

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

AB-9465

File: 20-505663; Reg: 14080048

7-ELEVEN, INC. and HAVEN PETROLEUM, INC.,
dba 7-Eleven Store #2171-39453
2200 South Haven Avenue, Unit A,
Ontario, CA 91761-0739,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED MARCH 24, 2015

7-Eleven, Inc. and Haven Petroleum, Inc., doing business as 7-Eleven Store #2171-39453 (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 police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellants 7-Eleven, Inc. and Haven Petroleum, Inc., 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.

¹The decision of the Department, dated July 30, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 12, 2011. On May 12, 2014, the Department filed an accusation against appellants charging that, on November 7, 2013, appellants' clerk, Domenica Flores (the clerk), sold an alcoholic beverage to 18-year-old Edgar Rebollar. Although not noted in the accusation, Rebollar was working as a minor decoy for the Ontario Police Department at the time.

At the administrative hearing held on June 17, 2014, documentary evidence was received and testimony concerning the sale was presented by Rebollar (the decoy) and by Robert Sturgis and Steven Munoz, Ontario Police officers. Appellants presented no witnesses.

Testimony established that on the day of the operation, the decoy entered the licensed premises alone. He went to the beer coolers, where he selected a six-pack of Bud Light beer in cans. He took the beer to the sales counter, and the clerk asked for his identification. The decoy handed the clerk his California driver's license containing his correct date of birth, showing him to be 18 years old, and bearing a red stripe indicating "AGE 21 IN 2016." The clerk swiped the license through a card reading machine two times, but did not ask the decoy any questions. The clerk stated the price and completed the sale. The decoy then exited the licensed premises with the beer.

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: (1) the decoy must appear in person before the Appeals Board, and (2) the decoy operation did not comply with rule

141(b)(2).²

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 and numerous subsequent cases. We offer only a summary of our reasoning here, and refer appellants to *Chevron Stations* 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 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. At oral argument, counsel for appellants confirmed that a writ has been sought in another

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.

matter in which they raised this issue. We anxiously await an ultimate appellate determination of this issue; until that time we will continue to reject it for reasons explained here in summary form and at length in our aforementioned decisions.

II

Appellants contend that the decoy operation violated rule 141(b)(2) because of the decoy's height, his law enforcement training, and his visible facial hair. Appellants maintain the Department did not proceed in the manner required by law when it failed to make findings on the decoy's demeanor and non-physical attributes.

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].)

It is the task of 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, 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.

The rule provides an affirmative defense, and the burden of proof lies with the appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

The ALJ made the following findings regarding the decoy's appearance, experience, training, and 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 the decoy did not shave before the decoy operation and the photographs depicted in Exhibits 2-A and 2-B show what is generally referred to as a "five o'clock shadow" over the decoy's upper lip. However, these two photographs are quite dark as compared to Exhibit 3 which was taken at the premises. The shadow over the decoy's upper lip is much less evident in Exhibit 3.

1. The decoy is a youthful looking male who was five feet eleven inches in height and who weighed 150 pounds on the day of the sale. On that day, his hair was relatively short and he appeared clean-shaven. His clothing consisted of jeans, a white T-shirt and a black jacket. The photograph depicted in Exhibit 3 was taken at the premises and the photographs depicted in Exhibits 2-A and 2-B were taken at the police station on the day of the sale prior to going out on the decoy operation. All three of these photographs show how the decoy looked and what he was wearing on the day of the sale.

2. The decoy had participated in approximately three or four prior decoy operations and he went to multiple locations on each decoy operation. The decoy had also served as a police Explorer with the Ontario Police Department for approximately eleven months prior to the date of the subject sale. As an Explorer, he attended meetings three times per month and he received training regarding gang units, traffic safety and CPR. He also received physical training.

[¶]

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.

[¶]

6. After considering the photographs depicted in Exhibits 2-A, 2-B and 3, 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 .)

Appellants suggest that the decoy's law enforcement training made him appear less nervous at the premises. However, their assertion that the decoy did not appear nervous at the time of the sale is mere speculation, since the clerk did not testify, and is bolstered only by the decoy's testimony that he was only a little nervous when he first started serving as a decoy and had become less so by the time of the incident at hand. (RT at p. 26.) Whether or not this resulted in his appearing older to the clerk is mere conjecture on their part. Whether he did or did not appear nervous, as this Board has observed, "[n]ervousness, or lack thereof, is only one consideration, to be balanced against such other considerations as overall appearance, demeanor, manner of dress, manner of speaking, physical movements, and the like." (*7-Eleven Inc./Kaur* (2012) AB-9202, at p. 4.)

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.)

With regard to the decoy's physical stature, we have repeatedly declined to substitute our judgment for that of the ALJ on this particular question of fact. Minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys who are 5'11" tall automatically violate the rule. (See, e.g., *Garfield Beach* (2014) AB-9382; *7-Eleven Inc./Lobana* (2012) AB-9164.) This Board has noted that

[a]n 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.)

Finally, appellants maintain that the decoy "sported facial hair on his upper lip during the operation" which made the operation unfair. (App.Br. at p. 10.) They contend "decoy operations should not be interpreted as a draconian scheme to catch each and every licensee regardless of the circumstances surrounding the sale. The use of male decoys sporting facial hair has been regarded by the Board as [sic] violating these required notions of fairness." (App.Br. at p. 9, citing *Assaedi* (1999) AB-7144.)

In the case cited by appellants, the decoy had a mustache, and was 6'1½" tall. The Board reversed, however, not because of the mustache, but because the ALJ made improper findings — finding that the decoy looked older than his age, but not over the age of 21. The Board also reversed the Department's decision in *Southland Corp./Samra* (2000) AB-7320, where the decoy displayed a goatee and was 6'1" tall.

However, in that case, the decoy had shaved off his goatee by the time of the administrative hearing — making it difficult for the ALJ to make findings on the appearance of the decoy as he had appeared during the sale. In the instant case, the decoy did not display a mustache or goatee, but rather had a faint five o'clock shadow on his upper lip, as noted above. (Finding of Fact ¶ II.C.) The ALJ made an express finding that the decoy displayed the appearance that could be expected generally of a person under 21 years of age, after having observed the decoy as he testified and after having heard and considered essentially the same arguments made by appellants on appeal. He considered the effect of this five o'clock shadow, in addition to the arguments regarding law enforcement training and the decoy's height, but concluded that these factors did not make the decoy look substantially different on the day of the violation than he did at the hearing, nor did they make him appear to be over the age of 21.

Altogether, appellants have provided no valid basis for the Board to question the ALJ's 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 in light of the whole record. 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.