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

AB-9451
File: 20-368292 Reg: 14079743

7-ELEVEN, INC., LAZERES P. CORREIA, and RONA CORREIA,
dba 7-Eleven Store #2171-27678
14519 Main Street, Suite A, Hesperia, CA 92345,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 5, 2015
Los Angeles, CA

ISSUED FEBRUARY 24, 2015

7-Eleven, Inc., Lazeres P. Correia, and Rona Correia, doing business as 7-Eleven Store #2171-27678 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 10 days, with all 10 days stayed subject to one year of discipline-free operation, because their clerk sold an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellants 7-Eleven, Inc., Lazeres P. Correia, and Rona Correia, through their counsel, Ralph Barat Saltsman and Margaret Warner Rose of the law firm of 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 June 18, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on September 12, 2000. On March 27, 2014, the Department filed an accusation against appellants charging that, on May 17, 2013, appellants' clerk, Gurvinder Kaur (the clerk), sold an alcoholic beverage to eighteen-year-old Kyle Taylor Maza. Although not noted in the accusation, Maza was working as a minor decoy in a joint operation between the San Bernardino County Sheriff's Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on April 23, 2014, documentary evidence was received and testimony concerning the sale was presented by Maza (the decoy), and by Scott LaFond, a deputy for the San Bernardino County Sheriff's Department. Also, appellant presented the testimony of Lazeres Correia, a co-owner of the licensed establishment.

Testimony established that, on the date of the operation, the decoy entered the licensed premises alone and proceeded to the beer coolers where he selected a 40-ounce bottle of Bud Light beer. He took the beer to the sales counter and waited behind four people who were in line ahead of him. When it was his turn to be served, the decoy placed the beer on the sales counter. The clerk rang up the beer, stated the purchase price, took the money tendered by the decoy, provided the decoy with change, and then bagged the beer. The clerk then asked the decoy for identification. The decoy handed the clerk his California Identification Card which indicated the decoy's true date of birth, 11/08/1994, and contained a red stripe indicating "AGE 21 IN 2015," and a blue stripe indicating "AGE 18 IN 2012." The clerk took the identification

card, looked at it for a few seconds, and returned it to the decoy without asking any age-related questions. The decoy exited the premises with the beer.

The Department's decision determined that the violation charged was proved and no defense was established. However, in light of appellants' length of licensure without any disciplinary action, the Department imposed a conditional, all-stayed penalty.

Appellants then filed an appeal contending rule 141(b)(2)[2] was violated because the administrative law judge (ALJ) failed to make adequate factual findings regarding the decoy's experience as a Police Explorer and the effect that it had on his overall appearance. In the same portion of their brief, appellants also argue that in order for the Board to properly assess whether such attributes were adequately considered, the decoy himself must appear before the Board. These two contentions will be discussed in separate sections below.

DISCUSSION

I

Appellants contend that the ALJ erred in failing to make findings concerning the decoy's experience as a police Explorer and the effect it had on his overall appearance. (App.Br. at pp. 3-4.) They maintain that such extensive experience is unusual among teenagers, and that the general population would not expect an average teenager to carry themselves with the authority and confidence that comes with it. (*Id*. at p. 4.) By condoning the use of such "professional decoys," appellants

[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.

contend, the Department departs from the principle that minor decoy operations are "intended to determine and penalize only the lax, ambivalent, and intentionally unlawful licensee." (*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." This rule provides an affirmative defense, and the burden of proof lies with the party asserting it. (*Chevron Stations, Inc*. (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

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 his demeanor:

> C. The overall appearance of the decoy including his demeanor, his poise, his mannerisms, his size and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that he was one inch taller and five pounds heavier on the day of the hearing.
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> 1. The decoy is a very youthful looking male who was clean-shaven on the day of the sale. He was five feet six inches in height, he weighed one hundred forty pounds and his hair was fairly short. His clothing consisted of the same gray shorts and red T-shirt that he wore to the hearing. He was also wearing a watch on the day of the sale which he was not wearing on the day of the hearing. The photographs depicted in Exhibits 3 and 5 were taken at the premises on the day of the sale. Both of these photographs show how the decoy looked and what he was wearing on the day of the sale.
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> 2. The decoy had participated in one prior decoy operation and he had been a volunteer Explorer since 2010. As an Explorer, the decoy went on police ride-alongs and he helped with community events such as parades.
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> 3. The decoy testified that he probably visited seventeen to twenty licensed premises on the day of the subject sale and that he believes that he was able to purchase an alcoholic beverage at a total of two locations. Deputy Lafond testified that the decoy visited twelve to fifteen licensed premises and that he believes that the decoy was only able to purchase an alcoholic beverage at the subject premises.
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> 4. There was nothing remarkable about the decoy’s nonphysical appearance and there was nothing about the decoy’s speech, his mannerisms or his demeanor that made him appear older than his actual age.
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> 5. The clerk who sold beer to the decoy did not testify at the hearing.
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> 6. After considering the photographs depicted in Exhibits 3 and 5, the overall appearance of the decoy when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance that could generally be expected of a

> person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

(Findings of Fact, ¶¶ II.C.1-6.) The ALJ went on to reject appellants' rule 141(b)(2) arguments. (See Determination of Issues II.)

