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

AB-9477
File: 20-422213; Reg: 14080411

7-ELEVEN, INC. and NRG CONVENIENCE STORES, INC.,
dba 7-Eleven Store #2175-13837E
425 East Broadway, Glendale, CA 91205,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 7, 2015
Los Angeles, CA

ISSUED MAY 19, 2015

7-Eleven, Inc. and NRG Convenience Stores, Inc., doing business as 7-Eleven Store #2175-13837E (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 10 days, with 5 days conditionally stayed provided appellants complete one year of discipline-free operation, because their clerk sold an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellants 7-Eleven, Inc. and NRG Convenience Stores, Inc., appearing through their counsel, Ralph Barat Saltsman and Margaret Warner Rose of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated October 14, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 24, 2005. On April 30, 2014, the Department filed an accusation against appellants charging that, on January 15, 2014, appellants' clerk, David Martines (the clerk), sold an alcoholic beverage to 18-year-old Jamie Lee Taylor. Although not noted in the accusation, Taylor was working at the time as a minor decoy for the Department of Alcoholic Beverage Control.

At the administrative hearing held on August 21, 2014, documentary evidence was received and testimony concerning the sale was presented by Taylor (the decoy) and by Ricardo Carnet, a Department agent.

Testimony established that on the day of the operation the decoy entered the licensed premises alone. She went to the beer coolers where she selected a can of Budweiser beer. She took the beer to the sales counter where she waited in line behind several customers. When it was her turn, she placed the beer on the counter. The clerk scanned the beer, punched something into the register, stated the price, and completed the sale. He did not ask the decoy for identification, her birth date, or her age. The decoy then exited the premises. Agent Carnet observed the transaction from outside the premises through a large window.

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 Department's rule 141(b)(2)[2] findings are not supported by substantial evidence, and (2) in order to

[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.

correctly review the findings the Board must view the decoy in person.

DISCUSSION

I

Appellants contend that the Department's rule 141(b)(2) findings are not supported by substantial evidence. They allege the decoy's mature physical appearance, her success rate, and her prior decoy experience do not support a finding that her appearance complied 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 inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasiveness 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.)

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the ALJ's findings on the issue of whether there was compliance with rule 141(b)(2). The ALJ made the following findings of fact regarding the decoy's appearance, demeanor and experience:

> B. The overall appearance of the decoy including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of a person under the age of twenty-one and her appearance at the time of the hearing was similar to her appearance on the day of the decoy operation except that she was approximately five pounds heavier, she was wearing some bronzer on her neck and her hair was curlier on the day of the hearing.
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> 1. The decoy is a youthful looking young lady who is five feet one inch in height and who weighed one hundred fifty pounds on the day of the sale. On that day, the decoy was wearing a black cardigan over a blue sweater, blue jeans and black tennis shoes. As far as makeup, the decoy wore the same light makeup to the hearing as she did on the day of the sale which

> consisted of foundation, powder and mascara. Exhibit 4 is a photograph that was taken at the premises and Exhibits 2 and 3 are photographs that were taken on the day of the sale prior to going out on the decoy operation. All three of these photographs depict what the decoy was wearing and how she appeared at the premises. The decoy actually looked younger in person than she did in her photographs.
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> 2. Even with light makeup, the decoy has a very youthful looking face. She was soft-spoken when she testified and she appeared to be nervous while testifying. She testified that she was nervous when she starting [*sic*] doing decoy operations, that she did not get less nervous as she did more operations and that she was less nervous testifying. There was nothing about her speech, her mannerisms or her demeanor that made her appear older than her actual age.
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> 3. The decoy had participated in more than ten prior decoy operations, and she was an Explorer with the Los Angeles County Sheriff's Department on the day of the sale. The evidence also established that the decoy was able to purchase an alcoholic beverage at six out of the ten locations she visited on January 15, 2014.
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> [¶]
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> 5. After considering the photographs depicted in Exhibits 2, 3 and 4, the overall appearance of the decoy when she testified and the way she conducted herself 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.B.1-5.)

