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

AB-9344
File: 20-470721 Reg: 12077466

7-ELEVEN, INC. and GURPREET SINGH, dba 7-Eleven #2131 13569
796 Broadway, Chula Vista, CA 91910,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 5, 2013
Los Angeles, CA

ISSUED JANUARY 30, 2014

7- Eleven, Inc. and Gurpreet Singh, doing business as 7-Eleven #2131 13569 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days, five days of which were conditionally stayed subject to one year of discipline-free operation, 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. and Gurpreet Singh,

[1]The decision of the Department, dated January 25, 2013, is set forth in the appendix.

appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J. Belvedere.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 23, 2008. Thereafter, on September 4, 2012, the Department instituted an accusation against appellants charging that, on May 4, 2012, appellants' clerk, Victor Moran (the clerk), sold an alcoholic beverage to 18-year-old Bryan Elqadi.[2] Although not noted in the accusation, Elqadi was working as a minor decoy for the Chula Vista Police Department and the Department of Alcoholic Beverage Control at the time.

An administrative hearing was held on November 29, 2012, at which time documentary evidence was received, and testimony concerning the sale was presented by Elqadi (the decoy) and by Michael Malden, a Chula Vista police officer.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants have filed a timely appeal and make the following contentions: (1) Rule 141(b)(2)[3] was violated, and (2) the ALJ failed to provide a specific analysis for his findings regarding the decoy's appearance and compliance with rule 141(b)(2). These contentions will be addressed together.

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[2]The minor's name is misspelled as "Elquadi" in the decision.

[3]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.

DISCUSSION

Appellants contend that the decoy did not display the appearance required by rule 141(b)(2),[4] and that the ALJ failed to provide an analysis of why he ruled as he did. They argue that he "should have arrived at a different conclusion because the decoy had a large stature, was not nervous during the sale, and may have had visible chest hair. (App. Br. at p. 5.)

> Our review "is limited to a determination of whether the Department has proceeded without or in excess of its jurisdiction; whether the Department has proceeded in the manner required by law; whether the Department's decision is supported by its findings; whether those findings are supported by substantial evidence; or whether there is relevant evidence which, in the exercise of reasonable diligence could not have been produced or was improperly excluded at the hearing before the Department." [Citations.]
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> Certain principles guide our review. ... 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 this 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.

(*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals* Board (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

The decoy testified that he entered appellants' store, went to the coolers where the refreshments were, selected a 24-ounce can of Bud Light, and took it to the counter. The

[4]Rule 141(b)(2) requires that a minor 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."

clerk did not ask his age nor did he ask for identification before selling the beer to him. He left the store, returned with the police officers, and identified clerk Moran as the seller.

Appellants argue that they presented evidence that the decoy was nearly six feet tall and weighed 175 pounds on the day of the decoy operation, had visible chest hair one inch above the collar of his tank top on the day of the operation, and had a calm and confident demeanor. They assert that the ALJ failed to address these facts, and erroneously concluded that the decoy weighed 165 pounds on the day of the decoy operation and appeared nervous. This is incorrect.

The ALJ addressed the decoy's appearance in Findings of Fact 5, 9, and 10, and in Conclusion of Law 5:

> FF 5: Elquadi appeared and testified at the hearing. He stood about 6 feet tall and weighed approximately 165 pounds. His hair was cut short. When he visited Respondents' store on May 4, 2012, he wore a black and white tank top, a black zip up hoodie jacket, dark jeans, and black basketball shoes. (See Exhibits 2A, 2B, 3A and 3B.) Elquadi'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, Bryan Elquadi looked substantially the same as he did at the hearing.
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> FF 9: Decoy Bryan Elquadi 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 clerk Moran at the Licensed Premises on May 4, 2012, Elquadi displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to clerk Moran. Elquadi appeared his true age.
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> FF 10: This was Elquadi's first time operating as a decoy. He did participate in two prior "shoulder tap" operations. Elquadi was very soft spoken and appeared to be somewhat nervous during his testimony.
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> CL 5: Respondents argue that the decoy Bryan Elquadi appeared older than 21 thereby violating Rule 141(b)(2). Counsel noted that in photos (Exhibits 2A & 2B) there was some chest hair that was noticeable. That argument is rejected. Clerk Moran did not appear and testify at the hearing. To conclude that this somehow influenced Moran's decision to sell the beer

to Elquadi would be pure speculation.

Appellants cite Board decisions from 1999[5] and 2002[6] where the Board expressed concerns about the physical size of decoys used by police or the Department. These decisions, early in the development of the law governing rule 141 and its constituent parts, have no real application to the decision in this case. In *Shams Ali Savaja* (*supra*, fn. 5), the Board reversed the Department because the ALJ, although noting that the decoy there was six feet three inches tall and weighed 210 pounds, focused on the decoy's "youthful looking face" and ignored other aspects of his appearance. In *Prestige Stations* (*ibid*.), the Board affirmed the Department's decision, stating:

> [W]e appreciate the fact that, on occasion, police have used decoys whose appearance, because of large physical stature, facial hair, or other feature of appearance, is such that a conscientious seller may be unfairly induced to sell an alcoholic beverage to that person. Within the limits that apply to this Board as a reviewing tribunal, we have attempted to deter such practices, either by outright reversal, or by stressing the importance of compliance with Rule 141. If licensees feel more is necessary, their resort must be to another body.

Based upon the many cases heard by this Board since 1999 and 2002, we are inclined to believe the Board's message has reached law enforcement. Sometimes we wonder if our message is reaching certain parts of the defense bar.

This case is just another example of appellants asking this Board to reweigh the evidence, substitute our assessment of the evidence for that of the ALJ, and reach a conclusion opposite the one that he reached. We have said many times that we cannot do that, and we say it once again here:

> 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

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[5] *Shams Ali Savaja* (1999) AB-7326.

[6] *Prestige Stations Inc*. (2002) AB-7802.

> determination whether the decoy's appearance met the requirement of Rule 141, that she possessed 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. We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that she did not.

(*Spirit Enterprises, Inc*. (2000) AB-7604.)

Appellants claim the ALJ was mistaken when he said in Finding of Fact 4 that the decoy weighed 165 pounds on the day of the decoy operation. Appellants have not read that finding correctly. The ALJ was clearly writing about the decoy's weight at the hearing, and while he noted that the decoy's height and weight "have remained approximately the same since the date of the operation," we are not prepared to say that was an unreasonable assessment of a one inch increase in height and a 10 pound loss of weight for an 18-year-old. The same is true of the ALJ's observation that the decoy appeared somewhat nervous "during his testimony."

We are also not prepared to say that the ALJ's rejection of the argument that the clerk might have noticed the decoy's black chest hair, and, from that, might have decided the decoy appeared to be 21 years of age or older because there was no testimony from the clerk, is a ground for reversal. The ALJ is not required to speculate as to what might have been, or what the clerk might have said.

Appellants are also off the mark when they complain that the ALJ did not explain his analysis of how he determined the decoy displayed the appearance rule 141(b)(2) requires. Appellants' attorneys once again make an argument this Board has consistently rejected, i.e., citing *Topanga Ass'n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836], for the proposition that an ALJ must explain his or her reasoning.

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 ultimate decision or order." (*Topanga*, *supra*, 11 Cal.3d 506, 515, italics added.)

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*.

ORDER

The decision of the Department is affirmed.[7]

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

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[7]This final decision is filed in accordance with Business and Professions Code § 23088 and shall become effective 30 days following the date of the filing of this final decision as provided by § 23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code § 23090 et seq.