

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

AB-9438

File: 20-446201; Reg: 13079639

7-ELEVEN INC. and JOHAL STORES, INC.,
dba 7-Eleven Store #2133-21483D
14104 Foothill Boulevard, Sylmar, CA 91342-1516,
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 9, 2015

7-Eleven Inc. and Johal Stores, Inc., doing business as 7-Eleven Store #2133-21483D (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 10 days, with all 10 days stayed for a period of one year provided no further cause for discipline arises during that period, because their clerk sold 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. and Johal Stores, Inc., 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, Kerry K. Winters.

¹The decision of the Department, dated April 23, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 21, 2006. On December 11, 2013, the Department filed an accusation against appellants charging that, on August 16, 2013, appellants' clerk, Syed Rizvi (the clerk), sold an alcoholic beverage to 19-year-old Yvonne Gonzalez. Although not noted in the accusation, Gonzalez was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on March 11, 2014, documentary evidence was received and testimony concerning the sale was presented by Gonzalez (the decoy) and by Jesus Camacho, an officer with the LAPD.

Testimony established that on August 16, 2013, Officer Camacho entered the licensed premises in an undercover capacity and stood near the coolers. A short time later the decoy also entered, went to the coolers, and selected a can of Bud Light beer, which she took to the counter. One or two people were ahead of her in line. When it was her turn, the clerk scanned the beer and asked to see her identification. The decoy handed the clerk her California driver's license, which had a vertical orientation and contained a red stripe indicating "AGE 21 in 2015." The clerk swiped the ID through the register and completed the sale without asking any age-related questions. Officer Camacho observed the transaction. After the decoy paid she exited with the beer. Officer Camacho also exited.

The decoy and LAPD officers re-entered the premises and went to the counter where the clerk was waiting on customers. The officers identified themselves and asked the clerk to step away from the register. The officers explained the violation to the clerk, and the clerk stated that he had checked the decoy's identification. The

officers then asked the decoy to identify the person who had sold her the beer. The decoy pointed to the clerk and stated that he had. A photo was taken of the clerk and decoy, then the clerk was issued a citation.

The Department's decision determined that the violation charged had been proven and that no defense had been established. In light of appellants' lengthy period of discipline-free licensure, the ALJ imposed a mitigated penalty of ten days' suspension, with all ten days stayed on the condition that no cause for discipline occur in the following year.

Appellants then filed an appeal contending the face-to-face identification of the clerk did not comply with rule 141(b)(5).²

DISCUSSION

Appellants contend that the face-to-face identification did not comply with rule 141(b)(5).³ They allege that the ALJ "improperly ignores the minor decoy's testimony, as related to the face to face identification, and solely relies on the testimony of a police officer involved in the operation without adequately considering the evidence that detracts from the officer's testimony." (App.Br. at p. 2.) They contend that, based on the decoy's testimony, no face-to-face identification of the clerk was made.

The ALJ made the following finding about the face-to-face identification:

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.

³Rule 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.

8. Outside, Gonzalez met up with various officers. The group of them entered the Licensed Premises and went to the counter where Rizvi was dealing with some patrons. The officers identified themselves and asked him to step away from the register, which he did. The officers explained the violation to Rizvi, who stated that he had checked Gonzalez's ID. The officers asked Gonzalez to identify the person who sold her the beer. Gonzalez pointed to Rizvi and stated that he had.^[fn.] A photo of the two of them was taken (Exhibit 4), after which Rizvi was cited.

(Findings of Fact ¶ 8.)

The ALJ addresses the discrepancies between the decoy's testimony and that of Officer Camacho in footnote 2 of the Proposed Decision:

The findings relating to the identification are based on the testimony of Ofcr. Camacho, who testified in a clear, straightforward manner. Gonzalez's testimony, although clear on most facts, waived *[sic]* when describing the identification. On direct, her testimony matched that of Ofcr. Camacho. On cross-examination, however, she indicated that the identification took place before the officers contacted Rizvi. On re-direct, she reiterated that she identified Rizvi upon first re-entering the Licensed Premises, then testified that she may have identified him a second time after the officers contacted im. Given these variations, Gonzalez's testimony on this point is rejected.

(Findings of Fact ¶ 8, fn. 2.)

Officer Camacho testified as follows about the face-to-face identification of the clerk by the decoy:

[MS. WINTERS]

Q. When you went back into the store, where did you go?

A. I believe I went near the register area.

Q. Who was with you when you returned to the store?

A. Sergeant Brown.

Q. Was the decoy with you?

A. Yes.

Q. And when you returned to the register area was the clerk there?

- A. Yes.
- Q. What happened when you got to the register area?
- A. I believe he was attending customers.
- Q. And so what happened?
- A. So we identified ourselves and called him back toward us.
- Q. When you say called him back toward you, what do you mean?
- A. Away from the register from the other customers.
- Q. Did you identify who you were?
- A. Yes.
- Q. So where did you move him to?
- A. To the rear of the register area.
- Q. And who was — when he moved to the rear of the register area, who was in that area besides you and the clerk?
- A. My supervisor, Sergeant Brown, and the minor.
- Q. Okay. And when you moved the clerk, what happened next? Well, let me ask you this. Did you explain to him why you were there?
- A. Yes.
- Q. What did you tell him?
- A. That we were LAPD officers and he had just sold alcohol to the minor.
- Q. And then what happened next?
- A. He told us that he checked her license and then, I think he made another statement, but I don't recall what that statement was.
- Q. Did you ask [the decoy] to identify the person who sold her the alcohol?

A. Yes.

Q. How did that take place?

A. We asked her who sold her the alcohol and then she advised us that he had sold it.

Q. And when she said that he had sold the alcohol, did she physically point at him?

A. Yes.

(RT at pp.38-40.)

