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

AB-9492
File: 20-372039; Reg: 14081013

7-ELEVEN, INC. and HAROOTUNI, INC.,
dba 7-Eleven Store #2172-13788
502 North El Camino Real, San Clemente, CA 92672,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 3, 2015
Los Angeles, CA

ISSUED SEPTEMBER 25, 2015

Appearances: Stephen Jamieson, of Solomon, Saltsman & Jamieson, for appellants 7-Eleven, Inc. and Harootuni, Inc., and Kerry K. Winters for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Harootuni, Inc., doing business as 7-Eleven Store #2172-13788 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 5 days (with all 5 days stayed provided appellants complete one year of discipline-free operation) because their clerk sold an alcoholic

[1]The decision of the Department, dated February 10, 2015, is set forth in the appendix.

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 January 3, 2001. The parties stipulated that prior to incorporating in 2001, Mr. Harootuni had been licensed at this same location since May 23, 1996, with no history of disciplinary action.

On August 18, 2014, the Department filed an accusation against appellants charging that, on January 24, 2014, appellants' clerk, Austin Muhlhauser (the clerk), sold an alcoholic beverage to 18-year-old Tyler Hickam. Although not noted in the accusation, Hickam was working as a minor decoy for the Orange County Sheriff's Department at the time.

At the administrative hearing held on January 8, 2015, documentary evidence was received and testimony concerning the sale was presented by Hickam (the decoy) and by Daniel Diamond Tann, an Orange County Sheriff's deputy. Appellants presented no witnesses.

Testimony established that on the day of the operation, the decoy entered the licensed premises alone, and went to the cooler where he selected a six-pack of Bud Light beer. He placed the beer on the counter, and the clerk asked for his identification. The decoy handed the clerk his California driver's license which had a vertical orientation, showed his correct date of birth, and contained a red stripe indicating "AGE 21 IN 2016." The clerk took the license briefly, handed it back to the decoy without asking any age-related questions, and completed the sale. The transaction was witnessed from inside the store by Deputy Tann in an undercover capacity.

After being apprised of the violation, the clerk said "I should have known better."

When asked how he was able to complete the sale on the store's register, he explained that he entered his own birthday into the register to complete the sale.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed a timely appeal contending: (1) the administrative law judge (ALJ) failed to make findings regarding the decoy's law enforcement training, and (2) he failed to analyze the effect of that training on how the decoy appeared to the clerk. These issues will be discussed together.

DISCUSSION

Appellants contend that the ALJ abused his discretion by failing to make findings regarding the decoy's law enforcement training, and that he failed to proceed in the manner required by law when he failed to make findings on the decoy's demeanor and non-physical attributes. Appellants maintain this training, and his large physical stature, caused the decoy to appear over the age of 21 to the clerk, in violation of rule 141(b)(2).[2]

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

[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.

> 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].)

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.)

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, experience, and demeanor:

> 5. Hickam appeared and testified at the hearing. He stood about 6 feet tall and weighed approximately 130 pounds. When he visited Respondents' store on January 24, 2014, he wore blue jeans, a red t-shirt and a black zip-up hoody jacket. (See Exhibits 2, 3 and 5). Hickam did not wear the hood of the jacket on his head at any time while he was in Respondents' store. Hickam'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, Tyler Hickam looked substantially the same as he did at the hearing.

[¶ . . . ¶]

> 9. Decoy Tyler Hickam appears his age, 18 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 January 24, 2014, Hickam displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to clerk Muhlhauser. Hickam appeared his true age.
>
> 10. Hickam has served as a decoy on 3 or 4 prior operations. During this operation on January 24, 2014, decoy Hickam attempted to purchase beer at 16 to 18 different stores. He was only able to purchase beer at one other location besides this one.

(Findings of Fact ¶¶ 5, 9-10.)

Appellants suggest that the decoy's law enforcement training made him appear confident, and therefore older. 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.) Appellants have presented no *evidence* that the decoy's experience *actually resulted* in his displaying the 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.

Appellants also maintain that the decoy's "large physical stature" — six feet tall and 130 pounds — made him appear older. Even if this decoy could be considered to

be "large," which is a stretch, the Board has repeatedly declined to substitute its 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 any particular stature automatically violate the rule. (See, e.g., *7-Eleven Inc./Lobana* (2012) AB-9164, at pp. 3-4.) This Board has noted:

> 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.)

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 he testifies, and to 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.

The ALJ 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. Simply because the ALJ does not explain all of his reasons for a decision, or in this case, omits reference to the decoy's law enforcement training, does not invalidate his determination or constitute an abuse of discretion. (See *Garfield Beach* (2014) AB-9430, at pp. 4-5.)

We see no flaw in the ALJ's findings or determinations, and 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.

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.