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

AB-9237
File: 20-506512 Reg: 11075111

7-ELEVEN, INC., HINA NILESH PATEL, and NILESH PATEL,
dba 7-Eleven Store 2368 17488D
320 Reservation Road, Marina, CA 93933,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: January 3, 2013
Sacramento, CA

ISSUED FEBRUARY 5, 2013

7-Eleven, Inc., Hina Nilesh Patel, and Nilesh Patel, doing business as 7-Eleven Store 2368 17488D (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, a co-licensee, 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., Hina Nilesh Patel, and Nilesh Patel, appearing through their counsel, Ralph Barat Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

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[1]The decision of the Department, dated January 5, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 14, 2011. On May 24, 2011, the Department filed an accusation against appellants charging that, on April 30, 2011, co-licensee Nilesh Patel, acting as clerk, sold an alcoholic beverage to 18-year-old Jose Barajas (the decoy). Although not noted in the accusation, Barajas was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on October 12, 2011, documentary evidence was received and testimony concerning the sale was presented by Barajas (the decoy) and by Francisco J. Gonzalez, Jr., a Department Investigator. Appellants presented no witnesses.

Testimony established that, on the date of the sale, co-licensee Patel was working at the register. The decoy retrieved a can of Budweiser and approached the counter. Patel completed the sale without requesting the decoy's identification or asking how old he was.

The licensed premises was one of six the decoy visited that day. Five establishments, including appellants', sold to him.

The Department's decision determined that the violation charged was proved and no defense was established. A penalty of 15 days' suspension was imposed.

Appellants filed this timely appeal contending that the ALJ (1) abused his discretion by giving insufficient weight to the decoy's success rate and by making his 141(b)(2) determinations on an improper basis, and (2) failed to bridge the analytical gap between the evidence and the findings and conclusions.

DISCUSSION

I

Appellants contend that the ALJ abused his discretion and failed to proceed in the manner required by law by giving insufficient weight to the decoy's success rate and by making his rule 141(b)(2) determinations on an improper basis.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decisions, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing. (California Constitution, article XX, section 22; Business and Professions Code §§ 23084, 23085; *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].)

This Board has said 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).[2] This Board has acknowledged that the ALJ has the opportunity to observe the decoy as he or she testifies, while all the Board has is a cold record.

Appellants argue that the ALJ gave insufficient weight to the decoy's success

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[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.

rate – in this case, approximately 83 percent. 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). This Board has clarified – and appellants acknowledge – 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 over the age of 21." (*Ibid.*)

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

This Board has reversed a handful of cases in which the decoy's success rate was notably high; in all of them, the success rate merely supplemented other indicia of error. In *Southland Corporation*, for example, the decoy's success rate was approximately 38%, and this Board gave weight to that fact. (*Southland Corporation*, (2001) AB-7603 at p. 7.) The ALJ's findings, however, were facially inconsistent: he had expressed concern that the decoy's "large stature" had "lulled the clerk into a belief" that he was over 21, but nonetheless held that he met the appearance requirements of rule 141(b)(2). (*Id.* at p. 6.) This Board noted that it was "persuaded that *the ALJ's own concern* over the appearance of the decoy reflects an element of possible unfairness." (*Id.* at p. 7., emphasis added.)

Appellants argue that the ALJ's rule 141(b)(2) determination was indeed made on an improper basis, and would have this Board draw a parallel between *7-*

Eleven/Dianne Corporation (2002) AB-7835 (*Dianne*) and the present facts. In that case, the decoy successfully purchased alcohol at eight of ten establishments. (*Id.* at p. 3.) *Dianne*, however, presented inconsistent findings similar to those addressed in *Southland Corporation*. In *Dianne*, the ALJ had found that:

> If, while at [appellants'] store, the decoy wore the uniform, badge and sidearm which he wore at the hearing, he clearly would not have displayed the appearance which could generally be expected of someone under twenty-one years old. However, he did not wear these items at appellants' store.

(*Ibid.*) With this statement, the ALJ made "an implicit finding that, at the hearing, the decoy, who was still just 19 years old, clearly had the appearance of a person over 21 years of age." (*Ibid*.) Nevertheless, the ALJ relied on photographs of the decoy taken just before the decoy operation as "the best evidence of how he appeared that day," and concluded that the decoy's appearance at the time of the sale was that of a person under the age of 21. (*Ibid.*)

On appeal, this Board reasoned that:

> the ALJ based his finding that the decoy appeared to be under 21 at the time of the sale on photographs of the decoy and on the decoy's mannerisms and demeanor at the hearing. He did so even though the physical and non-physical appearance of the decoy at the hearing was not comparable to his physical and non-physical appearance at the time of the sale. We cannot say that this finding has a reasonable basis.

