

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

AB-9416

File: 20-283554 Reg: 13079393

7-ELEVEN, INC., FASIL ASSEFA, and DESS WOLDERMARIAM,
dba 7-Eleven Store # 2173-25330
5791 Rodeo Road, Los Angeles, CA 90016,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 4, 2014
Los Angeles, CA

ISSUED JANUARY 9, 2015

7-Eleven, Inc., Fasil Assefa, and Dess Woldermariam, doing business as 7-Eleven Store # 2173-25330 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 5 days, all conditionally stayed, for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellants 7-Eleven, Inc., Fasil Assefa, and Dess Woldermariam, appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J. Belvedere.

¹The 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 December 3, 1993. On October 21, 2013, the Department filed an accusation against appellants charging that, on June 1, 2013, appellants' clerk, Yosef Assefa (the clerk), sold an alcoholic beverage to 19-year-old Joerdens Cancino. Although not noted in the accusation, Cancino was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on January 22, 2014, documentary evidence was received and testimony concerning the sale was presented by Cancino (the decoy) and by Sergeant Brent McGuyre of the Los Angeles Police Department. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises and proceeded to a cooler, where he selected a 24-ounce can of Budweiser beer. He took the beer to the sales counter for purchase.

The decoy placed the beer on the counter. The clerk asked the decoy for identification. The decoy handed the clerk his California identification card, which showed he was under the age of 21. The clerk took possession of the identification card and swiped it through the cash register. The cash register began making a beeping sound. The clerk touched something on the register, and the beeping stopped. The clerk then handed the identification card back to the decoy. The decoy paid for the beer and received his change. The clerk placed the beer in a bag, and the decoy exited the premises with the beer.

The clerk did not ask the decoy any age-related questions, nor did he ask any questions regarding the identification card.

The Department's decision determined that the violation charged was proved

and no defense was established. In light of appellants' lengthy period of discipline-free licensure, the ALJ imposed a mitigated penalty of five days' suspension, with all five days stayed on the condition that no cause for discipline occur in the following year.

Appellants then filed an appeal contending: (1) the ALJ failed to properly consider evidence in support of appellants' rule 141(b)(2) defense; (2) proper appellate review of the ALJ's findings mandates that the decoy appear in person before the Appeals Board; and (3) the face-to-face identification was unduly suggestive and did not comply with rule 141(b)(5).

DISCUSSION

I

Appellants contend that the ALJ failed to properly consider evidence of the decoy's experience and training as an "Explorer and/or Cadet"² with the Los Angeles Police Department, his Cadet rank, how "confident and experienced" he was in his role as a minor decoy, and the presence of a shadow of hair on the decoy's upper lip. (App.Br. at pp. 7-8.)

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." The 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

²As the decoy noted in his testimony, Explorers and Cadets are essentially the same program. The name change reflects organizational modifications. (See RT at p. 20.)

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].)

The ALJ made the following findings of fact regarding the decoy's appearance and demeanor:

5. Cancino appeared and testified at the hearing. He stood about 5 feet 8 inches tall and weighed approximately 140 pounds. When he visited Respondents' store on June 1, 2013, he wore a black and white baseball shirt, black pants and black and white Vans. (See Exhibits 3 and 4.) Cancino'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, Joerdens Cancino looked substantially the same as he did at the hearing. The only difference was that he wore different clothing at the hearing.

[¶ . . . ¶]

9. Decoy Cancino appears his age, 19 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 June 1, 2013, Cancino displayed the appearance that could generally be expected of a person less than 21 years of age

under the actual circumstances presented to clerk Assefa. Cancino appeared his true age.

10. Cancino has been a police explorer / cadet for about 5 years. This was Cancino's first time operating as a decoy. He said that he was not nervous during the decoy operation. While testifying at the hearing Cancino was noticeably nervous and fidgeting. He was extremely soft spoken.

