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

AB-9135

File: 21-222572 Reg: 10072665

7-ELEVEN, INC., LEOBARDO V. LOZA, and VIRGINIA LOZA,
dba 7-Eleven # 2175-18526
8708 Atlantic Avenue, South Gate, CA 90280,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: September 1, 2011
Los Angeles, CA

ISSUED OCTOBER 7, 2011

7-Eleven, Inc., Leobardo V. Loza, and Virginia Loza, doing business as 7-Eleven # 2175-18526 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for five days, all of which were stayed, for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Leobardo V. Loza, and Virginia Loza, appearing through their counsel, Soheyl Tahsildoost and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

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[1]The decision of the Department, dated October 21, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on October 25, 1988. On March 11, 2010, the Department filed an accusation charging that, on October 27, 2009, appellants' clerk, Miguel Malagon-Fonseca (the clerk), sold an alcoholic beverage to 19-year-old Marisela Ortiz. Although not noted in the accusation, Ortiz was working as a minor decoy for the South Gate and Bell Gardens Police Departments at the time.

At the administrative hearing held on August 19, 2010, documentary evidence was received and testimony concerning the sale was presented by Ortiz (the decoy) and by Ricardo Navarro, a South Gate police officer.

The Department's decision determined that the violation charged was proved and no defense to the charge was established. Appellants then filed an appeal contending: (1) The decoy violated rule 141(b)(3)[2] by not presenting her own valid identification, (2) the decoy's appearance violated rule 141(b)(2), and (3) the Department's decision does not explain the basis for the finding that the decoy appeared to be under the age of 21.

DISCUSSION

I

Appellants contend that the decoy violated rule 141(b)(3), which requires a decoy, if requested, to present his or her own identification showing the decoy's correct date of birth to any seller of alcoholic beverages. Officer Navarro testified that the clerk said he had swiped the decoy's identification card through a card reader. Had the decoy used her valid identification, appellants argue, the clerk would have been alerted as to her age when he swiped the identification card and would not have completed the

[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.

sale. Therefore, they conclude, the decoy must have presented an identification other than her own, that showed her as being over the age of 21.

In reviewing the Department's decision, the Appeals Board is guided by certain principles:

> 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]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) 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* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) 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 Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

In Finding of Fact 7, the ALJ found that the clerk "did not swipe the ID through a card reader." In making this finding, appellants argue, the ALJ improperly disregarded the clerk's statement to the officer, saying it was hearsay. This was error, appellants assert, because the statement was "exempt from the hearsay rule on various grounds" and the ALJ engaged in improper advocacy for the Department by finding that the clerk's statement was hearsay even though the Department did not make a hearsay objection when the officer testified. (App. Br. at p. 7.)

We agree that the statement of the clerk was not hearsay, not because it falls under an exception to the hearsay rule, but because it was not hearsay to begin with.

Hearsay is defined as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.) The clerk's statement that he had swiped the identification card through a card reader was not "offered to prove the truth of the matter stated." It seems it was offered to prove the opposite, that the clerk lied to the officer in an attempt to exonerate himself. While we agree with appellants' conclusion, we do not agree with their reasoning nor do we agree with their argument built on that conclusion.

Appellants argue that the ALJ violated their rights to due process "by infusing legal argument and advocacy on behalf of the Department into the case" because he said in the decision that the statement of the clerk was hearsay even though the Department had not made a hearsay objection. The language appellants find offensive is in the second paragraph of Conclusions of Law 5, which we set out in full:

> With respect to rule 141(b)(3), the Respondents asserted that the ID which Ortiz presented to Malagon-Fonseca was not her actual ID. This argument is based on a statement Malagon-Fonseca made to Ofcr. Navarro shortly after the sale, namely, that he had swiped her ID and the machine indicated that she was of legal age. Since Malagon-Fonseca did not testify, this statement is pure hearsay. Both Ofcr. Navarro and Ortiz, on the other hand, testified that Malagon-Fonseca did not swipe the ID. The finding that Malagon-Fonseca did not swipe Ortiz's ID (Finding of Fact ¶ 7) is based upon the direct evidence offered by Ofcr. Navarro and Ortiz. As such, the Respondents' rule 141(b)(3) argument is rejected.

