

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

AB-9576

File: 20-484818 Reg: 15083099

7-ELEVEN, INC. and HALLAK ENTERPRISES, INC.,
dba 7-Eleven #25302
711 Jamacha Road, El Cajon, CA 92019,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: D. Huebel

Appeals Board Hearing: May 4, 2017
Los Angeles, CA

ISSUED MAY 18, 2017

Appearances: *Appellants:* Melissa H. Gelbart and Donna Hooper, of Solomon Saltsman & Jamieson, as counsel for appellants.
Respondent: John P. Newton as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Hallak Enterprises, Inc., doing business as 7-Eleven #25302 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for ten days because their clerk sold an alcoholic beverage to a Department 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 February 24, 2010. On September 29, 2015, the Department filed an accusation against appellants charging that, on July 25, 2015, appellants' clerk, Kelley Hablin (the clerk), sold an alcoholic

1. The decision of the Department, dated March 17, 2016, is set forth in the appendix.

beverage to 19-year-old Cristian Gastelum. Although not noted in the accusation, Gastelum was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on January 5, 2016, documentary evidence was received and testimony concerning the sale was presented by Gastelum (the decoy) and by Agent Dean Maier of the Department of Alcoholic Beverage Control. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises, and Agent Maier followed shortly thereafter. The decoy went to the alcoholic beverage cooler and selected a six-pack of Bud Light beer bottles. The decoy took the six pack of beer to the front sales counter for purchase and stood in line.

At the counter, the decoy set the beer down. The clerk scanned the beer and told the decoy the cost. The decoy paid the clerk, who gave the decoy some change and bagged the beer. The clerk did not ask for identification, nor did she ask any age-related questions of the decoy. The decoy then exited the store with the bagged six-pack of beer.

Agent Maier was inside the store the entire time and witnessed the events. Agent Maier and the decoy did not communicate with or acknowledge each other while inside the licensed premises. Agent Maier exited the store soon after the decoy.

Agent Maier reentered the licensed premises with the decoy and two other agents. Just inside the entrance of the store, the decoy pointed out the clerk as the employee who sold her the alcoholic beverage.

Agent Maier contacted the clerk at the register. He identified himself as an officer and explained the violation to the clerk. Agent Maier then removed the clerk to the end

of the counter near a stock room. The decoy walked from the entrance to join Agent Maier and the clerk. Agent Maier asked the decoy her age and to identify the person who sold her the beer. The decoy acknowledged she was 19, looked at the clerk, and said she was the one who sold her the beer. The decoy and the clerk were standing approximately two to three feet apart, facing and looking at each other at the time of this identification. Immediately thereafter, Agent Maier asked the clerk if she was aware she had just been identified, to which the clerk acknowledged the identification and admitted to having sold the beer to the decoy. A photo of the decoy and the clerk was taken after the face-to-face identification.

The Department's decision determined that the violation charged was proved and no defense was established. The decision imposed a penalty of ten days' suspension.

Appellants then filed an appeal contending that the ALJ abused her discretion by failing to consider evidence in support of their rule 141(b)(2) defense.

DISCUSSION

Appellants contend that the ALJ ignored "key evidence" in support of their rule 141(b)(2) defense. (App.Br., at p. 5.) In particular, appellants point to the clerk's spontaneous statement, made at the time of the face-to-face identification, that she had sold to the decoy before and believed the decoy was over 21 years of age. (*Id.* at p. 6.) According to appellants, this spontaneous statement "clearly indicates that the clerk perceived [the decoy] as someone 21 years of age or older." (*Ibid.*) Moreover, appellants argue the clerk's failure to check the decoy's identification is further evidence that the clerk perceived the decoy as over the age of 21. (*Ibid.*) Appellants contend that this proffered evidence negates the ALJ's conclusion that appellants had presented "no evidence" in support of their defense. (*Id.* at pp. 5-6.)

The clerk did not testify at the administrative hearing.

Rule 141(b)(2) states: "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." (Code Regs., tit. 4, § 141(b)(2).) The rule provides an affirmative defense, and the burden of proof lies with the party asserting it. (*Chevron Stations, Inc.* (2015) AB-9445, at pp. 3-16; *7-Eleven, Inc./Lo* (2006) AB-8384, at pp. 8-11.)

