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

AB-9147
File: 20-422112 Reg: 10072803

7-ELEVEN, INC. and SYED CORPORATION, dba 7-Eleven #2171-20764C
700 West Sixth Street, Corona, CA 92882,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 3, 2011
Los Angeles, CA

ISSUED DECEMBER 7, 2011

7-Eleven, Inc. and Syed Corporation, doing business as 7-Eleven #2171-20764C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc. and Syed Corporation, appearing through their counsel, Jessica Cohen, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated December 9, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 15, 2005. On April 12, 2010, the Department filed an accusation against appellants charging that, on September 19, 2009, appellants' clerk, Moizuddin Haquani (the clerk), sold an alcoholic beverage to 18-year-old William McGuigan. Although not noted in the accusation, McGuigan was working as a minor decoy for the Corona Police Department at the time.

At the administrative hearing held on October 6, 2010, documentary evidence was received and testimony concerning the sale was presented by McGuigan (the decoy) and by Adam Mendenhall, a Corona police officer.

The evidence at the hearing established the following facts, which are not disputed on appeal: The decoy entered appellants' licensed premises, selected a 6-pack of Bud Light beer in bottles and took it to the counter. Appellants' clerk requested, and was given, the decoy's valid California driver's license which contained a birth date of 10-15-1990, a blue stripe indicating "PROVISIONAL UNTIL AGE 18 IN 2008" and a red stripe indicating "AGE 21 IN 2011." The clerk looked at the ID and asked the decoy if he was 19; the decoy responded that he was 18, after which the clerk sold him the beer. Following the sale, the decoy identified the clerk as the seller of the beer, and a citation was issued to the clerk for selling an alcoholic beverage to a person under the age of 21.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proven and no defense was established.

Appellants thereafter filed a timely notice of appeal contending: (1)The Department violated the Administrative Procedure Act (APA) proscription against ex

parte communications; and (2) rule 141(b)(2)[2] was violated.

DISCUSSION

I

Appellants contend that the Department impermissibly mingled prosecutorial and adjudicatory functions, by permitting ex parte contacts between the Department's prosecutor and its ultimate decision maker about the substance of the case, prior to the ultimate decision maker rendering a final decision, in violation of *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal. 4th 1, 8 [145 P.3d 462] (*Quintanar*). This allegation is based on a form letter, known as ABC-166-A, which was attached to the accusation and which bore the signature stamp of Matthew Botting, General Counsel.

At the administrative hearing, appellants argued that the matter should be dismissed because of this purported evidence of ex parte communication, and administrative law judge (ALJ) Echeverria invited the Department to submit a post-hearing brief in response (Exhibit 5), following which, in Finding of Fact II-F of the proposed decision, ALJ Echeverria found as follows:

> F. The Respondents' attorneys requested that this Administrative [L]aw Judge take official notice of documents/form letters in the Department's files that contain a stamp of Matthew Botting's signature to support their arguments that Exhibit A along with the documents contained in the Request For Official Notice establish that the Department's general counsel, Matthew Botting, had a prosecutorial role in this matter, that Exhibit A establishes that the Department participated in an unlawful ex parte communication and that as a result of this, the case should be dismissed. These arguments are rejected. The preponderance of the evidence did not establish that Mr. Botting actually signed Exhibit A or that he reviewed Exhibit A and/or its attachments. Furthermore, the evidence

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[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.

> did not establish that the Department's general counsel was involved in the prosecutorial process in this matter, that the Department violated *Quintanar* [fn. omitted] by failing to keep the prosecutorial and adjudicative functions separate or that the Department is engaging in a pattern and practice of unlawfully submitting ex parte communications.

The issue of whether the stamped signature of the Department's general counsel on a form letter constituted an impermissible ex parte communication was discussed at length in two recent Board decisions. (*See 7-Eleven, Inc. and Frankar, Inc*. (2011) AB-9141 and 7-*Eleven, Inc.* (2011) AB-9134.) The ALJ made factual findings in each of these cases that Botting did not sign the letter and that no prohibited ex parte communication had occurred, and the Appeals Board upheld the Department's decisions.

The 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. (*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]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) 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*).)

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Substantial evidence exists to support the finding in this case, in the form of Exhibit A which, upon examination, clearly bears a stamped signature. The affidavits from the Department employees, attached to Exhibit 5, further support the finding.

Therefore, the foundation upon which this argument is built is non-existent.

Even if we were to ignore the finding that Botting did not actually sign the letter, the inferences appellant draws from the purported signature cannot be sustained. Appellant's assertion that the signature reasonably implies that Botting had access to documents that he should not have is totally unsupported by any evidence or reasoning beyond appellant's say-so. Clearly, the ALJ drew different inferences from the evidence, which the Appeals Board is bound to accept as long as they are not unreasonable.

II

Appellants contend secondly that “[h]ere, we have a decoy who clearly exceeds the experience of any normal teenager or decoy, and the prior decoy, Explorer, and cadet experience gave this decoy an unusual degree of confidence not generally displayed of someone under the age of 21.” (App. Br. at p. 10.)

Appellants maintain that because of his experience, the decoy did not display the appearance required by rule 141(b)(2) which dictates: “[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.”

In his Findings of Fact II-B, paragraphs 3 and 5, the ALJ stated:

> 3. The decoy testified that he was a little nervous when he was at the premises and he appeared a little nervous at the hearing. While testifying, the decoy provided straight forward answers and there was nothing about his speech, his mannerisms or his demeanor that made him appear older than his actual age.
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> 5. After considering the photographs depicted in Exhibits 3, 4-A and 4-B, the overall appearance of the decoy when he testified and the way he conducted himself at the hearing, a finding is made that the decoy

> displayed an overall appearance that could generally be expected of a person under twenty-one years of age under the actutal circumstances presented to the seller at the time of the alleged offense.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he testifies, and making the determination whether the decoy's appearance met the requirement of rule 141, that he possessed 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.

We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that he did not.

The fact that this decoy had experience as an Explorer, police cadet and decoy does not convince us that *this* decoy's appearance failed to comport with the requirements of rule 141. As we said in *Azzam* (2001) AB-7631:

> 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.

We see no evidence that this decoy's experience resulted in him displaying the appearance of a person 21 years old or older. Neither do we believe appellants can convincingly argue that the clerk in this matter believed this decoy to be 21 or older,

when the facts establish that the clerk asked the decoy if he was 19, the decoy replied that he was 18, and yet the clerk completed the sale.

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[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.