(*Dianne*, *supra*, at p. 8.) This Board reversed based on "[t]he highly suggestive 'success rate' of this decoy *and* the unreliable basis used to find the decoy's apparent age." (*Ibid.*, emphasis added.)

In the present case, the ALJ found that the decoy visited six stores on the date of the sale, and that "[f]ive of the six stores sold him an alcoholic beverage." (FF ¶ II.D.2.) While the Department asserts that "[t]here is no evidence what the minor purchased at

the other premises," (Reply Br. at p. 2), we believe that the ALJ could reasonably have inferred this finding from the decoy's testimony at the administrative hearing:

> Q. [ALJ] And do you remember how many stores you visited as part of this decoy operation on April 30, 2011?
> A. [Decoy] Yes.
> Q. How many stores did you visit?
> A. Six.
> Q. And how many sold to you?
> A. Five.

[RT 14.] The ALJ specifically asked how many stores the decoy visited *as part of the operation*. The purchases made during such visits characteristically involve alcohol. Moreover, in its closing argument, the Department challenged the implications of the decoy's success rate, but did not dispute the success rate itself. [RT 41.] We believe the ALJ's findings on this point were reasonable, based on the testimony presented.

While we decline to offer statistical guidelines, the decoy's success rate, at just over 83%, is higher than those cited in *Southland Corporation* and *Dianne*, and is certainly high enough to merit scrutiny. The ALJ acknowledged the success rate in his findings and addressed it in his Determination of Issues. Even with this success rate in mind, he concluded that, in light of the evidence, the decoy's appearance complied with rule 141(b)(2):

> Respondent's counsel contends the decoy's mature appearance, as evidenced by a 83% success rate and his confident, poised manner, coupled with his black clothing, violate the appearance standard set out in Rule 141(b)(2). A decoy's success rate is a factor to consider when assessing the appearance of a decoy under the tenants [sic] of Rule 141 (b) (2). However, it is but one factor when considering the appearance of a minor decoy. Other factors must be contemplated in assessing the overall appearance of a minor decoy. The Court had the opportunity to observe the decoy at hearing and in the photographs presented in State's Exhibits 2 & 3, and concluded Barajas displayed an overall appearance which could generally be expected of a person under the age of twenty-one years under the actual circumstances presented to the seller at the time of the sale.

(Determination of Issues ¶ II.)

Unlike *Dianne* and *Southland*, however, there are no inconsistencies in the ALJ's findings, and we see no cause to question the ALJ's determination that the decoy's appearance complied with rule 141(b)(2). Appellants argue that "aside from comparing the minor decoy's height, weight, and haircut on the date of the operation and the date of the hearing, the Decision never addresses the minor decoy's physical appearance at the administrative hearing." (App.Br. at p. 3.) This is inaccurate; the ALJ addressed the decoy's appearance at length. Significantly, the ALJ began by expressly noting that "[the decoy's] appearance at the time of the hearing was *substantially the same* as his appearance on the day of the decoy operation." (FF ¶ D, emphasis added.) He then describes the decoy's appearance on both dates:

> On the day of the sale and at the hearing, the decoy had brown hair that was cut very short, crew-cut style. Barajas weighed around 190 pounds on the date of the operation, and he was 5 feet 8 inches tall. At the hearing, Barajas weighed five pounds less, but his height was still 5 feet 8 inches tall. Barajas's [sic] wore a black shirt over a white undershirt and a black jacket during the decoy operation. The decoy did not have a moustache during the decoy operation. Decoy Barajas has large, dark eyebrows and full lips. His complexion is smooth and wrinkle-free. The photographs in State's Exhibits 2 and 3 accurately depict what the decoy looked liked and what he was wearing at the premises on the day of the sale.

(FF ¶ D.1.) Finally, he describes the decoy's demeanor at the hearing, noting that he "testified politely" and that "[h]is testimony was concise and direct." (FF ¶ D.2.) Based on these findings, the ALJ concluded:

> After considering State's Exhibits 2 and 3, the decoy's overall appearance when he testified, and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under the age of twenty-one years under the actual circumstances presented to the seller at the time of the sale.

(FF ¶ D.4.)

