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

AB-9414
File: 20-516608 Reg: 13078585

7-ELEVEN, INC. and PEGASUS HOLDING, INC.,
dba 7-Eleven Store #2112-39236
3291 West Florida Avenue,
Hemet, CA 92545-3638,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: November 6, 2014
San Diego, CA

ISSUED DECEMBER 4, 2014

7-Eleven, Inc. and Pegasus Holding, Inc., doing business as 7-Eleven Store #2112-39236 (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 Pegasus Holding, Inc., appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr of the law firm of Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated February 14, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 23, 2012. On May 23, 2013, the Department filed an accusation against appellants charging that, on March 21, 2013, appellants' clerk, Mirvat Aziz (the clerk), sold an alcoholic beverage to 18-year-old Jesus Arzaga. Although not noted in the accusation, Arzaga was working as a minor decoy for the Hemet Police Department at the time.

At the administrative hearing held on December 23, 2013, documentary evidence was received and testimony concerning the sale was presented by Arzaga (the decoy) and by Sergeant Glen Brock of the Hemet Police Department.[2] Appellants presented no witnesses.

Testimony established that, on March 21, 2013, Art Paez, another officer from the Hemet Police Department who participated in the operation, entered the licensed premises. The decoy entered shortly thereafter and went to the coolers. He picked up a six-pack of Bud Light beer in bottles and proceeded to the checkout counter. Aziz asked the decoy for his identification, and the decoy handed her his California driver's license. Aziz swiped the license through the card reader, and then stated that the reader was not working. Without being asked, the decoy told Aziz that he was 18 years old. Aziz grabbed a calculator and began making some calculations. She then asked the decoy for the purchase price of the beer which he provided. The sale was completed, and the decoy exited the premises.

Once outside of the licensed premises, the decoy met up with Brock, and the two were subsequently joined by Paez. Brock entered the premises, contacted Aziz, and

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[2]Brock was a Corporal on the date of the operation but was promoted to Sergeant in the interim.

explained the violation to her; he then took Aziz to the back of the store. The decoy re-entered the premises and approached Brock and Aziz. Brock asked the decoy to identify the person who sold him the beer, and the decoy pointed to Aziz and said, "She did." At the time of the identification, the decoy and Aziz were less than five feet apart and facing one another.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants filed an appeal contending: (1) the Administrative Law Judge (ALJ) abused his discretion when he disregarded appellants' evidence and arguments that rule 141(b)(2) was violated; and (2) the Department failed to comply with rule 141(b)(5).[3]

DISCUSSION

I

Appellants contend that the ALJ did not "fully and adequately consider" appellants' evidence and arguments that the decoy operation failed to comply with the requirements of rule 141(b)(2). (App.Br. at p. 6.) More specifically, appellants argue that, in finding that there was compliance with the rule, the ALJ failed to properly consider the decoy's experience in acting as a minor decoy, his service as a Police Explorer, his lack of nerves during the operation, and his large stature — all of which, appellants contend, establish that the decoy did not display the appearance of someone generally expected to be under the age of 21 on the date of the operation. (*Id*. at pp. 6-8.)

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[3]References to rule 141 and its subdivision are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

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." This rule provides an affirmative defense, and the burden of proof lies with the appellants.

This Board is bound by the factual findings in the Department's decision so long as those findings 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]; . . .) 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* (*Lacabanne*) (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].) 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.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Here, the ALJ made the following findings of fact regarding the decoy's physical appearance as well as his nonphysical appearance, including both his prior experience in law enforcement and demeanor:

> 8. Arzaga had been an Explorer for 3½ years before this operation, which he believed to be his third or fourth. He was not nervous any of the times he acted as a decoy.

> 9. Arzaga appeared his 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 and conduct in front of Aziz at the Licensed Premises on March 21, 2013, Arzaga displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Aziz.

(Findings of Fact ¶¶ 8-9.)