We see no improper advocacy by the ALJ in his remark that the clerk's statement was "pure hearsay." At most, the ALJ made a legal error, and "a wrong opinion on the law of a case does not disqualify a judge, nor is it any evidence of bias or prejudice." (*Ryan v. Welte* (1948) 87 Cal.App.2d 888, 893 [198 P.2d 351].) If the clerk's statement was not hearsay, that would simply make it admissible. The ALJ made clear that it was the testimony of the officer and the decoy that he believed and

relied on, and we have no reason to think that he would have considered the clerk's statement any more believable just because it was admissible.

II

Appellants contend the decoy's appearance did not comply with the requirement of rule 141(b)(2) that the decoy display the appearance which could generally be expected of a person under the age of 21. They assert that the decoy "was a confident, experienced, and mature woman," noting that by the time of this decoy operation, she had been a police explorer for about three years, had participated in between 5 and 10 decoy operations, and was not nervous going into appellants' premises.

The decoy's appearance is discussed in Findings of Fact 5 and 10:

> 5. Ortiz appeared and testified at the hearing. When she visited the Licensed Premises, she was 5 feet, 4 inches tall and weighed 160 pounds. She was the same height at the hearing, but weighed only 146 pounds. Inside the Licensed Premises she wore a pink shirt with an unzipped purple sweatshirt over it, jeans, and purple Vans. Her hair was in a ponytail. She was not wearing any make-up. (Exhibits 3-5.) She was not nervous while inside the Licensed Premises.
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> 10. Ortiz appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of Malagon-Fonseca at the Licensed Premises on October 27, 2009, Ortiz displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Malagon-Fonseca.

Appellants' argument at the hearing was addressed in Conclusions of Law 5:

> With respect to rule 141(b)(2), the Respondent [*sic*] argued that, notwithstanding Ortiz's youthful appearance at the hearing, she appeared to be more mature at the time of the sale based on her weight and her lack of nervousness. This argument is rejected. As set forth above, Ortiz had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as she testifies, and

making the determination whether the decoy's appearance met the requirement of rule 141. In this case the ALJ made substantial findings regarding the decoy's appearance, both physical and non-physical, and concluded that the decoy's appearance met the standard of rule 141(b)(2).

This Board is not in a position to second-guess the trier of fact, especially with regard to the argument that the rule is violated because of the decoy's experience as a decoy and police Explorer. "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.) Appellants have not met their burden of proof.

III

Appellants contend the decision fails to explain how the ALJ found that the decoy's appearance complied with rule 141(b)(2) when she weighed 14 pounds less at the hearing than she did at the time of the decoy operation. They assert that *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] mandates that "[t]he Department has a duty to bridge the analytical gap between raw evidence and conclusions."

This Board has addressed, and rejected, this contention numerous times before. For example, in *7-Eleven, Inc./Cheema* (2004) AB-8181, the Board said: "Appellants misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made." (Accord, *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760]; *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909].) As this Board has also explained many times, the Department is not required to explain its reasoning.

> [I]n a quasi-judicial proceeding in California, the administrative board should state findings. If it does, the rule of *United States v. Morgan* [(1941)] 313 U.S. 409, 422 [85 L.Ed. 1429, 1435 [61 S.Ct. 999]] precludes inquiry outside the administrative record to determine what evidence was considered, and reasoning employed, by the administrators.

(*Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 779 [122 Cal.Rptr. 543].)

The Board has previously addressed this point specifically with regard to a decoy's appearance:

> Nor do we think the ALJ was obligated to articulate what it was, or was not, about the decoy’s experience as a police explorer, that led him to conclude that the decoy presented the appearance of a person who could generally be considered to be under 21 years of age. It is enough that he considered sufficient indicia of age, the decoy’s explorer experience being only one such indicia, in making the subjective assessment required by Rule 141(b)(2).

(Von’s Companies, Inc. (2003) AB-7949.)

Appellants have not shown that there was any error in the ALJ's determination of the decoy's apparent age.

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[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.