Appellants are correct that the decoy's appearance was, in certain respects, different at the hearing. Few individuals – particularly minors – will remain utterly unchanged over the course of six months. In this case, the changes described are slight. We can find no grounds to question the ALJ's conclusion that the decoy's appearance was substantially the same as it was on the day of the operation.

Appellants make much of the ALJ's failure to note that the decoy wore a moustache at the hearing, though he did note its absence on the day of the operation. This Board has addressed similar omissions in the past, and concluded:

> It is not one or two elements in the makeup and impression of the minor that are usually controlling in assessing whether a person has the appearance which could generally be expected of a person under 21. It is the overall impression based on numerous factors, such as the appearance, demeanor, mannerisms, attitude, etc., that form the foundation for a finding on this critical issue. The [appellants'] argument is based on a few selected characteristics and impressions which, without more, are misleading in making a reasonable assessment of the appearance of the minor's age.

(*7-Eleven, Inc.* (2001) AB-7756, citing *7-Eleven and Apend Inc.* (2001) AB-7666.)

As an initial matter, we observe that, because the moustache did not exist at the time of the operation, it had no influence over the apparent age the decoy presented to the clerk. It could only have influenced the decoy's appearance at the hearing, and, in turn, whether his appearance had changed significantly since the date of the sale.

We cannot say that the existence of a moustache necessarily makes a decoy appear over 21, or that it always constitutes a noteworthy change in a decoy's appearance. Moustaches vary in size, color, and density, particularly among minors. The ALJ was in the best position to assess whether and to what extent this particular moustache influenced this particular decoy's appearance, and he found that there was

no substantial change in the decoy's appearance between the operation and the hearing. He was not required to present a laundry list of factors he found inconsequential. Moreover, we are particularly unwilling to second-guess his determination, as we do not have so much as a photograph of the alleged moustache.

In sum, this case does not parallel *Dianne*, as appellants argue, but has more in common with *7-Eleven/Jain*, in which this Board held that:

> [t]he 80 percent purchase rate . . . does raise the question of whether the decoy complied with rule 141(b)(2). The ALJ, however, answered that question in his findings regarding the decoy's appearance. Nothing in those findings leads us to question the ALJ's conclusion that the decoy complied with the rule. We extend our usual deference to the judgment of the ALJ in making the finding as to apparent age, since the ALJ had the opportunity, which the Board does not, of observing the decoy in person.

(*7-Eleven, Inc./Jain* (2004) AB-8082 at pp. 8-9.) This Board has noted in countless cases that it is not in a position to second-guess the trier of fact, especially where all it has to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that he did not.

While a decoy's success rate may trigger increased scrutiny, we are unwilling to overturn a rule 141(b)(2) determination without evidence that the determination was made on an improper basis. There is no such evidence here. We are satisfied that the ALJ conducted a reasonable and proper assessment of the decoy's physical appearance.

II

Appellants assert that the ALJ "failed to bridge the analytic gap between the raw evidence and the findings, and the findings and the conclusions, as required by *Topanga*." (App.Br. at p. 2, citing *Topanga Association for a Scenic Community v. County of L.A.* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836].) As this Board has repeatedly noted, *Topanga* imposes no such requirement:

> Appellants misapprehend *Topanga.* It does not hold that findings must be explained, only that findings must be made. This is made clear when one reads the entire sentence that includes the phrase on which appellants rely: "We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision *must set forth findings* to bridge the analytic gap between the raw evidence and the ultimate decision or order." (*Topanga*, *supra*, 11 Cal.3d 506, 515, italics added.)
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> In *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760], the court quoted with approval, and added italics to, the comment regarding *Topanga* made in *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909]: "'The holding in Topanga was, thus, that *in the total absence of findings in any form on the issues supporting the existence of conditions justifying a variance*, the granting of such variance could not be sustained.'" In the present appeal, there was no "total absence of findings" that would invoke the holding in *Topanga*.

(*7-Eleven, Inc. & Cheema* (2004) AB-8181 at pp. 6-7.)

This Board has rejected countless attempts to stretch *Topanga* beyond its limited usefulness. *Topanga* addressed the total absence of findings. It is of no relevance to a case such as this, where the ALJ offered no less than six paragraphs of detailed findings regarding the decoy's appearance on the date of the sale and at the administrative hearing. (See FF ¶¶ II.C.1 through D.4). In stating our displeasure with attempts to stretch *Topanga* beyond its reasonable reach, we hope to deter counsel appearing before us from doing so in the future.

In reality, appellants would simply have us second-guess the ALJ and reach a different conclusion on the same set of facts. We are unwilling to do so, and find no abuse of discretion.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[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.