This Board is bound by the factual findings in the Department's decision as 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. [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 1429, 1437 [13 Cal.Rptr.3d 826].)

Moreover, it is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of abuse of discretion.

The whole of this appeal turns on the clerk's spontaneous statement, recounted as hearsay by Agent Maier—and, notably, objected to as such by appellant's counsel:

[BY MR. NEWTON:]

Q Did [the clerk] say anything to you when you were citing her?

MS. GELBART: Objection. Hearsay.

THE COURT: Again, I'll let that in as administrative hearsay.

[AGENT MAIER:] Yes, she did.

BY MR. NEWTON:

Q What did she say?

A Can I—so I get the exact wording, can I refer to my notes?

Q Would that refresh your recollection?

A Yes.

[¶ . . . ¶]

THE WITNESS: She made a spontaneous statement that—"I sold to her before, and she is over 21."

(RT at p. 40.) The clerk's alleged belief that the decoy was over 21 turned on her claim that she had sold to the decoy before—not, as appellants insist, on the decoy's experience or on any aspect of the decoy's physical appearance.

Regardless, the ALJ made a specific credibility finding discounting the clerk's spontaneous statement:

[A]ny hearsay allegations that [the decoy] had visited the Licensed Premises to purchase alcohol and was known by [the clerk] prior to July 25, 2015, is not credible. The unrebutted, sworn, direct testimony of [the decoy] established that [the decoy] had never entered the Licensed Premises prior to July 25, 2015, and did not know any employee working therein on July 25, 2015.

(Conclusions of Law, ¶ 5.)

At oral argument, appellants presented an alternative theory: that the ALJ improperly considered the decoy's appearance from the perspective of the selling clerk, rather than applying the broader reasonable person standard to determine whether the

decoy displayed the appearance generally expected of a person under 21 years of age. This argument is inexplicable, since the entirety of appellants' opening brief depends on the clerk's subjective hearsay statement regarding the decoy's age. It is appellants, not the ALJ, who focus on the clerk's perspective.

Nevertheless, we are convinced the ALJ applied the appropriate standard of law. A review of the proposed decision reveals he considered the decoy's appearance both at the hearing and during the decoy operation, and even reviewed appellants' claim that the decoy's experience made her look older:

With respect to Rule 141(b)(2), specifically, the Respondents argued [the decoy] had the appearance of a person over the age of 21, that the transparent t-shirt she wore and her photograph taken on the day of the operation gave her a "matronly look." Respondents further argued [the decoy] was confident when she testified, had a competent demeanor, "passion" for criminal justice having taken one introductory class two years prior to the decoy operation and due to her volunteer work at a courthouse, where she is required to wear an identification "badge." Respondents argued these factors gave her "authority" during the sales transaction. These arguments are rejected. The Respondent[s] presented no evidence that these factors actually resulted in [the decoy] appearing 21 or older to [the clerk]. Although [the decoy] took one introductory class, volunteers at a courthouse, and wore a transparent t-shirt, there is nothing about these factors which made her appear older than her actual age. She was not wearing the volunteer identification card during the decoy operation. Respondents' [*sic*] repeatedly referenced the identification card as a "badge." [The decoy], upon re-direct, described it as an identification card, not a police badge. She was visibly nervous during the hearing, with an audible nervous shaking of her voice during her testimony. She testified she was nervous at the hearing and during the decoy operation on July 25, 2015. She had no prior experience as a minor decoy prior to July 25, 2015. As noted above, [the decoy] had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 14.)

(Conclusions of Law, ¶ 5.) There is no question the ALJ properly applied the standard outlined in rule 141(b)(2)—and did so in unusual detail.

This Board may not second guess an ALJ's credibility finding absent an abuse of discretion. It is hardly an abuse of discretion to credit the direct testimony of a witness

over a snippet of self-serving hearsay. Moreover, the ALJ's rule 141(b)(2) analysis was proper.

ORDER

The decision of the Department is affirmed.¹

BAXTER RICE, CHAIRMAN
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

1. 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.