

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

AB-9218

File: 20-375867 Reg: 11074857

7-ELEVEN, INC., and KUMAR and KUMAR, INC., dba 7-Eleven #2174-23713
2600 Pacific Avenue, Long Beach, CA 90806,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 1, 2012
Los Angeles, CA

ISSUED DECEMBER 5, 2012

7-Eleven, Inc., and Kumar and Kumar, Inc., doing business as 7-Eleven #2174-23713 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days, all conditionally stayed, subject to one year of discipline-free operation, 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 Kumar and Kumar, Inc., appearing through their counsel, Ralph Barat Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J. Belvedere.

¹The decision of the Department, dated November 16, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 4, 2001. On April 7, 2011, the Department instituted an accusation against appellants charging that, on January 20, 2011, appellants' clerk, Krishna Mishra (the clerk), sold an alcoholic beverage to 18-year-old Michael Hurtado. Although not noted in the accusation, Hurtado was working as a minor decoy for the Long Beach Police Department at the time.

An administrative hearing was held on September 21, 2011, at which time documentary evidence was received, and testimony concerning the sale was presented by Hurtado (the decoy) and by Forrest Andersen and Eric Hooker, Long Beach police officers. Appellants presented no witnesses.

Two decoys, Michael Hurtado, age 18, and Christopher Cepeda, age 16, entered the store together. A sale to Hurtado ensued. Hurtado was asked for his identification. Hurtado handed his California Identification card to the clerk. The card contained Hurtado's correct date of birth and a red stripe with the phrase "Age 21 in 2013." The clerk swiped the card through the computerized cash register three times, and then went forward with the sale.

Hurtado testified at the administrative hearing. Cepeda did not. The ALJ made a specific finding that Cepeda, although he remained with Hurtado while they were in the premises, did not remove anything from the cooler, did not carry anything to the sales counter, did not speak to Hurtado while in the premises, did not speak to the clerk, and the clerk did not ask him for identification. Appellants do not dispute any part of this finding.

What is in dispute is whether the ALJ, in assessing the appearance of Hurtado

according to the standards of rule 141(b)(2), was also obligated to consider the appearance of Cepeda by those same 141(b)(2) standards because he had accompanied Hurtado into the store, to the cooler area, and to the counter. The ALJ did not make a finding as to whether Cepeda displayed the appearance required by rule 141(b)(2), but did make a finding that he was 16 years of age and, based on photos (Exhibits 5 and 6), has a “very youthful appearance.”

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

Appellants filed a timely appeal, and contend there was no compliance with rule 141(b)(2) because the ALJ failed to consider the apparent age of a second decoy who accompanied Hurtado while in the store. As appellants frame the issue in their brief:

The two decoys were acting as a unit thereby requiring an inquiry and analysis by the Administrative Law Judge of the apparent age of the non-purchasing decoy. The failure to do so constitutes reversible error in that the analysis of the apparent age of the purchasing decoy was devoid of an inclusion of the circumstances presented to the seller as part of the analysis. The second decoy is a circumstance presented to the seller within the meaning of the rule. [App. Br., pp.1-2].

DISCUSSION

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded

relevant evidence at the evidentiary hearing.²

Certain principles guide our review. . . . 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*).) 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 Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826] (*Masani*).)

At the administrative hearing, appellants' counsel argued that the accusation should be dismissed because the Department had failed to produce Cepeda at the hearing. The ALJ rejected this contention, and appellants have not raised the issue in this appeal.³ Instead, appellants argue that the mere presence of a second decoy obligates an ALJ to assess his or her appearance under rule 141(b)(2), in addition to that of the minor who actually purchased the alcoholic beverage.

In cases involving more than a single decoy, the Board has consistently been guided by the rule that the real question to be asked is whether the second decoy

²The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

³Whether this ruling itself foreclosed the issue raised by appellants was neither briefed nor argued, and we do not address it.

engaged in some activity intended to or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law. (See, e.g., *FV Bowling I-Pship* (2010) AB-9053; *7-Eleven, Inc./Lo* (2006) AB-8384; *CEC Entertainment, Inc.* (2004) AB-8189; *Chevron Stations, Inc.* (2004) AB-8153; *Prestige Stations, Inc.*, (2002) AB-7793; *7-Eleven, Inc./Janizeh Corporation* (2002) AB-7790; *Station Operations, Inc.*, (2002) AB-7781.)

The cases appellants cite are distinguishable on their facts.

The language that appellants quote from *Southland Corporation/ R.A.N. Inc.* (1998) AB-6967 (overruled on other grounds in *7-Eleven, Inc./Lo* (2006) AB-8384) is at best, dicta, and, in any event, there is no evidence or claim in this case of any “confusion at the time of the sale,” the possibility of which was of concern to the Board in *Southland, Inc.*

7-Eleven, Inc./Smith (2001) AB-7740 is an example of a case where the combination of the second decoy’s actions at the sales counter, coupled with instructions given to the decoys, created a potential for distraction which led the Board to reverse the Department’s decision in that case.

Hurtado (2000) AB-7246 is nothing at all like this case. First of all, the case did not involve a second decoy. In *Hurtado*, a 27-year-old plain-clothed police officer sat at a table with the decoy, and each ordered a beer. This is a far cry from a situation where a 16-year-old merely accompanied an 18-year-old whose physical description and appearance was judged by the ALJ to be that of a minor.

We conclude that the appeal lacks merit.

ORDER

The decision of the Department is affirmed.⁴

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

⁴This 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.