

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

AB-9352

File: 20-426302 Reg: 12077605

7-ELEVEN, INC. and TAHIRA SULTAN NIAZ,
dba 7-Eleven Food Store
100 West Imperial Avenue, El Segundo, CA 90245,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 6, 2014
Los Angeles, CA

Redeliberated April 3, 2014
Sacramento, CA

ISSUED APRIL 14, 2014

7-Eleven, Inc. and Tahira Sultan Niaz, doing business as 7-Eleven Food Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days, with all 10 days 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. and Tahira Sultan Niaz, appearing through their counsel, Ralph Barat Saltsman and Erica Woodruff, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly Belvedere.

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 17, 2005. On October 22, 2012, the Department filed an accusation against appellants charging that, on May 31, 2012, appellants' clerk, Adil Tarique Sultan (the clerk), sold an alcoholic beverage to 18-year-old Liliana Pinela. Although not noted in the accusation, Pinela was working as a minor decoy for the El Segundo Police Department at the time.

At the administrative hearing held on February 6, 2013, documentary evidence was received and testimony concerning the sale was presented by Pinela (the decoy) and by Chris Amorino, an El Segundo Police Detective. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises, followed a few seconds later by Detective Amorino. The decoy went to the refrigerated section and selected a six-pack of Bud Light beer in cans. She took the beer to the register. The clerk scanned them, then asked to see the decoy's identification. The decoy handed the clerk her California driver's license, which showed her correct date of birth, October 17, 1993, as well as a red stripe reading "AGE 21 IN 2014" and a vertical orientation indicating that the license holder is a minor.

The clerk examined the decoy's identification for a few seconds, then handed it back. The decoy paid for the beer and exited the premises, followed by Detective Amorino.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed an appeal contending: (1) the ALJ failed to consider all

relevant aspects of the decoy's appearance in conducting his rule 141(b)(2)² analysis; and (2) the decoy's experience and appearance rendered the operation unfair under rule 141(a).

DISCUSSION

I

Appellants contend that the ALJ failed to consider all relevant elements of the decoy's appearance when conducting his rule 141(b)(2) evaluation. Specifically, appellants argue that the decoy's makeup and her experience as a police Explorer made her appear older.

This Board is bound by the factual findings in the Department's decision as long as they 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. (*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];) 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.App2d 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.

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

This Board has held that an ALJ should not focus his analysis solely on a

²References to rule 141 and its subdivisions are to section 141, title 4, of the California Code of Regulations and to the various subdivisions of that section.

decoy's *physical* appearance and thereby give insufficient consideration to relevant *non-physical* attributes such as poise, demeanor, maturity, and mannerisms. (See, e.g., *Circle K Stores, Inc.* (2004) AB-8169; *7-Eleven Inc./Sahni Enterprises* (2004) AB-8083; *Circle K Stores* (1999) AB-7080.)

This should not, however, be interpreted to require that the ALJ provide a "laundry list" of factors he found inconsequential. (*7-Eleven, Inc./Patel* (2013) AB-9237; accord *Circle K Stores* (1999) AB-7080.) "It is not the Appeals Board's expectation that the Department, and the ALJ's [sic], be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered." (*Circle K Stores, supra*, AB-7080 at p. 4.) This is in accord with a long line of Board decisions holding that an ALJ is required to make a finding where a defense is properly raised, but is not required to explain his reasoning. (See, e.g., *Garfield Beach CVS, LLC & Longs Drug Stores California, LLC* (2013) AB-9281, at pp. 4-5; *Garfield Beach CVS, LLC* (2013) AB-9281, at pp. 4-5; *Garfield Beach, LLC* (2013) AB-9239, at pp. 3-5; *7-Eleven, Inc./Sahota* (2009) AB-8899, at pp. 3-5; *7-Eleven Inc./Cheema* (2004) AB-8181

The ALJ made the following findings of fact regarding the decoy's appearance:

5. Pinela appeared and testified at the hearing. On May 31, 2012, she was 5'6" tall and weighed 125-130 pounds. She wore a blue striped shirt, black jeans, and a pair of Uggs. She also wore a ring on her right hand and earrings. Her hair was long, parted in the middle, and pulled to the left side. She had on mascara, foundation, lip gloss, and nail polish. (Exhibits 4-5.) At the hearing her appearance was the same, although she wore different colored nail polish.

¶ . . . ¶

9. Pinela 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 [the clerk] at the Licensed Premises

on May 31, 2012, Pinela displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Sultan.

(Findings of Fact ¶¶ 5, 9.)

Based on these findings, the ALJ concluded that the decoy's appearance did not violate the rule. (Conclusions of Law ¶ 5.) The ALJ acknowledged appellants' general contention that the decoy appeared mature, and rejected it. (*Ibid.*)

It is true that the ALJ did not specifically address the effect of either the decoy's Explorer experience or her makeup on her appearance. He was not required to do so, however. The ALJ rejected appellants' contention that the decoy appeared mature, and made a finding that her appearance complied with the rule. He was not required to detail all the factors of the decoy's appearance he found inconsequential.

It is the ALJ, and not this Board, who had the opportunity to view the decoy, hear her, and question her. We are not in a position to second-guess the trier of fact.

II

Appellants contend that the operation violated the fairness requirement of rule 141(a) because the decoy's training and experience as a police Explorer gave her confidence, and because the decoy "altered her appearance in order to look older" by wearing mascara, foundation, and lip gloss.

It is settled law that the failure to raise an issue or assert a defense at the administrative hearing bars its consideration when raised or asserted for the first time on appeal. (*Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Wilke & Holzheiser, Inc. V. Department of Alcoholic Beverage Control* (1966) 65

Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 1182, 1187 [17 Cal.Rptr. 167].) Since appellants did not raise this issue at the administrative hearing, this Board is entitled to consider it waived. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal § 400, p. 458.)

At the administrative hearing, appellants argued that the decoy's makeup and experience as a police Explorer made her appear over 21, in violation of rule 141(b)(2). [RT at p. 55.] At no point, however, did appellants contend that the fact that the decoy wore makeup or had Explorer experience rendered the operation unfair under the broader language of rule 141(a). The defense under subdivision (a) was therefore waived, and we decline to address it here.

ORDER

The decision of the Department is affirmed.³

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

³This 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.