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

AB-9522
File: 47-522282 Reg: 14081604

MASOUD ZAIGHAMI,
dba Petes Restaurant and Brewhouse
6608 Folsom Auburn Road, Suite 9, Folsom, CA 95630-2147,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: January 7, 2016
Sacramento, CA

ISSUED MARCH 1, 2016

Appearances: *Appellant*: Masoud Zaighami and Jina Zaighami, in propria persona, for Masoud Zaighami, doing business as Petes Restaurant and Brewhouse.
Respondent: Dean Lueders as counsel for the Department of Alcoholic Beverage Control.

OPINION

This appeal is from a decision of the Department of Alcoholic Beverage Control[1] suspending appellant's license for fifteen (15) days because his employee furnished an alcoholic beverage to a police minor decoy in violation of Business and Professions Code section 25658, subdivision (a).

[1]The decision of the Department, dated May 21, 2015, is set forth in the appendix along with a subsequent motion for reconsideration filed by appellant and the Department's order denying that motion.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license (Type 47) was issued on July 24, 2012. On November 18, 2014, the Department filed an accusation charging that appellant's employee, Nick McBride, furnished an alcoholic beverage to nineteen-year-old Varsha Prakash on June 10, 2014. Although not noted in the accusation, Prakash was working as a minor decoy for the Folsom Police Department at the time.

At the administrative hearing held on April 28, 2015, documentary evidence was received, and testimony concerning the sale was presented by Prakash (the decoy). In addition, appellant, appearing in propria persona, testified on his own behalf, and presented the testimony of Robert L. Smith, a patron who was present at the licensed premises at the time of the subject decoy operation.

Testimony established that on the date of the operation, the decoy entered the licensed premises and was seated at a booth by one of appellant's employees. After being seated, the decoy ordered a Bud Light beer from McBride. McBride served a glass of beer to the decoy without asking her age or requesting to see proof of her age. The decoy did not pay for the beer. After receiving it, she informed the police officers who were working the decoy operation with her via text message that she had been furnished a beer.

After the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. The Department suspended appellant's license for fifteen (15) days.

Appellant filed an appeal contending: (1) the decoy's appearance violated rule

141, subdivision (b)(2),[2] and (2) the picture of the decoy presented at the administrative hearing was not a realistic depiction of her appearance. These two issues will be discussed together.

DISCUSSION

Appellant contends the decoy's appearance violated rule 141(b)(2). Specifically, appellant claims the decoy's physical appearance, poise, and mannerisms were not those which would generally be expected of a person under the age of 21. (App.Br. at p. 1.) Moreover, appellant claims the decoy's confidence, maturity, and the fact that she had participated in more than 20 decoy operations prior to June 10, 2014 suggest that her appearance violated the requirements. (*Ibid*.)

In addition, appellant alleges that the decoy's appearance on the date of the administrative hearing was not similar to her appearance on the date of the operation because she showed up to the hearing without the heavy makeup that she wore on the day of the operation, and was also dressed differently. (*Ibid*.) These differences, appellant contends, when coupled with the fact that the photograph of the decoy taken on the day of the operation (Exhibit 2) was unclear and darkly shaded, suggest that the decoy's appearance violated rule 141. (*Id*. at pp. 1-2.)

Rule 141(a) mandates that minor decoy operations be conducted in a fashion that promotes fairness. To that end, rule 141(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." This rule provides an affirmative defense, and the burden

[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.

of proof lies with the party asserting it. (*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 so long as those findings 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. (*CMPB Friends, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.App.4th 1250, 1254 [122 Cal.Rptr.2d 914]); *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; . . .) 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. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) 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].)

The administrative law judge (ALJ) made the following findings of fact relevant to the issues appellant raises in his appeal:

> IV
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> The decoy was 4'10" to 4'11" tall and weighed approximately 100 pounds on the day of the decoy operation. She wore a blue sweater-shirt with a "big heart" on it, blue jeans, and tennis shoes. She had on eyeliner, lip gloss, eye shadow, and light foundation. She felt nervous while in Respondent's restaurant. A photograph (State's Exhibit 2) was taken of the decoy, holding a glass of beer which McBride had furnished to her, standing next to McBride.
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> V
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> The decoy had participated in more than twenty decoy operations prior to June 10, 2014. There is no evidence that this experience made the decoy appear older, or younger, than her age when she ordered the beer at

Respondent's restaurant.

VI

The decoy was 4'10" to 4'11" tall and weighed approximately 105 pounds on the day of the hearing. Her appearance was similar to her appearance in the photograph. She sat with her hands folded and spoke softly. She appeared a little nervous, and stated that she was nervous.

VII

The photograph of the decoy, the testimony about her appearance on the day of the decoy operation, and her appearance at the hearing (including her demeanor, poise, and mannerism) show that the decoy did display the appearance which could generally be expected of a person under twenty-one years old when she ordered the beer from McBride.

(Findings of Fact IV-VII.)

After taking into consideration appellant's arguments, the ALJ reached the following conclusions of law:

II

Respondent argued that there was a violation of the Department's Rule 141(b)(2) because of the decoy's clothes and make-up.

III

According to Respondent, because the decoy "dressed like a professional," she appeared "at least 24 or 25." Respondent's argument is rejected. First, Respondent did not explain what he meant by the phrase "dressed like a professional." Moreover, Respondent did not explain why a sweater-shirt, blue jeans, and tennis shoes constitute the clothes of a professional. Surely teenagers, professional or otherwise, also wear sweater-shirts, blue jeans, and tennis shoes. If Respondent truly believes that the nineteen-year old decoy's clothes made the decoy appear "at least 24 or 25," he would be well-advised to adjust his view regarding the appearances of teenagers.