Appellants maintain that the decoy's large physical stature made her appear older. However, 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 of large stature automatically violate the rule. (See, e.g., *7-Eleven Inc./Lobana* (2012) AB-9164, at pp. 3-4.) 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.)

Appellants argue that the ALJ gave insufficient weight to the decoy's success rate — in this case, 60 percent, with 6 out of 10 stores selling alcohol to the decoy. As appellants correctly point out, an unusually high success rate *may* trigger suspicion that the decoy's appearance does not comply with rule 141(b)(2). However, this Board has clarified that a decoy's success rate alone cannot establish a rule 141(b)(2) violation:

> Appellants rely on the Board's decision in *7-Eleven, Inc./Dianne Corporation* (2002) AB-7835 (*Dianne*), in which the Board said that the decoy's 80-percent purchase rate was a "strong indication" that the decoy's appearance did not comply with rule 141(b)(2). However, they neglect to consider the Board's more recent decision in *7-Eleven/Jain* (2004) AB-8082, in which the Board made clear that *Dianne*, *supra*, did not signify that an 80-percent purchase rate would inevitably result in finding non-compliance with rule 141(b)(2). "Such a per se rule would be inappropriate, since the sales could be attributable to a number of reasons other than a belief that the decoy appeared to be over the age of 21." (*Ibid.*)

(*7-Eleven, Inc./Aziz* (2010) AB-8980, at p. 3.)

Appellants rely in this matter once again on *Dianne, supra*, and, in spite of our previous decisions, attempt to state a per se rule: "As this Board made clear in *7-Eleven/Dianne Corporation*, not *all* persons must believe that the decoy looks old enough, just *most*." (App.Br. at p. 7.) While this Board has reversed a handful of cases in which the decoy's success rate was notably high, in all of those cases the success rate merely supplemented other indicia of error. (See *7-Eleven/Patel* (2013) AB-9237.) Here, no other error exists, and we do not believe 60 percent reaches the level of a "notably high" success rate.

Appellants also cite the decoy's law enforcement training and her experience as

a decoy as factors contributing to her mature appearance. However, this Board has on innumerable occasions rejected the "experienced decoy" argument. As we have previously 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* (2001) AB-7631, at p. 5, emphasis in original.) Appellants have presented no *evidence* that the decoy's experience *actually resulted* in her displaying an appearance of a person 21 years old or older on the date of the operation in this case. Rather, they simply rely on a difference of opinion — theirs versus that of the ALJ — as to what conclusion the evidence in the record supports. Absent an evidentiary showing, appellants' argument must fail.

We have reviewed the entire record and agree with the ALJ's determination that there was compliance with rule 141(b)(2). As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity to observe the decoy as she testifies and to make the determination whether the decoy's appearance met the requirement of rule 141 that she 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.

II

Appellants contend that in order for the Board to correctly review the sufficiency of the ALJ's rule 141(b)(2) findings, the Board must view the decoy in person. (App.Br. at pp. 7-8.)

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. On or about February 9, 2015, counsel for appellants petitioned the Second District Court of Appeal for a writ of review of our decision in *Chevron* specifically as it pertained to this issue. On April 2, 2015, following a brief stay, the court entered a final order summarily denying the petition.

Since the Court's April 2, 2015 order, counsel for appellants has filed three additional petitions for writ of review on this issue — one in the Fourth District Court of Appeal, and two more in the Second District. Both petitions for writ in the Fourth District were summarily denied by the Court on April 30, 2015. One of the two petitions for writ in the Second District was summarily denied on May 12, 2015, and we are confident that the second will soon suffer the same fate. As such, we are convinced that this argument is without merit, and counsel for appellants' repeated insistence on raising it on appeal is nothing more than a frivolous delay tactic and an all-out assault on already strained public resources. We therefore strongly urge counsel for appellants to cease this fruitless venture.

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.