

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

AB-9379

File: 20-469460 Reg: 13078697

7-ELEVEN, INC. and F & R ENTERPRISES, INC.,
dba 7-Eleven #2174-25312
1785 Palo Verde Avenue, Long Beach, CA 90815,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: June 5, 2014
Los Angeles, CA

ISSUED JUNE 27, 2014

7-Eleven, Inc. and F & R Enterprises, Inc., doing business as 7-Eleven #2174-25312 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days, with 5 days stayed provided appellant completes 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 F & R Enterprises, Inc., appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr, and

¹The decision of the Department, dated October 2, 2013, is set forth in the appendix.

the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on September 8, 2008. On June 13, 2013, the Department filed an accusation against appellants charging that, on October 24, 2012, appellants' clerk, Aaron Aldana (the clerk), sold an alcoholic beverage to 18-year-old Matthew Merriman. Although not noted in the accusation, Merriman was working as a minor decoy for the Long Beach Police Department at the time.

At the administrative hearing held on September 25, 2013, documentary evidence was received and testimony concerning the sale was presented by Merriman (the decoy); by Eric Hooker and Joshua Rodriguez, Long Beach Police officers; and by Riyadh Adamjee, the 7-Eleven franchisee.

Testimony established that on October 24, 2012, the decoy entered the licensed premises and went to the coolers where he selected two 3-packs of Bud Light beer in 24-ounce cans. He took the beer to the counter where the clerk asked him for identification. The decoy handed the clerk his California driver's license, which had a vertical orientation, and which contained a red stripe stating "AGE 21 IN 2015." (See Exhibit 2.) The clerk looked at the license for 5 to 10 seconds, handed it back to the decoy, and completed the sale without asking any age-related questions. The decoy exited the premises, then returned with police officers to identify the clerk who had made the sale.

The Department's decision determined that the violation charged had been proven and that no defense had been established.

Appellants then filed a timely appeal contending that the decoy did not display the appearance required by rule 141(b)(2).²

DISCUSSION

Appellants contend that the ALJ failed to consider non-physical factors which made the decoy appear older than 21, such as the decoy's prior experience as a decoy and his law enforcement training and experience. Appellants maintain "[b]y only considering the decoy's height, weight, clothing, and hairstyle, the Administrative Law Judge impermissibly focuses on the decoy's physical appearance rather than evaluating both the minor decoy's physical and non-physical appearance." (App.Br. at p. 5.) Appellants allege "this Appeals Board is precluded from properly evaluating the Administrative Law Judge's findings as the findings are inadequate . . ." (*Ibid.*)

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." Appellants maintain that the decoy appeared older than 21 because of his training and experience.

The Appeals Board has rejected the "experienced decoy" argument many times before. As the Board said in *Azzam* (2001) AB-7631:

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. . . . 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.

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.

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 [122 Cal.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.

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

The ALJ's Findings of Fact paragraphs 4, 5, 9, and 10, concerning the decoy's appearance and compliance with rule 141(b)(2), were as follows:

¶ 4. Matthew Merriman was born July 1, 1994. He served as a minor decoy during an operation conducted by Long Beach police officers on October 24, 2012. On that day Merriman was 18 years old.

¶ 5. Merriman appeared and testified at the hearing. He stood about 6 feet 2 inches tall and weighed approximately 180 pounds. When he visited Respondents' store on October 24, 2012, he wore a black t-shirt, dark blue jeans and black canvas shoes. His hair was cut short. Decoy Merriman described it as a "buzz cut". (See Exhibits 3A, 4A and 4B). Since that decoy operation on October 24, 2012, Merriman has let his hair grow out. It is now a "normal" hair cut, about 1 or 2 inches long. Merriman's height and weight have remained approximately the same since the date of the operation. At Respondents' Licensed Premises on the date of the decoy operation, Matthew Merriman looked substantially the same as he did at the hearing, except for letting his hair grow out.

¶ 9. Decoy Matthew Merriman appears his age, 18 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 the clerk at the Licensed Premises on October 24, 2012, Merriman displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to clerk Aldana. Merriman appeared his true age.

¶ 10. Decoy Merriman attempted to purchase alcoholic beverages at eleven different businesses on October 24, 2012. He was able to purchase alcoholic beverages at four of the eleven businesses.

Appellants maintain the ALJ failed to consider factors which made the decoy appear older, but in Conclusions of Law paragraph 5 the ALJ noted:

¶ 5. Respondents argue that the decoy Brett Manis³ [sic] appeared older than 21 thereby violating rule 141(b)(2). That argument is rejected. Matthew Merriman appeared and acted his true age, 18. (Findings of Fact, ¶ 5, 9 and 10). Respondents argument regarding Merriman having a “receding hair line” which made him appear older than 21 is also rejected. Clerk Aldana did not testify so what he may have been thinking at the time of this sale is pure speculation. After evaluating the evidence presented at the hearing and viewing decoy Merriman in person as he testified, Merriman did not then and does not now appear to be older than his true age.

Appellants have provided no valid basis for the Board to question the ALJ's determination that the decoy complied with rule 141. As this Board has said many times, 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 requirements of rule 141. We must decline appellants' invitation to reweigh the evidence — particularly when the ALJ has made extensive findings on both the physical and non-physical characteristics of the decoy.

³We assume the ALJ meant Matthew Merriman.

ORDER

The decision of the Department is affirmed.⁴

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, 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.