

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

AB-9310

File: 20-454126 Reg: 11075895

7-ELEVEN, INC. and PAINTAL CORPORATION,
dba 7-Eleven Store #27623D-2111
6401 Mission Gorge Road, San Diego, CA 92120,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 5, 2013
Los Angeles, CA

ISSUED OCTOBER 1, 2013

7-Eleven, Inc. and Paintal Corporation, doing business as 7-Eleven Store #27623D-2111 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ 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 Paintal Corporation, appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J. Belvedere.

¹The decision of the Department, dated September 19, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 14, 2007. Thereafter, the Department instituted an accusation against appellants charging that, on July 16, 2011, appellants' clerk, Khushinder Paintal (the clerk), sold an alcoholic beverage to 18-year-old Erin Elizabeth Weaver. Although not noted in the accusation, Weaver was working as a minor decoy for the Department at the time.

An administrative hearing was held on June 28, 2012. Documentary evidence was received, and testimony concerning the sale was presented by Weaver (the decoy) and by Miguel Rios, a Department agent. Appellants presented no witnesses.

The testimony established that, on the day in question, the decoy visited appellant's store, selected a six-pack of Bud Light beer from the cooler, and took it to the service counter. The clerk scanned the beer and asked the decoy for her identification. The clerk examined the identification and consummated the sale. She did not ask the decoy any age-related questions.

The decoy's identification, her California driver's license, bore a blue stripe (Provisional Until Age 18 in 2010) and a red stripe (Age 21 in 2013), in addition to her date of birth.

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 an appeal making the following contentions: (1) there was no compliance with rule 141(b)(2); and (2) there was no compliance with rule 141(b)(5).

DISCUSSION

I

Appellants contend that the ALJ abused his discretion and failed to proceed in the manner required by law because his factual findings do not support his conclusion that the decoy's appearance complied with rule 141(b)(2).²

This 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 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.4th [1250,] 1254 [122Cal.Rptr.2d 914]; Laube v. Stroh (1992) 2 Cal.4th 364, 367 [3 Cal.Rptr.2d 770;...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. of 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.*

Appellants' clerk did not testify. Appellants' brief gives the Board an assessment of the decoy's appearance, which bears little resemblance to the description described by the ALJ. Instead, appellants paint a picture of a seductress, one who "had a tall physical stature for a woman, was well-endowed as displayed in her seductive low-cut and form-fitting shirt, and wore dark nail polish on her fingernails." (App.Br. at pp. 4-5.) The Board has inspected the photographs of the decoy taken on the day of the sale

²The rule requires that "a 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." (Cal. Code Regs., tit. 4, § 141(b)(2).)

(Exhibits 2, 3, and 4) and do not believe any objective observer of these photographs would agree with appellants' description of the decoy.

In any event, it is the judgment of the ALJ that matters, and he believed the decoy met the 141(b)(2) test (Findings of Fact 9 through 11):

9. The decoy's overall appearance, including her demeanor, her poise, her mannerisms, her maturity, her size and her physical appearance were consistent with that of a person under the age of twenty-one and her appearance at the time of the hearing was similar to her appearance on the day of the decoy operation except that her hair was a little longer on the day of the hearing. The decoy is a very youthful looking young lady who was five feet eight inches in height and who weighed one hundred twenty pounds on the day of the sale. On that day, the decoy was wearing no make-up and no jewelry. Her clothing consisted of blue jeans, a white T-shirt and tennis shoes. Exhibit 4 is a photograph of the decoy that was taken at the premises and Exhibits 2 and 3 are photographs of the decoy taken on the day of the sale before going out on the decoy operation. All three of these photographs show how the decoy looked and what she was wearing on the day of the sale.

10. The decoy had not served as an Explorer. Although the decoy had participated in approximately fifteen prior decoy operations, she testified that she was nervous when she first started as a decoy and that she was not less nervous when she was at the subject premises.

11. There was nothing remarkable about the decoy's nonphysical appearance and there was nothing about her speech, her mannerisms or her demeanor that made her look older than her actual age. After considering the photographs depicted in Exhibits 2, 3 and 4, the decoy's overall appearance when she testified and the way she conducted himself [sic] at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

Appellants' contention also suffers from the fact that their clerk actually examined the decoy's driver's license, which showed the decoy's true date of birth, as well as a red stripe warning that she would not be 21 until 2013.

II

Appellants contend that the face-to-face identification required by rule 141(b)(5)

was defective because it was unduly suggestive. They say the decoy made the identification only after she had seen the investigators approach the clerk and identify her as the person who made the sale to her.

Rule 141(a) requires that law enforcement agencies conduct minor decoy operations “in a fashion that promotes fairness.” Rule 141(b)(5) requires that, after a sale is made and before a citation is issued, the officer directing the decoy shall attempt to enter the premises and have the minor decoy make a face-to-face identification of the seller of the alcoholic beverage. Violation of any of the provisions of rule 141 provides a licensee a defense to the charge of an unlawful sale to a minor.

Appellants do not in this case claim there was no face-to-face identification. Instead, they contend the identification was unduly suggestive because the decoy was present when the Department agent told the clerk she had sold an alcoholic beverage to a minor.

Appellants’ argument seems to proceed on the premise that the decoy had not seen the clerk before the police officers told her she had sold to a minor. Of course, the premise is simply wrong. The decoy, only minutes before, participated in a transaction in which she brought beer to the counter, produced her driver’s license for examination by the clerk, paid for the beer, received change, and left the store.

The Board has heard this or similar arguments in many previous cases. In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board said:

As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer’s contact with the clerk before the identification takes place causes the rule to be violated.

(See, e.g., *7-Eleven, Inc./Dars Corporation* (2007) AB-8590; *West Coast Products LLC* (2005) AB-8270); *Chevron Stations, Inc.* (2004) AB-8187.)

Even where the clerk was taken outside the premises by the police to be identified (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687 [3 Cal.Rptr.3d 339] (*Keller*)), the claim the identification was unduly suggestive was rejected.

The *Keller* court said (at p.1698):

We note that single person show-ups are not inherently unfair. (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 [269 Cal.Rptr. 447].) While an unduly suggestive one-person show-up is impermissible (*ibid.*), in the context of a decoy buy operation, there is no greater danger of such suggestion in conducting the show-up off, rather than on, the premises where the sale occurred.

And, in *Carlos M.*, *supra*, the court said:

The burden is on the defendant to demonstrate unfairness in the manner the show-up was conducted, i.e., to demonstrate the circumstances were unduly suggestive. (*People v. Hunt* (1977) 19 Cal.3d 888, 893-894 [140 Cal.Rptr. 651, 568 P.2d 376].) Appellant must show unfairness as a demonstrable reality, not just speculation. (*People v. Perkins* (1986) (1986) 184 Cal.App.3d 583, 589 [229 Cal.Rptr. 219].)

Appellants have not demonstrated to this Board any reason why they are entitled to relief.

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
 FRED HIESTAND, MEMBER
 PETER J. RODDY, MEMBER
 ALCOHOLIC BEVERAGE CONTROL
 APPEALS BOARD

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.