The ALJ considered appellants' rule 141(b)(2) arguments and expressly rejected them:

> 6. With respect to rule 141(b)(2), the Respondents argued that the training Arzaga received as an Explorer, his experience as a decoy, his height and weight, and his lack of nervousness gave him the appearance of a person over the age of 21. This argument is rejected. There was nothing about Arzaga's appearance or his manner which made him appear older than he actually was. Phrased another way, Arzaga had the appearance generally expected of a person under the age of 21. (Citation.)

(Conclusions of Law ¶ 6.)

The ALJ's conclusion is in accord with previous opinions of this Board in which the "experienced decoy" argument has been rejected. Appellants extract language from *Azzam* (2001) AB-7631 and cite it out of context to support their contention that "prior minor decoy experience must be adequately considered as such prior experience leads to a finding that" a young person appears older. (App.Br. at p. 7.) However, a review of the entire passage upon which appellants rely establishes that *Azzam* stands for the proposition that a decoy's prior experience is *not conclusive* as to the issue of whether there was compliance with rule 141(b)(2). As the Board stated:

> 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 or older.

(*Azzam, supra*, AB-7631, at p. 5, emphasis in original.)

Contrary to appellants' contention, *Azzam* does not compel the ALJ to reach a conclusion favorable to their position merely because the decoy had experience in law enforcement prior to the subject operation. Appellants have offered nothing but a mere difference of opinion with the ALJ that the observable effect of the decoy's experience and nervousness (or lack thereof), coupled with his physical stature, made him appear older. Without more, the Board cannot upset the determination of the trier of fact.

With regard to the decoy's physical stature, as this Board has stated many times, large stature is not dispositive as to whether there was compliance with rule 141. Minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys of large stature automatically violate the rule. (See, e.g., *Garfield Beach CVS, LLC* (2013) AB-9261, at p. 4.)

In support of their position, appellants cite Board decisions from 1999[4] and 2002[5] where the Board expressed concern about the size of decoys used in similar operations. However, neither of the cited decisions supports appellants' position. First, in *Savaja*, the Board's decision to reverse was based not on the decoy's large physical

[4] *Savaja* (1999) AB-7326.

[5] *Prestige Stations, Inc*. (2002) AB-7802.

stature, but on the fact that the Department "limit[ed] its assessment to the decoy's facial appearance alone, and fail[ed] to consider any other indicia of age . . . ." (*Savaja*, *supra*, at p. 4, fn. 4.) In this case, by contrast, the Proposed Decision reflects that the ALJ *expressly considered* a variety of indicia of age[6] in reaching his conclusion that the decoy's appearance complied with the requirements of rule 141(b)(2). Because the concern that prompted reversal in *Savaja* is altogether absent from this case, the case is unavailing to appellants' argument.

Appellants' reliance on *Prestige Stations, Inc.* is also misplaced. There, the Board *affirmed* the Department's decision to suspend the appellant's license after its clerk sold an alcoholic beverage to a minor; nevertheless, the Board observed:

> By the same token, we appreciate the fact that, on occasion, police have used decoys whose appearance, because of large physical stature, facial hair, or other feature of appearance, is such that a conscientious seller may be unfairly induced to sell an alcoholic beverage to that person. Within the limits that apply to this Board as a reviewing tribunal, we have attempted to deter such practices, either by outright reversal, or by stressing the importance of compliance with Rule 141. If licensees feel more is necessary, their resort must be to another body.

(*Prestige Stations, Inc.*, *supra*, at p. 7.) Previously this year, this Board acknowledged that *Prestige Stations, Inc.* was decided early in the development of the law governing rule 141 and its constituent parts, and that we are inclined to believe that the message not to use minor decoys whose appearance might unfairly deceive otherwise conscientious sellers has reached law enforcement[7]. Nothing in this case merits a reconsideration of this inclination. Indeed, Aziz's completion of the sale despite the fact

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[6]The indicia considered by the ALJ include the decoy's "physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing." (Findings of Fact ¶ 9.)

