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

AB-9480
File: 20-436960 Reg: 14080625

7-ELEVEN, INC. and SATWANT SINGH DHAMI,
dba 7-Eleven Store #2237-18872D
1784 West Shaw Avenue, Fresno, CA 93711,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: July 9, 2015
San Francisco, CA

ISSUED JULY 31, 2015

Appearances by counsel:

Jennifer L. Oden of Solomon Saltsman & Jamieson for appellants 7-Eleven, Inc. and Satwant Singh Dhami, dba 7-Eleven Store #2237-18872D .

Heather Cline Hoganson for respondent Department of Alcoholic Beverage Control.

This is an appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending appellants' license for 10 days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 4, 2006. On June

[1]The decision of the Department, dated December 4, 2014, is set forth in the appendix.

9, 2014, the Department filed an accusation against appellants charging that, on April 23, 2014, appellants' clerk, Kamaljit Sangha (the clerk), sold an alcoholic beverage to 19-year-old Zachary Lawley. Although not noted in the accusation, Lawley was working as a minor decoy in a joint operation between the Fresno Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on October 22, 2014, documentary evidence was received and testimony concerning the sale was presented by Lawley (the decoy). Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises and went to a cooler, where he selected a 12-pack of Bud Light beer in 12-ounce cans. He took the beer to the sales counter.

The clerk asked the decoy for identification. The decoy handed the clerk his California driver's license, which bore his correct date of birth, a red stripe reading "AGE 21 IN 2016," a blue stripe reading "PROVISIONAL UNTIL AGE 18 IN 2013," and a vertical orientation indicating that the holder is a minor. The clerk took possession of the license and appeared to look at it for a few seconds, then handed it back to the decoy. The clerk then told the decoy the price of the beer. The decoy paid for the beer, received his change, and exited the premises with the beer.

The clerk did not ask any age-related questions, nor did he ask any questions about the decoy's identification.

The Department's decision determined that the violation charged was proved and no defense was established. In light of the fact that appellants have been discipline-free since 2007, a mitigated penalty of ten days' suspension was imposed.

Appellants then filed an appeal contending the administrative law judge (ALJ)

ignored evidence of the decoy's experience both as an Explorer and as a decoy on a number of previous operations.

DISCUSSION

Appellants argue that the ALJ failed to proceed in the manner required by law by omitting discussion of the decoy's experience from the Department decision. Appellants insist they "presented evidence that [the decoy] had significant nonphysical characteristics creating an observable effect on his apparent age." (App.Br. at p. 1.) These characteristics include the fact that the decoy "held a ranked position in the Explorer program, had practiced attempting to purchase alcohol at approximately 30 to 56 prior locations, and had become less somewhat [*sic*] nervous in his role as a decoy over the course of his experiences." (*Ibid*.) Appellants argue that the ALJ's failure to address these characteristics constitutes reversible error.

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." The rule provides an affirmative defense, and the burden of proof lies with appellant. (*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].)

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

> 5. Lawley appeared and testified at the hearing. He stood about 5 feet 10 inches tall and weighed approximately 185 pounds. When he visited Respondents' store on April 22, 2014, he wore a white tee shirt, tan shorts and sandals. His hair was cut very short. (See Exhibits 2A and 3A). Lawley's height and weight have remained approximately the same since the date of the operation. At Respondents' Licensed Premises on the date of the decoy operation, Zachary Lawley looked substantially the same as he did at the hearing. The only difference was that he wore different clothing to the hearing.
>
> [¶ . . . ¶]
>
> 9. Decoy Zachary Lawley appears his age, 19 years of 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/conduct in front of the clerk at the Licensed Premises on April 22, 2014, Lawley displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to [the clerk]. Lawley appeared his true age.
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> 10. Lawley has been a police explorer / cadet for about 2 ½ years. Lawley has operated as a decoy on several occasions in the past.

(Findings of Fact ¶¶ 5, 9-10.) Additionally, the ALJ noted that "Respondents presented no physical evidence or witnesses." (Findings of Fact ¶ 11.)

Based on these findings, the ALJ reached the following conclusion:

> 5. Respondents' sole argument was that 141b2 [*sic*] was violated because [the decoy] appears to be over the age of 21. This argument is rejected. [The decoy] appears his true age. (Findings of Fact, ¶ 9.) There was no evidence presented by Respondents to establish an affirmative defense pursuant to rule 141.

(Conclusions of Law ¶ 5.)

This Board has held "[a]n ALJ is not required to provide a laundry list of factors he found inconsequential." (See, e.g., *7-Eleven, Inc./Convenience Group, Inc.* (2014) AB-9350, at p. 4.) While appellants did argue, stridently, that the decoy's law enforcement experience affected his physical appearance, the argument was merely a speculative one presented by counsel. It was not supported by testimony from the clerk or any other individual who observed the decoy on the date of the operation. Moreover, the ALJ makes clear in his Findings of Fact that the decoy appeared his true age. Clearly, in the ALJ's opinion, the decoy's experience was inconsequential to his physical appearance. He committed no error by failing to mention it when reaching a legal conclusion on appellants' rule 141(b)(2) defense.

We note, however, that the decision could have been drafted more thoughtfully. The ALJ concludes "There was no evidence presented by Respondents to establish an affirmative defense pursuant to rule 141." The wording is somewhat vague: have appellants failed to present *any* evidence in support of their defense, or simply failed to present evidence sufficient to carry their burden of proof? In light of the findings of fact, in which the ALJ acknowledges the decoy's experience, we are willing to presume the latter — that the assertion that the decoy had prior law enforcement experience, without more, was insufficient to prove a rule 141(b)(2) defense. We encourage the Department, however, to be as clear as possible in future decisions.

Finally, at oral argument appellants argued that the Department decision

included an erroneous date. According to appellants, the decision stated the operation took place on October 22, 2014, while the Accusation alleged it took place on April 23, 2014. Appellants are only partially correct. The decision recites the date as April 22, 2014 (Findings of Fact ¶ 4) while both the Accusation and the decoy's testimony (see RT at pp. 6, 8) put the operation on April 23, 2014.[2] Given that appellants do not dispute that the sale took place and failed to raise this issue until the very last moments of oral argument, we regard this as a harmless typographical error and allow the decision to stand.

ORDER

The decision of the Department is affirmed.[3]

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

[2]The administrative hearing took place October 22, 2014; this is the only mention of an October date anywhere in the decision.

[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.