Appellants' arguments on this point fail for several reasons. First, this Board has on countless occasions rejected the "experienced decoy" argument proffered by appellants in this case. (See, *e.g.*, *7-Eleven, Inc./F & R Enterprises, Inc*. (2014) AB-9379; *Azzam* (2001) AB-7631.) As the Board has observed:

> 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.

(*Azzam*, *supra*, at p. 5.)

Next, appellants' contention that the ALJ's "utter lack of connection between the determination on 141(b)(2) compliance and the record was an abuse of discretion" (App.Br. at p. 4) is simply without merit. The ALJ made extensive findings concerning the decoy's physical appearance, nonphysical appearance, experience, and demeanor. Given those findings, there is no requirement that he explain the reasoning behind his determination that there was compliance with rule 141(b)(2).[3] (See *Garfield Beach*

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[3]We note that, although appellants have failed to cite the case in their brief, they are essentially raising the same argument that has previously been raised by appellants' counsel under *Topanga Association for a Scenic Community v. County of Los Angeles* (*Topanga*) (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836], and that has time and again been rejected by this Board. Given the Board's obvious distaste and lack of patience for attempts to extend *Topanga* to situations such as this, the strategic decision by appellants' counsel to omit reference to the case in their brief is understandable. That said, merely disguising an otherwise bogus argument by failing to cite the case from which it originates does not make that argument any more

CVS, LLC (2013) AB-9236, at pp. 3-4; *Garfield Beach CVS, LLC* (2013) AB-9255, at p. 4.) Moreover, appellants' mere disagreement with the determinations made by the ALJ concerning the decoy's appearance and apparent age does not render those determinations an abuse of discretion. Also, an ALJ need not provide a laundry list of factors he found inconsequential. (See, e.g., *7-Eleven, Inc./Samra* (2014) AB-9387, at p. 9; *7-Eleven, Inc./Convenience Group, Inc.* (2014) AB-9350, at p. 4.)

Finally, by claiming that the ALJ is required to make additional findings explaining the effect the decoy's experience had or may have had on his apparent age, appellants are essentially asking this Board to shift the burden of proof for appellants' own affirmative defense to the Department — something this Board cannot do. As is evident from the language quoted above from *Azzam*, *supra*, the burden is properly placed on appellants to present evidence and analysis which establish that the decoy's experience resulted in an actual observable effect on the decoy's appearance by making him look older. Appellants here have not explained how the decoy's law enforcement experience resulted in him appearing older, and merely recite their conclusion that "extensive experience with law enforcement is unusual among teenagers; the general population would not expect an average teenager to carry themselves with the authority and confidence that comes with such experience and thus [*sic*] can result in a trick upon licensees and their employees." (App.Br. at p. 4.) Suffice it to say, because they have presented no actual evidence or analysis to support their conclusion in this case, appellants have failed to carry their burden here.

II

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meritorious.

Appellants contend that, in order for the Board to conduct an adequate review of the Department's decision, the decoy himself must appear before the Board. (App.Br. at pp. 4-5.)

Appellants' argument is merely a more succinct version of the decoy-as-evidence argument we addressed at length — and firmly rejected — in *Chevron Stations* (2015) AB-9415. (See also *7-Eleven, Inc./Niaz* (2015) AB-9427; *7-Eleven, Inc./Jamreonvit* (2015) AB-9424; *7-Eleven, Inc./Assefa* (2015) AB-9416.) We offer only a summary of our reasoning here, and refer appellants to *Chevron Stations*, *supra*, for a more comprehensive analysis.

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 noted in *Chevron Stations*, *supra*, this argument has no merit and wholly lacks support in either law or logic. In our previous decisions addressing this issue, we strongly encouraged appellants to seek a writ of appeal if they disagree. During oral argument for this appeal, counsel for appellants informed the Board that they are indeed pursuing a writ at this time. That established, until such time as a higher

authority definitively resolves this issue, we do not wish to see this argument again.

ORDER

The decision of the Department is affirmed.[4]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]This final decision 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 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.