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

**AB-9424**
File: 20-504663 Reg: 13078293

7-ELEVEN, INC., VICTORIA JAMREONVIT and MIGUEL MIRANDA,
dba 7-Eleven Store #2175-34372
6224 Pacific Avenue, Huntington Park, CA 90255-2925,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

**ISSUED JANUARY 13, 2015**

7-Eleven, Inc., Victoria Jamreonvit, and Miguel Miranda, doing business as 7-Eleven Store #2175-34372 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending 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., Victoria Jamreonvit, and Miguel Miranda, through their counsel, Ralph Barat Saltsman and Jennifer L. Carr of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated March 7, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 10, 2010. On April 5, 2013, the Department filed an accusation against appellants charging that, on December 13, 2012, appellants' clerk, Jose Robledo (the clerk), sold an alcoholic beverage to nineteen-year-old Jose Garcia. Although not noted in the accusation, Garcia was working as a minor decoy for the Huntington Park Police Department (HPPD) at the time.

At the administrative hearing held on January 28, 2014, documentary evidence was received and testimony concerning the sale was presented by Garcia (the decoy) and by Humberto Lozano, a police officer for the HPPD. Appellants presented the testimony of Victoria Jamreonvit, a franchisee of the licensed premises, and of the clerk, Jose Robledo.

Testimony established that, on the day of the operation, the decoy entered the licensed premises and walked to the alcoholic beverage section. He picked up a six-pack of Bud Light beer and took it to the sales counter where there was a line ahead of him. When it was his turn to be served, the decoy handed the beer to the clerk, and the clerk scanned the beer and asked the decoy for identification. The decoy held out his California identification card showing he was under the age of 21. The clerk merely looked at it for a few seconds without taking the card or swiping it through the register. The decoy put the ID back in his pocket and paid the clerk for the beer. The clerk gave the decoy some change, and the decoy picked up the beer and exited the premises.

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

Appellants then filed an appeal contending: (1) the administrative law judge

(ALJ) failed to properly consider appellants' evidence that rule 141(b)(2) [2] was violated; and (2) proper appellate review of the ALJ's findings mandates that the decoy appear in person before the Appeals Board.[3]

DISCUSSION

I

Appellants contend the administrative law judge (ALJ) failed to adequately consider the decoy's experience as a police explorer and the effect it had on the decoy's overall appearance.

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 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.

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[2]References 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.

[3]Although appellants raise these points under a single subheading in their brief, they will be discussed separately here.

> (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 physical appearance and prior experience with law enforcement:

> 5. Garcia appeared and testified at the hearing. On December 13, 2012, he was 5'6" tall and weighed 133 pounds. He wore a white t-shirt, a white sweatshirt, blue skinny jeans, and black tennis shoes. His hair was short. (Exhibits 3-5.) His appearance at the hearing was the same, except his hair was slightly longer.
>
> [¶ . . . ¶]
>
> 11. December 13, 2012 was the first time that Garcia worked as a decoy. He previously had participated in shoulder tap operations. This was also his first time testifying. He was selected to be a decoy because he was an Explorer with the Bell Garden P.D. He had been an explorer for approximately one year before participating in this operation.
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> 12. Garcia 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 Robledo at the Licensed Premises on December 13, 2012, Garcia displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Robledo.

(Findings of Fact ¶¶ 5, 11-12.) Based on these findings, the ALJ reached the following conclusions:

> 6. With respect to rule 141(b)(2), the Respondents noted that Garcia was only one month away from his 20th birthday and that his appearance then was consistent with his appearance at the hearing (by which time he was only one month away from turning 21). Thus, in their opinion, Garcia had the appearance of a person who had already turned 21, both at the

> hearing and at the time of the sale. This argument is rejected. As already noted, Garcia had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 12.)

(Conclusions of Law ¶ 6.)

Appellants contend that, while the ALJ *did* make findings concerning the decoy's age, physical appearance, and prior experience as a police explorer, the ALJ did not apply adequate weight to these attributes. (App.Br. at pp. 5-6.) Appellants claim that the ALJ failed to consider the entire picture of how these characteristics contributed to the decoy's overall appearance as presented to the clerk on the day of the sale. Appellants rely on the clerk's testimony that the decoy did not look like a teenager on the day of the sale (RT at p. 66), and claim the ALJ erred in failing to expressly consider the clerk's testimony in his Proposed Decision. (App.Br. at pp. 5-6.)

Appellants' contentions are meritless. This Board has oft rejected the experienced decoy argument, explaining that::

> 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* (2001) AB-7631 at p. 5, emphasis in original.)

Here, the ALJ expressly acknowledged the decoy's experience in law enforcement and rejected the contention that it made him appear older. (Findings of Fact ¶¶ 5, 11-12.) The fact that the ALJ did not lend credence to, or even expressly

consider, the clerk's testimony that the decoy did not appear to be a teenager on the day of the sale does not render the ALJ's determination an abuse of discretion. It is the province of the ALJ, as the trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.3d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.3d 315, 323 [314 P.2d 807].) Moreover, as this Board has stated in the past, the ALJ need not provide a "laundry list" of factors he deemed inconsequential. (See, e.g., *Lee* (2014) AB-9359; *7-Eleven/Patel* (2013) AB-9237; *Circle K Stores* (1999) AB-7080).

The ALJ made ample findings regarding the decoy's age, physical appearance, and experience in law enforcement, and this Board should not interfere with the ALJ's factual determinations in the absence of a clear showing of an abuse of discretion; no such showing was made in this case.

II

Appellants contend that in order 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. Appellants submit that the decoy himself is evidence included in the record on appeal, and if the Board cannot see the decoy, then the Board cannot see what effect the decoy's law enforcement experience had on his apparent age, and therefore cannot decide whether or not the ALJ's findings are supported by substantial evidence. Appellants' case is one of four raising this same issue of law. (See *Chevron Stations, Inc.* (2014) AB-9415; *7-Eleven, Inc./Assefah* (2014) AB-9416; *7-Eleven, Inc./Niaz* (2014) AB-9427)

This Board has addressed this argument at length in *Chevron Stations, Inc.*,

*supra*. We offer only a summary of our reasoning here, and refer appellants to that case for a more comprehensive analysis.

Business and Professions Code section 23083 limits our review to evidence included in the administrative record. (See also *7-Eleven, Inc*. (2007) AB-8558, at p. 3.) Section 1038(a) of the California Code of Regulations defines the terms 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*., appellants' argument that the decoy should appear before the Board has no merit as it lacks support in both law and logic. 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.

ORDER

The decision of the Department is affirmed.[4]

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

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[4]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.