

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

AB-9253

File: 20-469183 Reg: 11074736

CRESTVIEW CONSOLIDATED, INC.,
dba Arco AM PM
501 Alessandro Boulevard, Riverside, CA 92508,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

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

ISSUED DECEMBER 5, 2012

Crestview Consolidated, Inc., doing business as Arco AM PM, Alessandro (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days for its clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Crestview Consolidated, Inc., appearing through its representative, Omar Haddadin, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated March 1, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on November 14, 2008. On April 5, 2011, the Department filed an accusation charging that appellant's clerk, Kimberlee Schartung (the clerk), sold an alcoholic beverage to 17-year-old Justin A. on August 28, 2010. Although not noted in the accusation, Justin A. was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on January 26, 2012, documentary evidence was received, and testimony concerning the sale was presented by Justin A. (the decoy); by Eric Burlingame, a Department investigator; and by Lisa Monreal, an assistant manager at the licensed premises.

Testimony established that on August 28, 2010, the decoy entered the licensed premises and went to the cooler where he selected a 24-ounce can of Bud Light beer. He took the beer to the counter, where the clerk rang up the sale without asking for identification and without asking any age-related questions. Department investigator Burlingame was inside the store posing as a customer during the sale. The clerk who rang up the sale had only been on the job for 2 or 3 days, less than 20 hours total time, and she was being supervised by an assistant manager who had left her alone for a moment at the time of the sale.

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

Appellant filed an appeal contending: (1) rule 141² was violated, and (2) the ALJ abused his discretion in disallowing the testimony of appellant's representative at the administrative hearing.

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 Department violated rule 141 by failing to conduct this decoy operation in a manner which promotes fairness, and that rule 141 was not properly applied by the ALJ. In particular, although it does not cite the subdivisions of the rule, appellant alleges that rule 141(a) and rule 141(b)(2) were violated and therefore appellant has a defense, as a matter of law, to the accusation under rule 141(c).

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*).)

The pertinent portions of rule 141 in this matter are as follows:

141(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*. [Emphasis added.]

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;

And 141(c) declares: "Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658."

Appellant maintains that this decoy operation was unfair for several reasons.

First, appellant contends the operation was unfair because the employees were distracted by the actions of investigator Burlingame, whom they suspected of shoplifting. In its brief, appellant contends "it did not permit or allow the sale to take place but rather it was entrapped by the investigator's excessive distractive and suspicious actions." (App.Br. at p. 2.) Secondly, appellant asserts that the decoy operation was unfair because appellant's 18-year-old clerk was so young and so new to the job that the decoy looked like an "Older Boy." (App.Br. at p.5.)

The ALJ addressed the issue involving investigator Burlingame in Conclusions of Law 6 through 8:

CL 6. Monreal testified that she noticed Investigator Burlingame standing in the candy aisle fidgeting around. Burlingame was in plain clothes posing as a customer. According to Monreal, Burlingame was acting suspiciously and she believed that he may be pilfering candy. Monreal testified that she was aware of a person who was going around to different stores stealing items who was called the "gum bandit". According to Monreal she told Clerk Schartung to watch the store and make sure nothing is stolen. Monreal then went to the office area to review the video from the surveillance cameras to see if Burlingame was in fact stealing something. A review of the video verified that Burlingame was not doing anything illegal.

CL 7. Monreal testified that she left Schartung for a total of 30 to 60 seconds. When Monreal returned to Schartung's location behind the cash register she was advised that Schartung had sold beer to [the decoy] while Monreal was away. Monreal testified that the cash register freezes

when an age sensitive item such as alcoholic beverages are scanned. In this instance Clerk Schartung hit the override button on the cash register to complete the sale according to Monreal.

CL 8. Respondent argues that the accusation should be dismissed because the decoy operation was not conducted in a manner that promotes fairness, thereby violating Rule 141(a). This argument is rejected. Although there may be a factual situation where distraction by police personnel may prove to be unfair, this situation is certainly not in that category. If Monreal was truly concerned about Schartung's lack of experience then she should have told her not to complete any transactions until she returned. There was nothing unfair about this decoy operation.

The ALJ similarly rejected appellant's argument that the decoy must have looked "older" to the clerk, in Findings of Fact 9:

FF 9. Decoy A[] appears his age, 17 years of 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/conduct in front of Clerk Schartung at the Licensed Premises on August 28, 2010, [the decoy] displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to Schartung. [The decoy] appeared his true age.

The clerk's belief, in any case, is not controlling. As this Board has said before about rule 141(b)(2):

The rule, through its use of the phrase "could generally be expected" implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of that of a person under 21 years of age.

(*7-Eleven, Inc. & Grewal* (2001) AB-7602.)

II

Appellant contends that the ALJ abused his discretion in disallowing the testimony of its representative at the administrative hearing. Appellant maintains it was thus unfairly denied the opportunity to submit evidence at the administrative hearing,

and contends that the "ALJ was playing prosecutor and preventing Mr. Haddadin from testifying and talked him into resting his case." (App.Br. at p.3.)

At the administrative hearing, the ALJ asked Mr. Haddadin if he had any further witnesses to present, and he responded in the negative. When the ALJ asked if he rested at that point, Mr. Haddadin responded that he did not know what that meant, and the ALJ explained it to him. Mr. Haddadin then rested.

Appellant now maintains that its representative at the hearing did not understand the difference between testimony and a closing argument, and that Mr. Haddadin was thus prevented from submitting evidence. As the Department points out in its brief, this misunderstanding was a risk that appellant assumed by allowing a lay person to represent it at the hearing. (Dept.Br. at p.9.)

A party proceeding in propria persona "is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys." (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1210 [51 Cal.Rptr.2d 328].) Indeed, "the in propria persona litigant is held to the same restrictive rules of procedure as an attorney." [Citations.]

(*First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 958 [134 Cal.Rptr. 206].)

Appellant's argument is similar to that of the criminal defendant who represents himself at trial and then complains on appeal that the court should not have granted his motion to appear in propria persona. We agree with the Department that appellant assumed the risk of ineffective representation, and has not raised an appealable issue here.

We have carefully examined the record, and are satisfied that appellant's other

contentions³ do not warrant discussion.

An appellate court is not required to address all of the parties' respective arguments, discuss every case or fact relied upon by the parties, distinguish an opinion just because a party claims it is apposite, or express every ground for rejecting every contention advanced by every party. [Citations.]

(*People v. Garcia* (2002) 97 Cal.App.4th 847, 853-854 [118 Cal.Rptr.2d 662].)

The Board finds no error or abuse of discretion in this matter.

ORDER

The decision of the Department is affirmed.⁴

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

³The allegations include: the ALJ failed to evaluate the decoy's appearance as viewed from the clerk's perspective; the operation was unfair because of improper tactics by the investigator; the investigator was not a credible witness; the Department failed to separate the prosecutorial functions from the adjudicative function; and the ALJ abused his discretion by sustaining objections to questions and excluding Exhibit B.

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.