaw in the ALJ's findings or determinations.

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

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.