IV

Respondent also argued that the decoy's make-up made her appear at least twenty-one years old. This argument is also rejected, as it has also consistently been rejected by the Alcoholic Beverage Control Appeals Board.

"(T)he fact that the decoy wore makeup has never been found by this

> Board to be justification for claiming the decoy appeared to be older than 21." 7-Eleven/Johal Stores, Inc. (2014) Alcoholic Beverage Control Appeals Board Case Number AB-9403, page 5.
>
> "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 . . . ." 7-Eleven/Said (2011) Alcoholic Beverage Control Appeals Board Case Number AB-9118, page 6.
>
> V
>
> A customer of Respondent's testified that the decoy appeared at least twenty-one years old because of "the way she carried herself." This conclusion, without any supporting facts, is not helpful to Respondent's argument. Neither Respondent nor the customer explained how a nineteen-year old female is supposed to "carry herself," as opposed to how a female at least twenty-one years old is supposed to carry herself.
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> VI
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> Accordingly, Respondent's argument that the decoy operation violated the Department's Rule 141(b)(2) is rejected.
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> VII
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> Based on the findings in Paragraphs IV, V, VI, and VII in the Findings of Fact, there was no violation of Rule 141(b)(2).

(Conclusions of Law II-VII.)

Appellant is essentially asking the Board to reweigh the evidence by considering the same set of facts considered by the ALJ, and reaching the opposite conclusion. This is something that the Board simply cannot do, especially when the ALJ prepares a thoroughly reasoned proposed decision, such as the one at issue here.

Moreover, the individual arguments appellant raises have been raised innumerable times before the Board and consistently rejected. For instance, with regard to the decoy's makeup, appellant appears to argue that individuals under the age of 21 do not ordinarily wear "heavy make-up." Perhaps appellant is privy to a populace of "ordinary" teenagers to which the Board is not. (See, e.g., *7-Eleven, Inc./Said* (2011) AB-9118, 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, at p. 6.) The same reasoning applies here.

Similarly, with regard to the appellant's contention that the decoy appeared more confident and poised because of her previous experience with minor decoy operations, the proposed decision reflects that the ALJ took that specific point into consideration, and nevertheless rejected it. (See Findings of Fact V.) This Board has rejected this so-called "experienced decoy" argument many times before. As we stated in *7-Eleven, Inc./Azzam* (2001) AB-7631, the most frequently cited and yet oft-misinterpreted decision of this Board addressing this issue:

> 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 old or older.

(*Id*. 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."].) Appellant has cited no evidence that the decoy's experience actually resulted in her displaying the appearance of a person 21 years old or older, and thus his contention is as easily dismissed here on appeal as it was at the administrative hearing.

Next, appellant's point that the decoy appeared differently at the hearing than she did on the day of the operation is well taken. Unfortunately for appellant, however, the evidence in the record weighs against this contention. The decoy's testimony regarding the makeup she wore on each occasion proceeded as follows:

> [Appellant]: Q. The question I have is at the time when you came to the restaurant, was your appearance the same as you are right now, with make-up? You had make-up on?
>
> [The decoy]: Yeah, I had eyeliner and eye shadow and lip gloss.
>
> JUDGE LO: And what?
>
> THE WITNESS: Lip gloss. I have lipstick on right now. And like the light foundation, not too much.

(RT at p. 7.) The decoy subsequently stated that the makeup she had on at the hearing was somewhat different because she woke up late that day. (See RT at p. 11.) She also indicated that she was dressed similarly on the day of the hearing and on the day of the operation. (See RT at p. 12.)

The death knell for appellant's contention that the decoy appeared substantially different on the date of the hearing, however, sounded from the testimony of appellant's own witness, Mr. Smith:

> JUDGE LO: Do you recall how [the decoy] looked that day back in June?
>
> [ROBERT SMITH]: *No big difference*. My impression was now and then her — she was of age to be served.

(RT at pp. 28-29, emphasis added.) There is simply no evidence in the record beyond appellant's own obviously biased contentions made throughout the administrative hearing (see, e.g., RT at p. 8) that the decoy's appearance varied substantially on the two dates. Appellant's repeated assertion is thus plainly unsupported by any evidence the record. Moreover, the participants in the administrative hearing — including the ALJ — had ample opportunity to question the decoy regarding her appearance on both days, and the ALJ had the opportunity to view the decoy as she testified and to make an assessment of her apparent age. McBride did not testify at the administrative hearing, so his impressions — as the person who furnished the decoy with an alcoholic beverage — of how the decoy appeared on the date of the operation are unknown. In the end, all we are left with is a difference of opinion regarding whether the decoy displayed the appearance generally expected of person under the age of 21 — the ALJ found that she did, and appellant argues she did not. Without more, this is simply an insufficient basis for this Board to overturn the factual findings made by the ALJ.

On a final note, the proposed decision establishes that the ALJ considered a vast array of indicia of age when assessing the decoy's overall appearance, including her mannerisms, poise, demeanor, and testimony on the day of the hearing, and his conclusion is supported by the facts in the record. That established, appellant's mere dissatisfaction with the quality of the photograph of the decoy entered into evidence during the hearing is simply not enough to merit reversal of the Department's decision.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

PETER J. RODDY, MEMBER, listened to oral argument of this case by telephone, but did not participate in this decision, because the Board did not provide sufficient advance notice to all parties of this fact pursuant to Government Code section 11123, subdivision (b)(1)(C).

[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.