(Findings of Fact ¶¶ 5, 9-10.) Based on these findings, the ALJ reached the following conclusions:

5. Respondents argue that the decoy Joerdens Cancino appears older than 21 thereby violating Rule 141(b)(2). That argument is rejected. Joerdens Cancino appeared and acted his true age. (Findings of Fact, ¶ 4, 5, 9 and 10.) Respondents' counsel argued that although Cancino had shaved his upper lip was dark and this somehow caused him to appear older than 21. What was noticeable was acne about his face which made Cancino appear the teenager that he is. Respondents present no evidence to support their claim.

(Conclusions of Law ¶ 5.)

Contrary to appellants' claim, the ALJ did in fact consider the decoy's experience as an Explorer and Cadet, his relative nervousness, and the presence of a shadow of hair on his upper lip, as well as other elements of appearance — such as the presence of acne — which appellants strategically omit from their brief. To say that he “disregarded” this evidence is patently false; in reality, he did consider the evidence, and found appellants' position unpersuasive.

On one point, however, appellants are technically correct: the ALJ made no reference in the decision to the decoy's relative *rank* as an LAPD Cadet. However, no finding was necessary on that point, for two reasons. First, as this Board has noted elsewhere, the ALJ need not provide a “laundry list” of factors he deems inconsequential. (See, e.g., *Lee* (2014) AB-9359; *7-Eleven/Patel* (2013) AB-9237; *Circle K Stores* (1999) AB-7080).

Second — and more importantly — appellants never argued the decoy's rank as evidence of his apparent age. (See RT at pp. 46-48.) Though they did elicit his rank during cross-examination (see RT at pp. 20-21), at no point did they assert his rank influenced his appearance.³ Rule 141 provides an affirmative defense, and appellants bear the burden of proof. It is incumbent upon them to present any arguments they deem relevant; neither an ALJ nor this Board will infer arguments on appellants' behalf. The lack of findings regarding the decoy's Cadet rank is neither surprising nor fatal to the Department's case.

Altogether, appellants have provided no valid basis for the Board to question the ALJ's determination that the decoy's appearance complied with rule 141. This Board has on innumerable occasions rejected invitations to substitute its judgment for that of the ALJ on a question of fact, and it must do so here as well.

II

Appellants contend that in order to for this Board to conduct a meaningful review of the Department's decision, it must assess the decoy in person — that is, the decoy must appear at oral argument. Appellant's case is one of four raising this same issue of law. (See *7-Eleven, Inc./Niaz* (2014) AB-9427; *7-Eleven, Inc./Jamreonvit* (2014) AB-9424; *Chevron Stations, Inc.* (2014) AB-9415.)

This Board has addressed this argument at length in *Chevron Stations, supra*. We offer only a summary of our reasoning here, and refer appellants to that case for a more comprehensive analysis.

³Moreover, the decoy's rank would be functionally invisible to the clerk, and would therefore only be relevant insofar as it evidences experience — a factor the ALJ did address in Findings of Fact ¶ 10.

Section 23083 limits our review to evidence included in the administrative record. (Bus. & Prof. Code § 23083; see also *7-Eleven, Inc./Grover* (2007) AB-8558, at p. 3.) Section 1038(a) of the California Code of Regulations defines the items to be included in the administrative record — none of which conceivably allows for an actual human being. (See Cal. Code Regs., tit. 1, § 1038(a).) The properly compiled record — including testimony, arguments, photographs of the decoy, and the Department’s decision containing the ALJ’s firsthand impressions — is both legally and practically sufficient for the Board to determine whether the conclusions reached regarding the decoy’s appearance are supported by the evidence.

As we observed in *Chevron Stations, Inc.*, this argument has no merit. We encourage appellants to seek a writ of appeal if they disagree. In the meanwhile, we do not wish to see this argument again, and will enforce that expectation with appropriate sanctions.

III

Appellants contend the face-to-face identification did not comply with rule 141(b)(5). In particular, appellants claim that the investigating officers, rather than the decoy, conducted the identification, and that the clerk was “quarantined and secluded” in a back room so that the decoy had no other choice but to confirm the officers’ identification. (App.Br. at p. 11.) The identification, they insist, was therefore unduly suggestive.

