

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

AB-9461

File: 20-484814; Reg: 14079852

7-ELEVEN, INC., JASVINDER KAUR VIRK, and MUNINDER SINGH VIRK,
dba 7-Eleven Store #2133-18828
1017 North Broadway, Santa Maria, CA 93454-3133,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED MARCH 24, 2015

7-Eleven, Inc., Jasvinder Kaur Virk, and Muninder Singh Virk, doing business as 7-Eleven Store #2133-18828 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days 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., Jasvinder Kaur Virk, and Muninder Singh Virk, 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, Kerry K. Winters.

¹The decision of the Department, dated July 24, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 26, 2010. On January 24, 2014, the Department filed an accusation against appellants charging that, on October 26, 2013, appellants' clerk, Ranjen Matthews (the clerk), sold an alcoholic beverage to 18-year-old Megan Love. Although not noted in the accusation, Love was working at the time as a minor decoy in a joint operation with the Santa Maria Police Department and the Department of Alcoholic Beverage Control.

At the administrative hearing held on June 18, 2014, documentary evidence was received and testimony concerning the sale was presented by Love (the decoy) and by Ronald Murillo, a Santa Maria police officer. Appellants presented no witnesses.

Testimony established that on the day of the operation, the decoy entered the licensed premises alone and went to the coolers where she selected a six-pack of Bud Light beer. She took the beer to the counter, and the clerk asked to see her identification. The decoy handed the clerk her California driver's license, which had a vertical orientation and indicated her correct date of birth — 04/16/1995. It also contained a red stripe indicating "AGE 21 IN 2016." The clerk swiped the ID, then stated that the machine was not working. He told her the price of the beer, then completed the sale without asking any age-related questions.

The decoy exited, then returned with two police officers and an ABC agent to identify the individual who had sold her the beer. A face-to-face identification of the clerk was made, after which the clerk was cited.

October 26, 2013 was the first time Love had acted as a decoy. She visited 17 locations on that date, and two of them sold alcohol to her — including the subject premises.

The Department's decision determined that the violation charged had been proven and no defense had been established.

Appellants then filed a timely appeal contending the administrative law judge (ALJ) failed to proceed in the manner required by law when making findings on whether there was compliance with rule 141(b)(2).²

DISCUSSION

Appellants contend that the ALJ failed to proceed in the manner required by law by focusing exclusively on the decoy's physical characteristics and ignoring her non-physical characteristics when making findings on whether there was compliance with rule 141(b)(2).

This Board is bound by the factual findings in the Department's decision as long as they 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. [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].) When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an

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.

inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; see also 6 Witkin, Cal. Procedure (2d ed. 1971) *Appeal*, § 245, pp. 4236-4238.)

The issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].)

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 for which the burden of proof lies with appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

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

5. Love appeared and testified at the hearing. On October 26, 2013, she was 5'5½" feet [*sic*] tall and weighed 140 pounds. She wore a superhero t-shirt, jeans, sneakers, and a white watch. Her hair was long and parted in the middle. She was not wearing any make-up. (Exhibit 2.) Her appearance at the hearing was the same, except that she was five pounds lighter.

[¶ . . . ¶]

10. Love appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of the clerk at the Licensed Premises on October 26, 2013, Love displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk.

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

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)^[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Love’s experience as a softball player gave her an athletic build which made her appear to be over the age of 21. It did not. Although Love was in shape, there was nothing about her appearance which made her appear to be older than her actual age — 18. In short, Love had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

(Conclusions of Law ¶ 5.)

Appellants contend the ALJ’s proposed decision fails to include “specific facts on any other facets of her appearance, such as her poise, demeanor, and mannerisms either during the operation or during her testimony.” (App.Br. at p. 5, emphasis in original.) The ALJ, however, is not required to 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). Nor, as the Board has said many times, is there a requirement that the ALJ explain his reasoning ad nauseam. Simply because the ALJ does not explain all of his reasons for a decision does not invalidate his determination or constitute an abuse of discretion. (See *Garfield Beach* (2014) AB-9430.)

One of the cases cited by appellants — for the proposition that an ALJ’s opinion

must include a discussion of the decoy's poise, demeanor, maturity and mannerisms — was one which literally presented no findings of fact whatsoever about the decoy's appearance, and nevertheless reached the following conclusion:

Respondent argued that there was a violation of the Department's Rule 141(b)(2). This argument is rejected. There is no evidence that the nineteen-year old decoy appeared twenty-one years old to Respondent's clerk, or to anyone else.

(*Circle K Stores, Inc* (2010) AB-8919, Department Decision, Determination of Issues II.)

Another case cited by appellants, for the same proposition, was one which presented only minimal findings, and nothing about the decoy's non-physical characteristics:

1. Although [the minor] was six feet in height and weighed approximately 150 pounds as of December 20, 1996, he is a youthful looking male, whose physical appearance is such as to reasonably be considered as being under twenty-one years of age and who would reasonably be asked for identification to verify that he could legally purchase alcoholic beverages. The minor's appearance at the time of his testimony was substantially the same as his appearance at the time of the sale which occurred on the licensed premises on December 20, 1996, except that he was about ten pounds lighter as of the date of the hearing.

(*Circle K Stores* (1999) AB-7122, Department Decision, Findings of Fact ¶ 1.)

The case before us, however, does not present the same lack or paucity of findings as these cases. Here, the ALJ *does* make findings on the physical and non-physical characteristics of the decoy, which led him to conclude there was compliance with rule 141(b)(2). Appellants have provided no valid basis for the Board to question his 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 when, as here, it is supported by substantial evidence. We must do so here as well.

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

³This 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.