

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

AB-9400

File: 20-517966 Reg: 13078855

7-ELEVEN, INC., KULDEEP SINGH DHALIWAL, and MANPREET KAUR DHALIWAL,
dba 7-Eleven Store #2171-35349A
920 West Bloomington, Rialto, CA 92376,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 7, 2014
Los Angeles, CA

ISSUED AUGUST 20, 2014

7-Eleven, Inc., Kuldeep Singh Dhaliwal, and Manpreet Kaur Dhaliwal, doing business as 7-Eleven Store #2171-35349A (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 12 days 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., Kuldeep Singh Dhaliwal, and Manpreet Kaur Dhaliwal, appearing through their counsel, R. Bruce Evans and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 15, 2012. On June 11, 2013, the Department filed an accusation against appellants charging that, on June 6, 2013, appellants' clerk, Farrukh Hafeez (the clerk), sold an alcoholic beverage to 19-year-old Dorian David Couto. Although not noted in the accusation, Couto was working as a minor decoy for the Rialto Police Department at the time.

At the administrative hearing held on October 16, 2013, documentary evidence was received and testimony concerning the sale was presented by Couto (the decoy); by Javier Pulido, a Rialto Police officer; and by Kuldeep Dhaliwal, one of the licensees.

Testimony established that on June 6, 2013, the decoy entered the premises and went to the beer coolers where he selected a 24-ounce can of Bud Light beer. He took the beer to the register and placed it on the counter. The clerk asked him for identification and the decoy handed him his California driver's license which bore his correct date of birth, June 3, 1994, and which contained a red stripe stating "AGE 21 in 2015." The clerk observed the license for several seconds, returned it to the decoy without asking any questions, then completed the sale and bagged the beer. The decoy took the beer and exited the premises. Detective Pulido observed the sale from outside the premises.

The decoy returned to the premises with several officers shortly thereafter. Pulido identified himself to the clerk, advised him of the violation, and asked him to move to the customer side of the counter. Pulido asked the decoy who sold him the beer. The decoy pointed to the clerk and identified him as the seller of the beer while standing in close proximity to the clerk and facing him. A photograph was taken of the decoy and clerk together (Exhibit 4) and a citation was issued to the clerk.

The Department's decision determined that the violation charged had been proven and that no defense had been established.

Appellants then 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

Appellants contend that the decoy did not display the appearance required by 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." Appellants maintain that the decoy appeared older than 21 because of his physical appearance — in particular, his large stature, muscular build, and the fact that his driver's license photo showed him with a mustache — as well as his training and experience as a decoy and police Explorer which resulted in a lack of nervousness.

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 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 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.4th 364, 367 [3 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

²References 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.

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

The administrative law judge (ALJ) describes the decoy as follows:

8. The decoy's overall appearance including his demeanor, his poise, his mannerisms, his maturity, his size and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation. The decoy is a youthful looking male who is five feet ten inches in height and who weighs one hundred eighty-five pounds. On the day of the sale, the decoy was clean shaven and his clothing consisted of dark colored jeans, a white T-shirt and black tennis shoes. He was also wearing the same eye glasses that he wore to the hearing. Exhibit 4 is a photograph of the decoy that was taken at the premises and Exhibit 3 is a photograph taken on the day of the sale before going out on the decoy operation. Both of these photographs show how the decoy looked and what he was wearing on the day of the sale.

9. The decoy served as a police Explorer with the Rialto Police Department for about twelve months prior to the subject decoy operation and he had participated in approximately three prior decoy operations. The decoy also testified that he was not nervous when he acted as a decoy.

10. There was nothing remarkable about the decoy's nonphysical appearance and there was nothing about his speech, his mannerisms or his demeanor that made him look older than his actual age. After considering the photographs depicted in Exhibits 3 and 4, 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 twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

(Findings of Fact ¶¶ 8 - 10.)

Appellants maintain the ALJ failed to consider factors which made the decoy appear older, but the above description goes into extensive detail about why the decoy did *not* appear to be over the age of 21 at the time of the sale.

Large stature is not dispositive. This Board has repeatedly declined to substitute its judgment for that of the ALJ on this question of fact. Minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys of large stature automatically violate the rule. (See, e.g., *Garfield Beach CVS, LLC* (2013) AB-9261, at p. 4.)

The Appeals Board has also rejected the "experienced decoy" argument many times before. As the Board said in *Azzam* (2001) AB-7631:

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. . . . 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.

Similarly, the fact that the decoy had a mustache when his driver's license photo was taken must be rejected as a basis for claiming the decoy appeared to be older than 21. This Board is only concerned with how the decoy appeared to the clerk on the day of the sale — and he was clean shaven on the day of the decoy operation.

Appellants have provided no valid basis for the Board to question the ALJ's determination that the decoy's appearance complied with rule 141. This Board has time and again rejected invitations to substitute its judgment for that of the ALJ on questions of fact, and we must do so here as well.

As this Board has said on countless 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. We must decline appellants' proposition to re-weigh the evidence — particularly when, as here, the ALJ has made extensive findings on both the physical and non-physical characteristics of the decoy.

II

Appellants contend that the face-to-face identification of the clerk failed to comply with rule 141(b)(5) because it took place after the police officer initiated contact with the clerk. (App.Br. at p. 8.)

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.

Appellants maintain the face-to-face identification was unduly suggestive because the officer made the initial contact with the clerk, and informed him that he had sold an alcoholic beverage to a minor. They contend that the identification was actually made by the police officer, rather than by the decoy, and thus failed to comply with the requirement that the decoy make the identification. They argue that the face-to-face identification failed to strictly comply with this Board's decision in *Chun* (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.

The Board has addressed this issue before, and rejected the same argument appellants make here:

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.

(*7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983.)

Appellants' contentions are not supported by the evidence. While an "unduly suggestive" identification is impermissible, appellants have presented no evidence that the identification in this instance was unduly suggestive.

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.