[7]*7-Eleven, Inc./Gurpreet Singh* (2014) AB-9344, at p. 5.

that the decoy had already voluntarily disclosed his true age (RT at pp. 11-12) belies the contention that Aziz was an otherwise "conscientious seller" who was duped by the decoy's physical appearance.

Altogether, appellants once again ask this Board to substitute its judgment for that of the ALJ by considering the same facts and reaching the opposite conclusion — something the Board cannot do unless the factual findings are not supported by substantial evidence. As we have stated 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 requirement of rule 141 that he possess 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. Here, the ALJ found that the decoy's appearance met the requirements of rule 141, and the Board sees no reason based on a review of the record to disturb that conclusion.

II

Appellants contend that the face-to-face identification was unduly suggestive because the decoy only identified the clerk after the clerk had been "quarantined and secluded" by Brock in the back of the store for the decoy to make the identification. (App.Br. at p. 9.) Appellants also argue that the identification was flawed because Brock, and not the decoy, was the one who identified the clerk because he initiated contact with the clerk, informed her of the violation, removed her to the back of the store, and then asked the decoy to identify the clerk. (*Ibid*.)

Rule 141(b)(5) provides:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

Failure to conform to this rule provides an affirmative defense and the burden of proof falls on the party asserting it. Notably, nothing in the plain language of the rule forbids the officer from making first contact with the suspected seller.

Appellants contend that Brock's seclusion of the clerk prior to the decoy's identification indicates that, rather than identify the clerk himself, the decoy "simply followed" Brock's suggested identification. (App.Br. at p. 9.) The ALJ specifically rejected this argument. (Conclusions of Law ¶ 7.)

In *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board/Keller ("Keller")* (2003) 109 Cal.App.4th 1687 [1 Cal.Rptr.3d 339], the appellate court reversed the decision of the Appeals Board that found a violation of rule 141(b)(5) where the decoy remained outside, the officer brought the clerk outside, and the decoy then identified the clerk as the seller. The court explained:

> 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 operations [*sic*], there is no greater danger of such suggestion in conducting the show-up off, rather than on, the premises where the sale occurred.

(*Id*. at p. 1698.) If the circumstances in *Keller* did not, in and of themselves, give rise to an unduly suggestive identification, the Board fails to see how the circumstances here could do so. Without specific evidence to suggest the impropriety of a single-person identification, whether the isolated clerk is brought to the decoy, as in *Keller*, or the decoy is brought to the isolated clerk, as here, is inconsequential — mere seclusion or

"quarantining" of the clerk is simply not enough. Appellants have presented no additional evidence that the identification was unduly suggestive in this case, and the ALJ's determination should not be disturbed.

Appellants also cite *Chun* (1999) AB-7287, which, they claim, stands for the proposition that the decoy, rather than an officer, must initiate contact with the clerk. (App.Br. at pp. 8-9.) They rely on one passage in particular:

> The phrase "face to face" means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id*. at p. 5.) We read nothing in that passage, or the rest of *Chun*, that precludes an officer from initiating contact with the clerk before the decoy proceeds with his identification. As this Board has stated before, one can imagine many circumstances (*e.g*., out of concern for safety of persons on the scene, or potential disruption of business) in which it would be necessary and wholly appropriate for the officer to approach first.

Additionally, decisions from this Board consistently reflect the position that the rule is not violated where the officer initiates contact:

> 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.

(*7-Eleven, Inc./M&N Enterprises, Inc*. (2003) AB-7983 at pp. 7-8; see also *Hilu* (2013) AB-9262; *Chevron Stations, Inc*. (2012) AB-9215; *7-Eleven, Inc./Dars Corp*. (2007) AB-8590*; BP West Coast Products LLC* (2005) AB-8270; *Chevron Stations, Inc*. (2004) AB-

8187.) The facts of this case establish that there was a face-to-face identification. Appellants neither allege nor present evidence that the identification was in any way incorrect. In reaching his conclusion, the ALJ properly applied the law, and the Board finds no reason to reconsider.

ORDER

The decision of the Department is affirmed.[8]

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

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[8]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.