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

AB-9348
File: 20-354451 Reg: 12077490

APRO, LLC, dba Apro 2
7900 Beverly Boulevard, Los Angeles, CA 90048,
Appellant/Licensee

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

Apro, LLC, doing business as Apro 2 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days, all stayed provided appellant completes one year of discipline-free operation, for its 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 appellant Apro, LLC, appearing through its counsel, Ralph Barat Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J. Belvedere.

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[1]The decision of the Department, dated February 13, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 12, 1999. On September 24, 2012, the Department filed an accusation charging that appellant's clerk, Jessica Velasquez (the clerk), sold an alcoholic beverage to 18-year-old Darryl Hicks on December 29, 2011. Although not noted in the accusation, Hicks was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on January 17, 2013, documentary evidence was received, and testimony concerning the sale was presented by Hicks (the decoy); and by Jon Winstanley and Allan Ocampo, LAPD officers. Appellant presented no witnesses.

Testimony established that on December 29, 2011, the decoy entered the licensed premises and proceeded to the cooler, where he selected a 24-ounce can of Bud Light beer. He took the beer to the counter, where the clerk asked for his identification. The decoy placed his California Identification Card (Exhibit 2), which bore a blue stripe stating “AGE 18 IN 2011" and a red stripe stating “AGE 21 IN 2014," in a pass through well — similar to those seen in banks. The clerk was behind bullet proof glass. The clerk observed the ID card, swiped it in a machine, then observed it again before passing it back to the decoy. The clerk did not ask any age-related questions. The clerk completed the sale and the decoy exited the premises. LAPD Officer Winstanley observed the transaction while posing as a customer inside the store. The decoy reentered the premises with police officers. The officers identified themselves to the clerk, informed her of the violation, and asked her to come out from behind the enclosure. Officer Ocampo asked the decoy who sold him the beer and he said “that’s her,” or words to that effect, while standing three to five feet from the clerk and facing

her. A photo was taken of the clerk and decoy (Exhibit 3), and the clerk was cited.

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

Appellant filed an appeal contending: (1) The decoy's appearance did not comply with rule 141(b)(2);[2] and (2) the face-to-face identification of the clerk did not comply with rule 141(b)(5).

DISCUSSION

I

Appellant contends the decoy's appearance did not comply with rule 141(b)(2).

Rule 141(b)(2) provides:

> 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.

Appellant maintains that the decoy did not display the appearance which could generally be expected of a person under the age of 21, and contends "the administrative law judge (ALJ) erred in failing to consider "non-physical indicia of age, such as the minor's experience and training and the minor's self-admitted confidence and comfort level of being a minor decoy." (App.Br. at p. 7.)

This Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence.

> We cannot interpose our 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.4th [1250,] 1254 [122Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.4th 364, 367 [3

[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.

> Cal.Rptr.2d 770;. . . 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. of 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*. (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826] (*Masani*).)

Appellant cites *7-Eleven, Inc. and Azzam* (2001) AB-7631 for the proposition that law enforcement experience can result in a finding that the decoy appeared to be over the age of 21. We do not disagree, but in that case the Board went on to say:

> 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. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. *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*. (Emphasis added.)

The ALJ asked the decoy questions about his appearance and experience at the administrative hearing [RT 38-40] and made the following findings about the decoy's appearance (Findings of Fact ¶¶ 5 and 9):

> FF 5. Hicks appeared and testified at the hearing. He stood about 5 feet, 4 inches tall and weighed approximately 100 pounds. His hair was cut short. He described it as a "number 1". When he visited Respondent's store on December 29, 2011, he wore a black t-shirt, blue jeans, a black

> jacket and blue and white Vans shoes. (See Exhibits 3 and 4). Hicks has grown about one inch and gained about 10 pounds since the date of the operation. At Respondent's Licensed Premises on the date of the decoy operation, Hicks looked substantially the same as he did at the hearing
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> FF 9. Decoy Hicks 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 Velasquez at the Licensed Premises on December 29, 2011, Hicks displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to Velasquez. Hicks appeared his true age.

We are not in a position to second-guess the trier of fact. Appellant has given us no reason to depart from our general rule of deference to the ALJ's factual determination regarding the decoy's appearance, particularly when appellant has offered no evidence to support the assertion that the decoy's law enforcement experience somehow made him appear over the age of 21.

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 he testifies, and making the determination whether the decoy's appearance met the requirements of rule 141. Further, we have examined Exhibits 3 and 4, and would contend that no amount of confidence could make this 5 foot 3 inch, 90 pound individual appear to be over the age of 21.

II

Appellant contends that the face-to-face identification of the clerk did not comply with rule 141(b)(5) because it was "unduly suggestive." (App.Br. at p. 9.)

Rule 141(b)(5) provides:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor

> decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

Appellant maintains that the face-to-face identification was unduly suggestive because the officers made the initial contact with the clerk, and informed her that she had sold an alcoholic beverage to a minor. Appellant also alleges that the face-to-face identification failed to strictly comply with this Board's decision in *Chun*[3] (1999) AB-7287, which defined face-to-face identification as:

> . . . the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

Appellant maintains that the identification was actually made by the police officers, rather than the decoy, and thus failed to comply with the requirement that the decoy make the identification.

Appellant fails to support either of these arguments, and as the ALJ found in Conclusions of Law ¶ 6, the face-to-face identification complied with rule 141(b)(5):

> CL 6. Respondent also argued that there was no proper face to face identification thereby violating Rule 141(b)(5). According to the testimony of Officer Ocampo, a credible witness, the face to face identification was conducted properly. There was no testimony or evidence to the contrary. There is no doubt that clerk Velasquez knew that she was being identified as the person who sold the beer to decoy Hicks.

The Board has addressed this issue before, rejecting the same argument appellant makes here. In *7-Eleven, Inc./M&N Enterprises, Inc*. (2003) AB-7983, the Board said:

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[3]Appellant also refers us to *Keller* (2002) AB-7848, a case which was overruled by the Court of Appeal. Rather than repeat ourselves, we refer the reader to AB-9312 for our remarks on that issue.

> The fact that the officer first contacts the clerk and informs him or her of the sale to a minor has been used to show that the clerk was aware of being identified by the decoy. (See, e.g., *Southland & Anthony* (2000) AB-7292; *Southland & Meng* (2000) AB-7158a.) ¶ . . . ¶ As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

Appellant's contentions are not supported by the evidence. While an "unduly suggestive" identification is impermissible, appellant has presented no evidence that the identification in this instance was unduly suggestive.

ORDER

The decision of the Department is affirmed.[4]

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

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[4]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.