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

**AB-9453**
File: 20-336784; Reg: 14079973

7-ELEVEN, INC., JOHN HYUN SHIN, and YUN SOOK SHIN,
dba 7-Eleven #2175-18283
1723 West Main Street, Alhambra, CA 91801,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

**ISSUED FEBRUARY 23, 2015**

7-Eleven, Inc., John Hyun Shin, and Yun Sook Shin, doing business as 7-Eleven #2175-18283 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 5 days, all stayed provided appellants complete one year of discipline-free operation, 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., John Hyun Shin, and Yun Sook Shin, through their counsel, Ralph Barat Saltsman and Margaret Warner Rose 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 June 26, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 26, 1997. On February 19, 2014, the Department filed an accusation against appellants charging that, on October 24, 2013, appellants' clerk, Davinoer Singh (the clerk), sold an alcoholic beverage to 19-year-old Nery Rodriguez. Although not noted in the accusation, Rodriguez was working as a minor decoy for the Alhambra Police Department at the time.

At the administrative hearing held on May 8, 2014, documentary evidence was received and testimony concerning the sale was presented by Rodriguez (the decoy) and by Jasper Kim, an Alhambra Police Department officer. Appellants presented no witnesses.

Testimony established that on the day of the operation, the decoy entered the licensed premises alone, followed a short time later by Officer Kim. The decoy went to the coolers and selected a six-pack of Bud Light beer which he took to the register. The decoy put the beer down, and the clerk asked for his identification. The decoy tried to hand the clerk his California driver’s license (Exhibit 2), but the clerk did not take it. Instead, the clerk glanced at the identification as it was being held out, told the decoy the price of the beer, and completed the sale. The decoy exited with the beer.

Officer Kim contacted the clerk, identified himself, and explained the violation. The decoy re-entered the premises accompanied by another officer and they joined Kim at the counter. Kim asked the decoy who sold him the beer. The decoy pointed at the clerk and said that he had. The two of them were approximately three feet apart and facing each other across the counter at the time. A photo was taken (Exhibit 3) after which 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.

Appellants then filed a timely appeal contending: (1) the decoy should be required to appear before the Appeals Board, and (2) the findings regarding rule 141(b)(2)[2] are not supported by substantial evidence.

DISCUSSION

I

Appellants contend that decoy must appear in person before the Board in order for the Board to conduct an adequate review of the Department's decision.

Appellants are simply raising the same 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 administrative law judge's (ALJ) firsthand impressions — is both

[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.

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, and counsel at oral argument indicated that such a writ is forthcoming. Until such time as a writ is granted and this matter is resolved by an appellate court, we do not wish to see this argument again.

II

Appellants contend that the proposed decision fails to mention key facts showing that the decoy's experience had an observable effect on his apparent age, and that therefore the Department's findings — affirming a conclusion that the decoy met the appearance standard set forth in rule 141(b)(2) — are not supported by substantial evidence. (App.Br. at p. 8.)

This Board is bound by the factual findings in the Department's decision if 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. [Citations.] 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. [Citations.] 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 1439, 1437 [13 Cal.Rptr.3d 826].)

Rule 141, subdivision (b)(2), restricts the use of decoys based on appearance:

> 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 Board has rejected the "experienced decoy" argument many times. As we noted in *Azzam* (2001) AB-7631:

> 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. . . . 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.

(*Id.* at p. 5, emphasis in original.)

This Board has further noted that:

> An ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJ's are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.)

In the decision below, the ALJ made the following findings of fact regarding the decoy's appearance:

> 5. Rodriguez appeared and testified at the hearing. On October 24, 2013, he was 5'2" tall and weighed 130 pounds. He wore a blue and white t-shirt with a dark-colored jacket over it, khaki jeans, and black tennis shoes. He wore a black watch on one wrist and a black and blue bracelet on the other. His hair was short and parted on the side. (Exhibits 3 & 4.) His appearance at the hearing was the same, except that he was five pounds heavier.
>
> [¶ . . . ¶]
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> 8. October 24, 2013 was the second time that Rodriguez volunteered as a decoy. Two of the eight locations he visited on that date sold alcoholic

> beverages to him. He learned of the decoy program through his involvement in the Explorer program. He had been an Explorer for approximately one year as of the [*sic*] October 24, 2013. As an Explorer, he helped out in the community and at the station. He went to an Explorer academy, during which time he learned about the penal code, learned radio codes, and underwent physical training.
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> 9. Rodriguez 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 Singh at the Licensed Premises on October 24, 2013, Rodriguez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Singh.

(Findings of Fact ¶¶ 5, 8-9.) Based on these findings, the ALJ reached the following conclusion of law:

> 7. With respect to rule 141(b)(2), the Respondents argued that Rodriguez's physique, his training and experience, and his mature face made him appear to be over the age of 21. They did not. Although Rodriguez worked out, there was nothing unusual about his physique — he simply looked like he was in shape. As already noted, Rodriguez had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 9.)

(Conclusions of Law ¶ 7.)

Here, the ALJ specifically acknowledged the decoy's training and experience and rejected the contention that they made him appear older. The fact that the ALJ did not expressly consider Officer Kim's testimony, that the clerk told him "he believed he [the decoy] was of age" (RT at p. 60), does not render the ALJ's determination an abuse of discretion as appellants allege. The clerk did not testify, so the inference that the clerk said this because of the "observable effect" of the decoy's experience is mere conjecture. Further, 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 cannot 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.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity to observe the decoy as he testifies, and make 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.

We see no flaw in the ALJ's findings or determinations. Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. This we cannot do.

ORDER

The decision of the Department is affirmed.[3]

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

[3]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.