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.

As appellants correctly point out, the rule requires “strict adherence.” (See *Acapulco Restaurants, Inc.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] [finding that no attempt, reasonable or otherwise, was made to identify the clerk].)

In *Chun* (1999) AB-7287, this Board observed:

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.) In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, we clarified application of the rule in cases where, as here, an officer initiates contact with the clerk following the sale:

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.

(*Id.* at pp. 7-8; see also *7-Eleven, Inc./Paintal Corp.* (2013) AB-9310; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *West Coasts Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

The court of appeals has found compliance with rule 141(b)(5) even where police escorted a clerk outside the premises in order to complete the identification. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2003) 109 Cal.App.4th 1687 [3 Cal.Rptr.3d 339] (*Keller*).) As the court noted:

[S]ingle 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 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.

The court concluded that “[t]he literal terms of [rule 141(b)(5)] leave the location of the identification to the discretion of the peace officer.” (*Id.* at p. 1697.)

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) 184 Cal.App.3d 583, 589 [229 Cal.Rptr. 219].)

(220 Cal.App.3d at p. 386.)

With regard to appellants’ rule 141(b)(5) defense, the ALJ made the following findings of fact:

8. There were two clerks working in the store. Cancino described the clerk who sold him the beer as being a middle-eastern male. The other clerk was an African-American male. Sgt. Brent McGuyre entered the store and contacted the middle-eastern male clerk, subsequently identified as Yosef Assefa. Sgt. McGuyre identified himself as a police officer and advised Assefa of the violation. The officer and Assefa then went to a rear store room to complete their investigation. Decoy Cancino was then taken back into Respondents’ store. Sgt. McGuyre then asked decoy Cancino if Assefa was the person who sold [him] the beer. Cancino pointed his finger at clerk Assefa and said “He is the one who sold me the alcohol”. They were standing about 3 or 4 feet apart and facing each other at the time of this identification. They were making eye contact at that time. Clerk Assefa was aware that he was being identified as the seller of the beer. A photo of clerk Assefa and decoy Cancino holding the beer he purchased was taken after the face to face identification. (See Exhibit 3.)

(Findings of Fact ¶ 8.) Based on these findings, the ALJ reached the following conclusions of law:

6. Respondents argue that Rule 141b5 [*sic*] was violated because the face to face identification was “overly suggestive”. This argument is rejected. This is not a criminal show-up or line-up. There were only two clerks on duty. Cancino described the clerk who sold him the beer as a middle-eastern male. The other clerk was an African-American male.

There was no mistake as to the identity of this seller. There was nothing improper about completing this investigation in the rear store room away from the public. Rule 141(b)(5) ensures that the seller will be given the opportunity, soon after the sale, to come face-to-face with the decoy. Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. 109 Cal.App. 4th 1687. In this case clerk Assefa was given the opportunity to come face-to-face with the decoy. In other words, clerk Assefa was shown the minor to whom he sold the beer. There was no evidence that Assefa disputed or denied selling the beer to Cancino.

(Conclusions of Law ¶ 6.)

Appellants' argument in this case seems to proceed on the premise that the decoy had not seen the clerk until the moment he entered the back room. Of course, that premise is demonstrably incorrect — there were, in fact, only two clerks on duty, and officers pulled Assefa aside based on distinguishing physical characteristics described by the decoy himself. (See Findings of Fact ¶ 8.) Moreover, appellants do not contend that the clerk was in fact misidentified, and the undisputed evidence indicates that the identification was absolutely correct. Finally, even if officers had pulled aside the wrong clerk, there was nothing to prevent the decoy from correcting their error, and nothing to prevent the clerk from objecting to the identification. Neither took place, however, for the simple reason that the identification was correct.

Without a showing of demonstrable unfairness, the fact that officers first isolated the clerk is irrelevant. Appellants have offered nothing to suggest that this face-to-face identification was unfair. We see no grounds to overturn the decision below.

ORDER

The decision of the Department is affirmed.⁴

BAXTER RICE, CHAIRMAN
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.