On direct examination the testimony of the decoy was as follows:

[MS. WINTERS]

Q. When you went back in with the officers, at some point were you asked to identify the clerk?

A. Yes.

Q. Where did that the [sic] identification take place?

A. In the same store. The officers pulled him aside in the same store.

Q. They pulled him aside from the counter?

A. Yes.

Q. And when you were asked to identify the clerk, how far apart were you standing?

A. A couple of feet.

Q. And when you were asked to identify the clerk, did you say or do anything?

A. The officers asked me what happened. But that's about it.

Q. Did they ask you who sold you the beer?

A. Yes.

Q. What did you say or do?

- A. I told them who sold me the beer.
- Q. Did you point at that person?
- A. Yes, I did.
- Q. I am going to have you look at Exhibit 4. Do you recognize that?
- A. Yes.
- Q. What is that a picture of?
- A. Me and the guy who sold me the beer.
- Q. And what are you holding in your hand?
- A. The beer.
- Q. And you said that's the person who did sell you the beer?
- Q. Yes.

(RT at pp. 12-13.)

On cross examination, the decoy testified as follows:

[MS. CARR].

- Q. And at that time immediately upon reentering with the officers, what happened?
- A. When we entered the store with the officers, the officers pulled him aside. Pulled the clerk aside and they started asking him questions of what had happened.
- Q. Were you present with the officers at that time?
- A. Yes.
- Q. And were you close enough to the officers and the clerk to hear a conversation, if any, between the officers and the clerk?
- A. Yes.
- Q. Do you recall if there was a conversation?

- A. There was a conversation. They just asked what had happened. They told him that if he knew I was not 21. They asked him if he knew what he had done.
- Q. And then did the officers ask you to identify the seller of the alcoholic beverage?
- A. Yes.
- Q. At that time, you identified the clerk?
- A. Well, first I identified the clerk because when we stepped in the store they asked me if it was him and I said, yes. And that's when they pulled him aside.
- Q. So when you first reentered and the officers asked you to identify the clerk, was that in the presence of the clerk or was that for you to simply inform the officers who had sold you the alcoholic beverage?
- A. It was in the presence of the clerk.
- Q. And at that time, were you a couple feet away from the clerk?
- A. Yes.
- Q. And where did that identification take place?
- A. Aside from the cash register.
- Q. So had the officers upon immediately — upon reentering had the officers asked the clerk to step outside then asked you to identify the seller?
- A. No. They first asked me to identify him and then they pulled him aside.
- Q. But the identification, your identification of him took place away from the register?
- A. While we were entering the store.
- Q. Okay. I just want to be clear for the record. So when you entered the store with the three officers, you and the three officers approached the counter; is that right?

A. Yes.

Q. And the clerk was there; is that correct?

A. Yes.

Q. And he was at the register?

A. Yes. He was attending other customers from the store.

Q. Okay. He was helping customers?

A. Uh-huh.

Q. And at that time, did one of the officers ask you to identify the person who had sold you the alcoholic beverage?

A. Yes.

Q. And at that time, is that when you pointed and said he did or words to that effect? The clerk that was behind the register?

A. Yes.

Q. And at that time, the clerk was helping customers?

A. Yes.

Q. And then later the officers asked the clerk to move away from the register?

A. Yes.

Q. And you accompanied the officers to that location as well?

A. Yes.

Q. And is that where the photograph that is depicted in Exhibit 4 was taken?

A. Yes.

Q. At any time when you, the officers, and the clerk moved away from the register, did you then re-identify the clerk?

A. No.

Q. So the only identification took place at the register upon immediately reentering while the clerk was helping the customers?

A. Yes.

(RT at pp. 25-28.)

On re-direct the decoy testified as follows:

[MS. WINTERS].

Q. And then, you reentered with the officers; is that correct?

A. Yes.

Q. And you said when you reentered, they asked you who sold you the beer?

A. Yes.

Q. And you pointed to the clerk; correct?

A. Yes.

Q. And then you moved away from the register area?

A. Yes.

Q. And the clerk moved with you?

A. Yes.

Q. And weren't you asked again who sold you the beer?

MS. CARR: Objection. Leading.

ADMINISTRATIVE LAW JUDGE: Overruled.

BY MS. WINTERS:

Q. Do you understand the question?

A. Yes. They did ask me again I guess to verify that he was the man who sold me the beverage. Obviously, when we entered the store, they asked me and they probably asked me again, but I probably don't remember. But, yes, that is obviously him.

- Q. Well, in the photograph, why are you pointing at the clerk?
- A. They asked me to step aside and take a picture pointing at him with the beer. I guess so they could see that he was the one who sold me the beverage.

(RT at pp. 32-33.)

Appellants assert that “[b]ecause the minor decoy’s testimony was based on her memory, observations, and/or perception of the events, as related to the face to face identification, the Administrative Law Judge must find her testimony credible.” (App.Br. at p. 7.) This is incorrect. It is a fundamental precept of appellate review that it is the province of the administrative law judge, as trier of fact, to make determinations as to witness credibility and to resolve any conflicts in the testimony. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

Appellants are asking the Board to ignore the findings of the ALJ and the testimony of the officer, to reweigh the evidence, and to resolve conflicts in the manner most favorable to appellants’ position. This is exactly contrary to what the Board is authorized to do by the California Constitution and the Alcoholic Beverage Control Act.

The Appeals Board's review of the decision is strictly limited: the Board must determine whether the Department's findings of fact are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any

evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

It is the province of the trier of fact — i.e., the ALJ — to resolve conflicts in the evidence, and the Board is bound to accept the Department's findings unless they are patently unreasonable. We have carefully reviewed the entire record and are satisfied that the decision, its findings, and the ALJ's determinations are supported by substantial evidence.

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.